EXECUTIVE COMMITTEE MEETING TO CONSIDER
HEALTH CARE REFORM

WEDNESDAY, SEPTEMBER 30, 2009

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

The hearing was convened, pursuant to notice, at 10:21 a.m., in room 216, Hart Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.


Also present: Democratic Staff: Bill Dauster, Deputy Staff Director and General Counsel; Elizabeth Fowler, Senior Counsel to the Chairman and Chief Health Counsel; Cathy Koch, Chief Tax Counsel; and Kelly Whitener, Fellow. Republican Staff: Kolan Davis, Staff Director and Chief Counsel; Mark Prater, Deputy Chief of Staff and Chief Tax Counsel; Mark Hayes, Republican Health Policy Director and Chief Health Counsel; Rodney Whitlock, Health Policy Advisor; Becky Shipp, Health Policy Advisor; Kevin Courtois, Health Staff Assistant; Sue Walden, Health Policy Advisor; and Andrew McKechnie, Health Policy Advisor.
Also present: Josh Levasseur, Deputy Chief Clerk and Historian; Athena Schritz, Archivist; Mary Baker, Detailee; David Schwartz, Professional Staff; Thomas Reeder, Senior Benefits Counsel; Thomas Barthold, Chief of Staff of the Joint Committee on Taxation; David Hughes, Senior Business and Accounting Advisor; Neleen Eisinger, Professional Staff; and Tony Clapsis, 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.

Good morning, everybody. This is our sixth day of consideration of America's Healthy Future Act. Now, in 6 days, the good Lord created the heaven and earth.

[Laughter.]

The Chairman. And even though we have a little less going on for us, I am hoping we can still finish this bill in only a little bit more time, give or take.

Yesterday, the Committee considered 23 amendments. We have thus considered a total of 81 amendments so far.

This morning I hope we can begin to consider some financing amendments. Senators can still offer their coverage and delivery amendments, if they wish, but I hope we can begin addressing the major financing issues this morning.

For the information of Senators, we will break between 12:45 and 2:15 for the party caucus lunches, and we will break again between 4:45 and 6:30 for votes, dinner, and a classified briefing. Once again, we will go late tonight.

We are making good progress, and I hope we can have a productive day.
Senator Hatch. Mr. Chairman? Mr. Chairman?

The Chairman. Senator Hatch.

Senator Hatch. I would like to call up an amendment.

The Chairman. Actually, Senator Hatch, I have got another amendment I have got lined up. We will get to you later.

Senator Hatch. Can I do mine after yours then?

The Chairman. Well, let us see where we are. I will try to accommodate you.

Okay, Senator Kerry.

Senator Kerry. Mr. Chairman, I would like to call up amendment number 469, Kerry F-1. Mr. Chairman, I am not going to ask for a vote on this amendment, but I do want to talk about it for a moment, and the reason I am not asking for a vote is that you have been very accommodating in working with us, both in the mark as well as ongoing, in order to try to see if we can find the sweet spot on the changes here.

But this is an amendment which Senators Rockefeller, Schumer, Stabenow, Cantwell, and Menendez are all cosponsors of, and I want to begin comments just by thanking you, Mr. Chairman, for moving in the right direction on the excise tax on the high-cost insurance by incorporating some of the provisions of this amendment in
the modifications. Increasing the indexing of the threshold on the Consumer Price Index to the consumer price index plus one percent I believe will prevent the provision from having unintended consequences in the out-years, and that change will also help to prevent the tax from expanding rapidly over time, impacting too many health insurance plans.

Also, providing a higher threshold for retirees over age 55 and plans that cover high-risk professions I believe is the right thing to do. As you know, some health insurance plans have high costs not because they provide generous coverage, but because they cover older workers. And other plans have high costs because they cover professions for which employees are engaged in high-risk activities. It is usually more expensive to insure mine workers and firefighters due to the nature of their work, and we do not want people unfairly penalized.

But I am concerned, as I have mentioned to you a number of times, Mr. Chairman--and I think you are aware from other people--that the threshold is currently set at a level that is too low. I think it ought to be higher. I had contemplated it as being higher when I proposed this to the Committee, and I understand that there is a cost to my amendment. Right now we are working to find an offset that all of us can agree on.
So for that reason, after a couple more comments, I will withdraw the amendment, but I want to have your assurance that we are going to work in good faith in these next days as we go towards the melding process out of Committee in order to try to fix this issue between now and the floor consideration.

Let me mention a revenue offset that is not part of the amendment, but, frankly I believe could be used to offset the cost of the threshold, and that is the capping of itemized deductions. Not all of us agree on this, but, frankly, the current deduction system is both inefficient and unfair. High-income individuals benefit much more than middle-income or, obviously, as you know, people on the margins of where they begin to pay taxes in the country.

A wealthy banker with income over $1 million benefits far more from the itemized deduction than a hard-working teacher or someone else at a middle-income level who would want to seek a deduction. As we have all talked about in the last days, there is more to providing health care to people than just the insurance process. There is the moral and structural questions that are raised in terms of the country and what we ought to properly be doing for people. And I think those of us in the upper-income brackets--and because of our salaries
here in the United States Senate, that is everybody here. Those of us in the higher-income bracket should forego a tax break in order to help millions of people who do not have health care.

The amendment that I have put forward that does not include that offset, Mr. Chairman, would increase the threshold for individual coverage from $8,000 to $9,800 and for family coverage from $21,000 to $25,000. And as you know, when I originally proposed this back in July, we were looking for about $120 to $140 billion of revenue. Currently, this provision has been used to find about $210 to $215 billion.

I also proposed it as a way to leverage high-cost plans to reduce health care costs, and all the actuaries and everybody who has looked at this are convinced that this will drive down costs. And that is why I continue to believe it is a good idea. But I think we ought to adjust it preserve the cost-containing effect while simultaneously guaranteeing that it does not have an adverse impact on some sector of the workforce that we do not want it to have an impact on.

The remaining provision of the amendment would exempt existing collective bargaining agreements from the threshold, and I think that would give plans subject to the agreement time to renegotiate, which is an important
part of sort of extending fairness to every sector of the workforce.

So I urge all of us to work on this, but, Mr. Chairman, I would specifically ask you for the commitment to try to see if we cannot further refine the changes that have already been made to try to adjust this so that we can address the concerns that I have expressed.

The Chairman. Thank you, Senator. I appreciate your amendment. I think we all recognize one of the major goals of health care reform is to lower the rate of growth of health care costs in this country, and as the budget resolution states, any action we take must be deficit neutral over 10 years.

To be frank, this Committee, I think more than other committees, includes provisions which, in fact, do bend the cost curve. It is in my judgment critical that we not only provide health care coverage, we not only include delivery system reform, and not only reform the health insurance market, but we must bend the cost curve.

We must bend it, in the right way not the wrong way. And all of us were very pleased with the decision by the Congressional Budget Office that the mark is not only deficit neutral over 10 years but a slight surplus in the last year of the 10-year period. Even more importantly, it starts to bend the cost curve in the right way in the
second 10 years. I think that is critical for many reasons.

Now, one provision that does bend the cost curve is the item that you are talking about, high-cost insurance excise tax on high-cost plans. In fact, it is kind of interesting. I woke up this morning and saw an article in one of the newspapers today stating that, highlighting this provision in the mark, that this does have a positive effect—it was a positive article in one of today's newspapers. And it is reaffirming what we have to do here.

Now, I also further recognize that there are other people trying to address some of the concerns that some people have with the earlier provision in the mark. We have modified the mark which in some of the provisions, I might add, that increase the threshold level by $2,000 for families and $750 for individuals for pre-Medicare retirees over the age of 55. So that was an improvement.

In addition, we provide for an increase for plans with high levels of certain high-risk workers, and also an increase in the index to the threshold. The threshold was CPI. We increased the threshold, and, of course, the more the threshold is increased, the more it does not bend cost curve on down the road.

The key here is balance. It is balance between the
objectives I just outlined and also the effect it will have on certain populations, certain folks, and you have recognized—you have named, you have mentioned groups of people, inferentially anyway, impliedly anyway, which do need a little bit of relief here—namely, by raising the threshold for individuals by $1,000 and for families by $4,000, and I appreciate that. And as we work with you and with other Senators, frankly, and the other concerns, we are just trying to find a balance for everybody because—I will not say it is totally a zero-sum game, but it is in the nature of a zero-sum game how we work with what we have and find a balance. I deeply appreciate your amendment, and I pledge to you that we will work very hard to try to help address the issues that you have raised, but also recognize we have to do it in the context of balancing it out with other--

Senator Kerry. Well, I understand that, Mr. Chairman. I would just reiterate this is a proposal which is here because, as you know, I offered it. And I would hate to see it extrapolated beyond its original intent. So I would like to see if we can work on it because a lot of people were supportive of this with the understanding that it would be X; now it is Y. And I would like to see if we cannot continue to work at it. And I appreciate that very much.
So I will withdraw the amendment and look forward to working with you.

Senator Rockefeller. Mr. Chairman, I would like to speak in strong support of Senator Kerry’s amendment #F-1.

In West Virginia, coal miners need more expensive coverage, not because they are getting unnecessary procedures, but because they risk their lives in dangerous jobs that take a serious toll on their health as they work to provide everyday electricity to the nation. Taxing that coverage would impose a new cost and ultimately cut benefits -- and that is not acceptable to me.

Across the nation, first responders, firefighters, law enforcement officers, and others are facing the same threat. These workers do their jobs honorably, day-in and day-out, and put their lives on the line for our safety.

Mr. Kerry’s amendment, which I cosponsor, includes an enormously important exemption for high-risk workers like West Virginia’s coal miners and first-responders everywhere.

This amendment would also increase the overall thresholds of the excise tax to $9,800 for individual coverage and $25,000 for family coverage. This increase
would make sure families, older workers, and retirees who truly require expensive health care do not see their benefits cut as a consequence of the excise tax.

I understand the need to raise revenue to pay for health care reform. But we must do it sensibly, without preventing families and high-risk workers from getting the coverage and the care they have earned and deserve. We do not want to hurt the very same people we are trying to help.

For all these reasons, I strongly support the modified Chairman’s mark which increases the excise tax limits for plans that cover employees engaged in high-risk professions by $750 for individual coverage and $2,000 for family coverage. This provision is adapted from an amendment I filed, and I appreciate the Chairman’s work on this issue.

However I want to make clear, we can and should do more. I will continue fighting for additional relief for coal miners and high-risk workers as we continue working on this bill through Conference.

Thank you, Mr. Chairman, and I look forward to continuing to work with you on this issue on the Senate floor.

Senator Stabenow. Mr. Chairman?

The Chairman. Senator Stabenow.
Senator Stabenow. If I might as a cosponsor of the amendment just speak in support of it.

The Chairman. Sure.

Senator Stabenow. I appreciate that it is going to be withdrawn. I very much appreciate Senator Kerry's leadership on this, and, Mr. Chairman, I understand what we are trying to do overall in terms of bringing down costs long term and trying to address a number of issues.

I am very concerned about this provision and believe that we need to increase the thresholds both for individuals and families because there is, I think, a discussion that goes on about these Cadillac plans that really does not hold true from many, many working Americans who over the years have given up salary increases to get their increased benefits, to have health care for themselves and their families, and they are now, because of cost increases--the same cost increases we are trying to address overall in reform--they are seeing their copays and deductibles go up. It is a high-value plan, but they are paying more and more for it. It is squeezing them. And I do not want to see them, in addition to that, have to add an additional tax to them as they are trying to figure out how to keep their health insurance.

A lot of the plans we are talking about cost more
because the workforce is older, and I am particularly concerned about those who have retired early, not necessarily of their own voluntary decisions, at age 55 or 60, who are paying more because of age rating, because of the way the insurance system is set up, not because they are getting some kind of a Cadillac plan. They are paying more.

Mr. Chairman, I appreciate the modified mark to begin to show some sensitivity to that in terms of increased threshold for retirees, but certainly for us in our State, when we look at what has happened with the VBAs, the voluntary arrangements where retirees are now taking over and assuming the cost of their health care, their costs are much higher than the thresholds currently in the mark. And that is of great concern to me.

We also have complications with multi-employer plans under the Taft-Hartley Act where they are structured differently and employers and employees pay in in self-insured plans.

And so there are a number of issues involved here, and I am very, very concerned and committed that, before this bill is signed into law, we address these issues effectively, that we make sure that we are not adding a tax on middle-income workers or on retirees.

So, Mr. Chairman, I hope we are going to continue to
work on this. I am hopeful that, before our process in
the Committee is done, we can, in fact, see some
additional movement in the right direction. I think that
is a very, very important issue for families who are
seeing a loss of everything else, but they are trying to
hold on to their health care for their families. And I
do not want to add an additional tax burden to them.

Senator Grassley. Mr. Chairman?

The Chairman. Senator Grassley.

Senator Grassley. I assume we are going to go back
and forth between Republican amendments--

The Chairman. Yes, that is correct.

Senator Hatch. Mr. Chairman, I am prepared.

Senator Schumer. Mr. Chairman?

The Chairman. Senator Schumer.

Senator Schumer. I will just be very brief. I feel
strongly about this amendment, but I know you want
to move the process forward, so I will ask unanimous
consent my statement be put in the record and just say I
want to echo Senator Kerry, whose leadership on this
issue I appreciate, as well as Senator Stabenow. We have
made some changes. There is a need to go further given
the exigencies of middle-class people who have worked
hard in our States, and I know you are working on that,
and we look forward to working with you on it.
Thank you.

[The statement appears at the end of the transcript.]

Senator Hatch. Mr. Chairman?

The Chairman. Thank you, Senator, very much. I appreciate that.

Senator Hatch. Mr. Chairman?

The Chairman. Okay. We are going to alternate back and forth. Senator Hatch?

Senator Hatch. Thank you, Mr. Chairman.

The Chairman. Would you identify your amendment, please? Is that filed?

Senator Bunning. Excuse me. May I question someone on Senator Kerry's amendment?

The Chairman. Well, he has withdrawn it. I recognized Senator Hatch.

Senator Hatch. I call up amendment number C-14. I do not intend to take a lot of time on this. I have two amendments that I would like to dispose of. I could probably do them both—not together, but one right after the other, if the Chairman wants me to.

My amendment is simple. It states that Federal taxpayers' dollars cannot be used to pay for subsidized abortion of the news programs and plans created in this bill. It essentially codifies the Hyde language, which
we have all included in appropriations bills for many years.

Now, to be clear today, the Hyde language only applies to programs appropriated through the annual Labor-HHS appropriations bill. The current Hyde language would not--let me make that clear--would not apply to the new programs and subsidies created through this mark because they are not part of the Labor-HHS appropriations bill. My amendment applies to Hyde language in these new programs and subsidies.

Now, during the HELP Committee's consideration of the health reform bill, I offered an amendment to reflect that intent. The goal of my amendment here today is to incorporate that same legislative language in the Finance bill reported to the Senate.

Last week, I feel like I had a good conversation with counsel who assured Committee members that Federal funding for elective abortions would not be covered under the Chairman's mark. The only exceptions would be those covered by the Hyde language. Again, those exceptions are pregnancies resulting from rape or incest or when the life of the mother is in danger. My amendment simply adds that legislative language to this bill.

Now, one of the arguments I have heard is that this amendment is not necessary because the Hyde amendment
prevents Federal funding of abortion or the purchase of plans that cover abortion. Because this bill both authorizes and provides the funding for the premium subsidies, no future appropriations bill would be necessary in regards to this specific funding.

Mr. Chairman, you have made it clear during this markup that you do not want Federal taxpayer dollars to pay for abortions. I know you are a man of your word. But I also want assurances that it is clear in the bill's language that taxpayers' dollars will not be used to fund abortions through the new programs or subsidies created in this bill. And that is why I am offering this amendment. It is a simple amendment that really says what you and I have agreed ought to be done.

It is my hope that this amendment will be accepted by the Committee, and just a main point. If the intent of the Finance Committee mark is that we do not want to fund or subsidize abortions, let us be very clear. Let us put specific language from my amendment in the bill text, and that will solve that problem.

That is all I need to say about it. I hope you will accept this amendment, and we will go from there.

The Chairman. I might ask the staff what protections are there, what provisions are there in the modified mark that prohibits Federal funds to be spent on
abortions? If you could just describe the mark in that respect.

Ms. Henry-Spires. Sure. There are a couple of things in the mark, Chairman, that prohibit the use of Federal funds for abortion.

One, abortion cannot be mandated as a part of a minimum benefits package. Plans are prohibited from providing—or not prohibited from providing abortion coverage, but Federal funds continue to be prohibited for abortion except where permitted by Hyde, as Senator Hatch said, and those cases would be in rape, incest, or the life of the mother.

Secondly, private funds used to cover abortion must be segregated from Federal funds. Insurance companies would be required to provide HHS with assurances that it is keeping private funds separate from Federal funds and that only a portion of those private funds held separately could be used to provide any abortion coverage if the plan offers it.

The Chairman's mark states specifically and clearly that no tax credits, not cost sharing, no Federal funds can be used to cover abortion. As Senator Hatch pointed out, last Friday we went through the mark and showed three specific places where the language "no Federal funds" or "no tax credits" can be used to cover
abortions.

    Senator Hatch. Can you tell us which page that is on?

    Ms. Henry-Spires. Sure. If you just give me one second, I believe it is on page 26. The language on abortion goes from page--somewhere from page 24 to page 26 of the actual mark.

    So on page 26 of the mark, under the section that begins on page 25 that says "Abortion coverage prohibited as part of minimum benefits package," on the last sentence of the first paragraph on page 26, it says, "Federal funds continue to be prohibited from being used to pay for abortions unless the pregnancy is due to rape, incest, or the life of the mother is in danger." And that is stating the Hyde exception.

    The other place where it is specifically mentioned is the following paragraph, the first sentence, which says, "No tax credit or cost-sharing credits may be used to pay for abortions," and then it says "beyond those permitted by the most recent appropriation for the Department of Health and Human Services," which also references Hyde--rape, incest, or the life of the mother. And I think there is another one, but those are two.

    Senator Hatch. Let me ask counsel, even if tax credits and cost-sharing credits are prohibited from
paying for abortion, would that apply to reinsurance and
risk adjustment payments? I would appreciate it if you
would answer that. Before you answer that question, let
me read from page 26 of the mark. It says this:

"No tax credits or cost-sharing credits may be used
to pay for abortions beyond those permitted by the most
recent appropriation for the Department of Health and
Human Services. In addition, insurers participating in
any State-based exchange that offer coverage for abortion
beyond those permitted by the most recent appropriation
for the Department of Health and Human Services must
segregate from any premium or cost-sharing credits an
amount of each enrollee's private premium dollars that is
determined to be sufficient to cover the provision of
those services. The Secretary shall also establish a
process using an estimated actuarial value by which
insurers that provide coverage for abortions beyond those
permitted by the most recent appropriation for the
Department of Health and Human Services must demonstrate
that no Federal premium and cost-sharing credits are used
for the purpose of paying for such abortions."

So even if tax credits and cost-sharing credits are
prohibited from paying for abortion, the question whether
reinsurance, risk adjustment payments, and other matters
that are in this later bill actually are covered.
Ms. Henry-Spires. Okay. I may need to take your question in two parts to do it justice.

The issue of reinsurance, when we looked to find examples of segregation of funds to see if this was even plausible, if insurance companies really can segregate funds, one of the good examples that we found was an example of reinsurance. Where it is a practice of some insurance companies to separate out money for—a portion of premium, private premium dollars for catastrophic events, like transplant surgery, they separate those funds, hold them in a separate account, and some smaller plans use those premium dollars, a portion of private premium dollars, to then purchase or pay a premium for reinsurance.

So it actually in some cases is a good example of ways to segregate money and make sure that you are keeping a portion of private premiums separate from other dollars.

To your second question—and forgive me if I—your second question, as I understand it, what the Chairman's mark is stating is that in plans that offer abortion—and not all plans under the Chairman's mark would offer abortion, but in ones that do, Federal funds must be kept separate from private premium dollars used to cover abortion, and it says further to make it a sincere effort
at separating those funds, the Secretary must require
insurance companies to set a value for what those
abortion services would cost and segregate further from
the premium dollars that amount of money. Without that
actuarial cost or actuarial estimation, there is no real
way to know sincerely that the insurance company has kept
the appropriate amount of money separate.

So the Chairman's mark really strives to make sure
that the separation and segregation of Federal funds and
premium dollars that go to abortion is real and sincere
by requiring an actuarial value to be set and that amount
of money to be kept separate. That is something that can
be checked on and ensured by the Secretary.

Senator Hatch. On the same page 26, it does have
this sentence: "Federal funds continue to be prohibited
from being used to pay for abortions unless the pregnancy
is due to rape, incest, or the life of the mother is in
danger."

Now, what does that mean? And how would Hyde be
impacted if it is not included in appropriations down the
road? I would like to codify it so we do not have to go
through this every year, and we have been doing it for
many years now. And why not just codify it and make sure
that we cover all these contingencies that could arise?
But go ahead. You can explain that if you would care to.
Ms. Henry-Spires. Sure. This points to the
Chairman's mark commitment to maintaining the status quo.
Those were some of the principles that came into this
collection.
The Chairman in his instruction to staff was clear
that this was to be a health reform bill and not an
abortion bill, so that we were to maintain the status quo
wherever possible, respect current law and not advance--
not move the ball in either direction.

So in this sense, the Chairman's mark references
current law and makes current law the rule for these
provisions. It does not advance the ball in either way,
but respects Hyde, references Hyde multiple times, and
holds it steady.

The Chairman. I might say basically this is a
health care bill. This is not an abortion bill, and we
are not changing current law. That is fundamentally what
is going on here, and that is important, I think, for us
to remember.

Senator Snowe?

Senator Snowe. Yes, Mr. Chairman. I think you
indicated, correctly I know, that based on the Group of
Six discussions, the true intent was to maintain current
law and not create any unintended consequences or any
other changes in current policy.
Can you cite examples of where we have segregated funds in other programs? For example, in Medicaid there are 17 States that go beyond the restrictions of Hyde, for example, and they have set up separate funding, separate coding and so forth, or international family planning programs, we require separation of funding as well so that we avoid any commingling of funds. Can you inform the Committee of those examples? Because I think that that is also important to the essence of Senator Hatch's question and what the intent is in the current mark.

Ms. Henry-Spires. Sure. The Senator is exactly right. In Medicaid, a program that receives Federal funds, there are 17 States that use State funds to provide abortion coverage. In those States, Federal funds are still strictly prohibited from being used to provide abortion coverage beyond the Hyde exceptions. In order to do this, those States' Medicaid programs set up separate billing accounts. They set up separate billing codes so that you know what is Federal money that has come in, what is State dollars that have come in, and then what those funds can be used for. And they must correspond one to another. So this segregation of funds, there are State examples, there are also insurance examples.
Another example from the world of insurance, Senator Snowe, is one where insurance commissioners often require that insurance companies maintain a reserve. Those reserves have to be held separate from operating funds and have to be held in a separate account. So there are examples of this. There are real-life examples.

Senator Snowe. Thank you.

The Chairman. Further discussion? Senator Stabenow.

Senator Stabenow. Thank you, Mr. Chairman. First let me say I know that people have strong feelings on both sides on this. This is a difficult, personal issue for people. The Chairman, I believe, has gone above and beyond to address this in a way that guarantees nothing is changed about current law. My preference would have been actually to have other language in this mark, which is not here, and I appreciate the fact that this is an effort to make sure that we maintain the status quo.

This amendment does not maintain the status quo. In fact, with all respect to my friend, as a woman I find it offensive that in here any woman, any family purchasing through the exchange, if they did not receive any tax credit, would be prohibited from having the full range of health care options that they may need covered. This does not just refer to the tax credits. As I read this,
"prohibit private insurers offering through the exchange from offering coverage." This is an unprecedented restriction on people who pay for their own health care insurance.

Then when we look at the fact that this offers that people could have a supplemental single-service rider, the assumption that somehow a woman or a family would say, you know, someday we may have an unintended pregnancy, so we are going to get a separate rider, or maybe my pregnancy is going to have a crisis, many, many crises, and so we are going to try to find some other rider, it is— in my judgment, I do not even know how that would work.

In the few States that have tried to do that, there is no evidence that even those kinds of riders are available. I mean, just—it goes to the point of moving this from a bill that is neutral, which those of us who believe that choice should be available, are willing to accept as fairness in this bill, to a bill where we would be saying to anybody who purchased insurance, who needs insurance now—we have already debated whether or not we should cover maternity care and prenatal care and make sure babies can live through the first year of life by having prenatal care. And now the question is whether or not women are able to have the option and choice
available to them, most in the worst possible situations, excruciating choices, great tragedies, and whether or not women should be covered under the health care exchanges for their reproductive health choices.

I find this personally just an extreme amendment, and I would oppose it. I would hope that we would vote no.

Senator Hatch. Well, Mr. Chairman, let me answer that. I would be the last person on Earth--

The Chairman. Senator Hatch.

Senator Hatch. I would be the last person on Earth who would want to offend you or any other woman. All I am trying to do is make sure that—and I do not think it makes it an abortion bill. It just says we are going to codify what we believe to be the case.

Millions of people, even pro-choice people, do not believe that the taxpayers should have to pay for abortions. But there are a huge number of people, almost 50 percent or more—I think it actually is more—who are against abortion, who really find it highly offensive that they have to pay taxes that will be used for abortion purposes.

Now, look, I--

Senator Stabenow. May I ask my friend a question?

Because I--
Senator Hatch. If I could just finish.

Senator Stabenow. --understand what you are saying.

Senator Hatch. If I could just finish, then I will be happy to turn to you with the Chairman's mark's permission.

Under my amendment, current law would be maintained in that the Federal Government will not pay for abortions or subsidize plans that cover abortion. Now, my amendment does not prevent individuals from purchasing with their own money a supplemental policy for abortion coverage. Nothing--it does not interfere with that at all. It just says, look, to the 100 million-plus people our there--and I think it is plus by quite a margin--who do not think that the Government should be paying--using taxpayer dollars--everybody's taxpayer dollars paying for abortion, we want to make sure that the Government does not do that.

And let me just make another point here. The language in the bill that really makes, I think, my point, in addition--it says, "In addition, insurers who participate in any State-based exchange that offer coverage for abortion beyond those permitted by the most recent appropriation for the Department of Health and Human Services must segregate from any premium or cost-
sharing credits an amount of each enrollee's private
premium dollars that is determined to be sufficient to
cover the provision of those services."

Under Medicaid, in States that cover non-Hyde
abortions with State-only dollars--which States can do.
You just said that those States use completely separate
codes, approaches to do it. The mark does not specify
the level of segregation of funds that staff just
described. And what my amendment does is it clarifies it
and makes it very clear that we are just not going to use
taxpayer dollars to pay for something that I think a vast
majority of taxpayers do not think taxpayer dollars
should be used for. It does not interfere with the
individual's right to purchase additional insurance so
that they can cover their own abortions.

And, frankly, on page 26 of the mark also does not
call--it does not call for separate supplemental coverage
of non-Hyde abortions, which is what States do under
current law to comply with the Hyde amendment. And
without that separation, there is no way to guarantee
that Federal funds are not used for non-Hyde purposes.

So all we are trying to do is just clarify this, get
it straight, make sure taxpayer funds are not used for
this purpose. Whether you are for or against abortion, I
think most people have concerns about that. And I am
certainly not trying to offend my dear friend from Michigan.

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe.

Senator Stabenow. Mr. Chairman, if I might respond.

The Chairman. Senator Snowe. Senator Snowe.

Senator Snowe. Mr. Chairman, I think that we all agree with the goal. We all share the same goal. It is how best to accomplish it. And I would appreciate a response from the staff on this very question, because, really, it is a difference between whether or not we are prohibiting that, prohibiting the use of Federal funds beyond what is in current law for abortions. But requiring a supplemental policy would mean that somebody would have to assume they are undergoing an abortion, and it is privacy concerns that will affect women.

So that the States are able to accomplish this, how can we accomplish that in this legislation without requiring a supplemental policy that raises significant issues? Because we do not disagree with the goal of Senator Hatch, and that is what we discussed at great length in the Group of Six about how best to achieve that.

So I would appreciate hearing from the staff on that
question. Is there a way of accomplishing that short of a supplemental policy? Because you would have to assume that the women is assuming to an abortion. You know, most of these pregnancies that result in abortion are not planned pregnancies. And so I think that we have to really address the central question how best to accomplish that without, I think, abrogating one's privacy rights.

Ms. Henry-Spires. That is right. To accomplish that is what the Chairman's mark does. It requires the segregation. It requires the determination of an actuarial cost so you know exactly how much money in private premium dollars must be separated.

We did look at--we really did explore as staff the idea of doing a supplemental policy and a rider, but we came to the same place. Even with a supplemental policy, you have one insurer receiving monies from the Federal Government or private dollars, and with the supplemental policy, receiving more private dollars, but they are still going to the same entity. So you still need the actuarial value. You still need to be able to separate and segregate these costs.

The difference is when you do this in a rider as opposed to the construct that is in the Chairman's mark, you are not altering the way that women receive coverage.
Many women are already covered for this today. Abortion coverage is offered in many plans. There are arguments as to what statistic is right. Is it 45 to 85 percent? We can agree it is somewhere in that range. But there are plans that offer this coverage today.

So you would be changing the way that women get this coverage and bringing up all kinds of—as you already indicated—privacy issues with women having to somehow, I do not know, plan for an unintended pregnancy and purchase this rider. We could not get around those issues.

So the Chairman's mark really struck the balance. The fiduciary issues is what the Chairman's mark was addressing. How do you keep these two pots of money separate and further ensure that no Federal funds are used to pay for abortion.

Senator Snowe. May I ask a further question, Mr. Chairman? Have there been any violations among the States that exceed the Hyde restrictions?

Ms. Henry-Spires. No.

Senator Snowe. You do not know of any?

Ms. Henry-Spires. No.

Senator Snowe. Thank you.

The Chairman. Okay. We are ready for a vote.

Senator Stabenow. Mr. Chairman?
Senator Hatch. She wanted to speak, and then I
need to--

The Chairman. Senator Stabenow.

Senator Stabenow. Mr. Chairman, just briefly, I
did want to emphasize again what is in the Chairman's
mark that guarantees that at least one plan in the
exchange does not offer abortion coverage and that at
least one does. And that certainly seems like the
fairest approach.

I would, secondly, just emphasize again this is not
just about taxpayers' dollars. This is about any
insurance company in the exchange. And if I do not
receive any of the tax credits, if I am just trying as a
small business or an individual to go through the
exchange to get a better deal on insurance, this is
unprecedented restrictions on what people can buy in the
private insurance market.

And so I believe this is an extreme version of what
has been trying to be accomplished. I hope we are going
to vote no on this.

The Chairman. Okay. Let us--

Senator Hatch. Mr. Chairman?

Senator Cantwell. Mr. Chairman? Mr. Chairman?

The Chairman. Senator Hatch wants to close, but,

Senator Cantwell, I will recognize you before Senator
Hatch closes.

Senator Cantwell. Thank you, Mr. Chairman. I will be short because I obviously do not want the private sector insurance to now start discriminating against the full health care coverage that women deserve to have. This is not keeping the status quo. I know the Senator from Utah might have a different perspective, but I think we have the legal advice here. It is changing the status quo. Because of the exchange and the purchase of private insurance with subsidized contributions from the Federal Government, this will put those subsidies under this amendment if it passes, which says then that those private insurers have to deny women these full reproductive choices.

So I hope that we defeat this amendment. It is a major, major change, and I think a poison pill for this bill if it is hung on this legislation. So I urge my colleagues to defeat it.

Senator Hatch. Mr. Chairman, I will be short.

The Chairman. Senator Hatch.

Senator Hatch. Look, five States already require complete separate supplemental policies for non-Hyde abortion coverage. The mark also appears to reverse these constitutionally valid State laws. And it is clear here that the attempt at full segregation of public funds
falls short.

In these ways, there is no complete segregation. There is no supplemental that is completely separate. The provision does not apply to reinsurance payment to plans, and there is no accounting mechanism. So, clearly, the bill falls short.

Look, all I am asking, my gosh, is for specific language in the bill that prohibits Federal dollars being used to pay for abortions. Now, I believe that putting specific language in the bill is the way to accomplish this goal, instead of--you know, instead of referencing an annual appropriations bill. So that is all we do here.

Now, if somebody can improve that language, I would be happy to work with you. But, my gosh, that is not asking for a lot. It is not trying to change the law. It is not trying to infringe on a woman's right to have an abortion. It is not trying to infringe on the States' rights to handle this the way they want to handle it. It just says let us codify it so that we do not have to come up every year on appropriations and pass the Hyde language every year.

Senator Cornyn. Would the Senator yield for a question?

Senator Hatch. Yes, I would be happy to.
The Chairman. Go ahead, Senator Cornyn.

Senator Cornyn. My understanding of the thrust of the amendment is that Federal funds should not go to plans to cover abortion.

Senator Hatch. That is right.

Senator Cornyn. And I would just ask the Senator, is this a different rule than appears to apply to Federal Employees Health Plans or TRICARE and Medicaid? It is my understanding that this would propose a different rule than already applied to those Government programs.

Senator Hatch. Are you talking about the mark or my amendment? The mark applies a different rule.

Senator Cornyn. The mark applies--that is my question. Does the mark apply a different rule than applies to Federal Employees Health Plans, TRICARE, and Medicaid?

Senator Hatch. Of course it does. That is why I read that provision, and pretty much the counsel has indicated that there may be a problem with reinsurance.

Senator Cornyn. And the concern--

Senator Hatch. And risk adjustment payments.

Senator Cornyn. Is the concern that the Senator has that money is fungible and that what prevents an insurer under this bill from using a dollar for general health benefits and using it to pay for abortion
services? There is no guarantee that they will not use
money under this general--from a general health benefit
to pay for abortion services. Is that the concern that
you have?

Senator Hatch. That is the concern that I have, and that is what the Hyde amendment is supposed to do. We have to go through an appropriations process every year, and, frankly, this would solve that problem without really changing--and it certainly would rectify this language that is currently in the bill.

Senator Cornyn. And, finally, isn't the problem of fungibility the very reason that the Federal Employee Health Benefit Plan, Medicaid, and TRICARE all prohibit coverage of abortion with Federal dollars? Isn't that fungibility problem the reason why there is an express prohibition?

Senator Hatch. Sure. Even President Obama and Secretary Sebelius have promised repeatedly that Federal funds would not be used for abortion. I do not see the problem, to be honest with you.

Now, for those who want abortion to be paid for with Federal funds, naturally they would be against this amendment. But they would be against what we have done for years and years and years and years. And, frankly, this just resolves the problem, it seems to me, in a way
that is reasonable without--this one little amendment is
certainly not going to make this an abortion--

The Chairman. Let me see if I can clear this up.

First of all, FEHBP is distinguishable because there
is one employer, and that is Uncle Sam, and that one
employer has decided that no funds would be used for
abortions.

We are talking here about women applying for private
plans, not Uncle Sam plans but private plans.

Senator Hatch. Right.

The Chairman. The mark makes it clear that no
Federal funds will be spent for abortion. None. Very
clear. Very clear. The only difference between what
Senator Hatch suggests and the mark is that Senator Hatch
requires women to ask for a special rider for unintended
abortion--or consequences, and that is just not fair to
treat women that way. And as has been explained by the
staff, a private insurance company is going to have to
segregate the funds anyway. When a woman asks for a
rider, it is still going to have to segregate it. But it
is discriminating against women to have a woman get a
rider in a private plan for the reasons explained.

So in both cases, Senator Hatch's case or the mark,
no Federal funds for abortion, period. The difference is
that Senator Hatch requires a special rider for a woman
who has to apply for this rider in the case that she may have to have an abortion. And I do not think that is fair. Right now, when she applies to a private company--and many private companies provide for abortions, irrespective of the exchange. Many private companies provide for abortion irrespective of any exchange. We are just saying here an exchange, because some Federal dollars are being used, there is a total segregation so no Federal funds will be used for abortion.

Let us make it clear again. No Federal funds will be used for abortion in the modified mark, period.

Senator Hatch. Mr. Chairman, counsel indicated there is as problem with reinsurance and risk adjustment payments. Fungibility--

The Chairman. I did not hear that, Senator.

Senator Hatch. Well, I did.

The Chairman. I did not hear--

Senator Hatch. Well, read the language in the bill.

The Chairman. I did not hear counsel say that is a problem.

Senator Hatch. Well, maybe I have misconstrued--

The Chairman. Let us just ask the counsel: Is that a problem?

Ms. Henry-Spires. No, sir. I am sorry if my
response was confusing.

Senator Hatch. I will accept that. What I am complaining about is the language of the bill that is not clear. Fungibility is why we require complete segregation into a separate policy for non-Hyde abortions. That is why it is required. Otherwise, Federal funds would undeniably end up being used for non-Hyde abortions.

Now, I know there are those who would prefer that Federal funds be used. Well, that is why we have the Hyde amendment, because taxpayers just do not want their funds, their taxes, being used for that purpose.

My amendment simply applies what all Federal health programs have appropriated through Labor-HHS appropriations to the programs that are created in this bill. If anybody can show me where my language does more than that, I would like to know what it is. What is wrong with that?

I feel that the intent of my amendment is not only being mischaracterized, but there is some fear of having the Hyde language that would be codified so we would not have to bring it up every year in a bill that is very far-reaching in a way that would resolve this in the minds, I think, of most people in this country.

Now, I am prepared to vote on it, but I do not see
the arguments on the other side. You can accomplish complete segregation of the funds, you know, requiring a completely separate policy. This is a plan--you know, as far as I am concerned, this is plain to see. A completely separate policy is the only way to achieve complete segregation of Federal funds, and that is all we are trying to do here.

The Chairman. Okay. I think we have aired this out. Let us vote. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

The Chairman. Aye by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

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?
Senator Nelson. No.
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. 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 10 ayes and 13 nays.
The Chairman. The amendment is not carried.
I would like to offer an amendment on this side now.
Good. Senator Nelson, I think we have to wait on your amendment. We are not ready. Is there any other over here? Senator Bingaman.

Senator Bingaman. Mr. Chairman, I have an amendment which is a modified version of C-1, which I offered before, or which was filed. Should I go ahead with describing it?
The Chairman. Yes. Why do you not go ahead? Yes.
Thank you.

Senator Bingaman. Mr. Chairman, this amendment does two important things. First of all, it establishes a coordinated system of eligibility determination for Medicaid, for tax credits, and for CHIP. The idea here is to prevent multiple subsidy programs from creating pointless red tape for families, and high administrative costs for government, and erroneous eligibility decisions.
being made, and reduced program participation.

In fact, the Congressional Budget Office estimates that this will increase program participation. They say that that is why they will score this amendment, this first part of the amendment that I have referred to, at $4.4 billion. That is because more people will become covered or obtain coverage if this amendment is adopted.

The amendment directs the Secretary of Health and Human Services to work with the Secretary of Treasury to establish a system of application, enrollment, and retention for Medicaid, for CHIP, and for tax credits that meets several requirements. We have that laid out. The main thrust of it is to establish a single, streamlined form that can be used to apply for all three of these programs, Medicaid, CHIP, and tax credits. The form could be filed online, in person, by mail, or by telephone. The form could be filed with the exchange, with Medicaid, or with CHIP.

As I say, CBO concludes that this kind of coordinated, streamlined process would result in more people getting coverage, which is a major purpose of the whole exercise we are going through here. This does not change in any way the eligibility requirements for any of these programs. The amendment does not. It simply says, let us try to simplify the process that people would have
to go through to apply for each of the programs. The Secretary would promulgate model agreements, enter into interagency agreements concerning data sharing, and they would have to be consistent with safeguards of privacy, data integrity, and that sort of thing.

Now, the second big thing that this amendment does relates to the offset. The Chairman's mark currently includes a list of benefit categories that must be included in insurance plans that are offered in the exchange, for example, preventative and primary care, outpatient services, emergency services.

In addition, the modifications to the mark require that the Secretary provide, through regulation, further definition of the benefit categories, but the benefit package ultimately described by the Secretary may not be more extensive than the typical employer plan as certified by the Office of the Actuary of the Centers for Medicare and Medicaid Services.

Finally, State-mandated benefits that fall outside the scope of the benefit package would be required to be covered by insurance plans licensed in State exchanges and the premium and cost-sharing cost attributed to these extra benefits would be eligible for Federal subsidy. That is all in the mark as it now exists. This amendment would prohibit Federal subsidization of premium and cost-
sharing costs attributable to extra benefits and would require States to subsidize the cost of those extra benefits.

So the effect of this is to say that if the State has a series of additional mandates that they would like to see covered, they would first go to the Secretary and say, we want these additional mandates covered, we believe that they fall within the definition of outpatient services, or emergency services, or preventive or primary care, the categories that we are setting out in this legislation for coverage. If they are successful, then the Secretary goes ahead and concludes that those are part of the benefit package.

If they are not successful and the Secretary is not persuaded that those can be included and still keep the cost of the benefit package comparable to that of a typical employer plan as certified by the actuary—and that is in the mark today—then the subsidization would have to come from the State into the exchange to cover the cost of those additional benefits.

So, this offset that I just described is a provision we included in the Help Committee bill. It was part of our mark there, and as far as I know enjoyed the support of all members who voted for that legislation. I cannot speak for those who opposed the legislation, but I think
it was good policy there and I think it is good policy here.

The offset, I am advised by CBO, generates about $5 billion in revenue, which is adequate to cover the $4.4 billion required for the streamlining of this application process, which is the first part of the amendment. There is about $600 million left over, so any of you folks that have a purpose you want to use that for, have at it. I hope all members will support the amendment. I think it is good policy.

The Chairman. Senator, this is a modification. Frankly, we have just seen it. I think a lot of members on the committee would like a little time to digest it.

Senator Bingaman. Well, that is fine. I am glad to withhold it until you think people have had plenty of time.

The Chairman. If I understand it, essentially, you have expedited procedures which are going to cost you, what, about 5 --

Senator Bingaman. The expedited procedures part of it is expected to cost $4.4 billion.

The Chairman. 4.4.

Senator Bingaman. And that is because so many more people will actually get covered.

The Chairman. Correct. Right. That is right.
But the saver is on the mandate of benefits side.

Senator Bingaman. Yes. On the individual State mandate side. If the Secretary is not persuaded that the services being mandated by a State are a part of the benefit package that we are defining here, or legislating here, then the State would have to put additional funds into the exchange to cover those if it wanted to continue that mandate, in effect, for policies sold on the exchange.

The Chairman. All right. Fine.

Senator Ensign. Mr. Chairman?

The Chairman. That is a thumbnail description, but I think we probably should set it aside until we have further --

Senator Ensign. Mr. Chairman, could we have one question just so we will be able to mull over?

The Chairman. Sure.

Senator Ensign. If this form can be filed online, in person, by mail, or telephone, the Chairman has certain provisions in the mark to prevent people who are in the country illegally from getting public benefits. How would, based on the amendment, then, this streamlined procedure -- how would the Chairman's provisions in the mark prevent somebody who is here illegally from actually getting the benefits if it does not have to be done in
person and the documentation? If they are presenting identification or whatever, how do you know that that is the person if it is done by telephone or online?

Ms. Baker. Senator, you are correct that in the mark there are robust provisions to ensure that illegal individuals do not benefit from the tax credits or are not able to receive personal coverage through the exchange. I think, as the Chairman has indicated, this is a new amendment. We have not had time to digest everything that is in it, so I think it is premature to comment on that.

Senator Ensign. All right. If you could get that for us, please.

Senator Bingaman. Let me just clarify my intent. My intent would be that all of those provisions in the Chairman's mark that are designed to prevent undocumented immigrants from obtaining benefits would continue in full force and effect.

The Chairman. All right.

Senator Bingaman. That is my purpose.

The Chairman. Let us set this aside so we can think this through a little bit more.

Senator Cornyn. Mr. Chairman, may I ask one short question in that regard?

The Chairman. Sure. Senator Cornyn?
Senator Cornyn. As we are thinking about this, I have heard estimates that as many as $10 million of the uninsured are people who are eligible, currently eligible, for government benefits.

Senator Bingaman. Right.

Senator Cornyn. And I think your amendment would help make sure that people who are eligible actually can get signed up. My concern is a little bit along the lines of Senator Ensign's. We know that Medicare and Medicaid, unfortunately, are riddled with fraud. I wonder if the Senator has had the opportunity—I am looking on page 2 under number VIII, under the description—to get technical feedback from the Internal Revenue Service, the Social Security Administration, and the National Directorate of New Hires, that this would actually be feasible and would have systems in place designed to prevent fraud. I do not guess we need to hash this out now too much, but I just --

Senator Bingaman. Yes. I am glad to get into detail. We tried to work with experts on this subject about how to safeguard the program's integrity. I think the fraud that you are concerned about is primarily provider billing fraud. That is really not part of this amendment in any way.

Senator Cornyn. Well, I know individuals,
particularly in Medicaid, go in and out of the program. In other words, people get another job, they are employed, they no longer qualify for Medicaid, and the like. But I am sympathetic to part of the concerns you are raising. I just have some more questions, because in Texas we have 800,000, maybe 900,000 children who are eligible for Medicaid and SCHIP, but they are not signed up.

Senator Bingaman. And I think this amendment would help solve that problem, so I am glad to try to respond on any detail about it.

Thank you, Mr. Chairman.

Senator Hatch. Mr. Chairman?

The Chairman. All right. Senator Hatch?

Senator Hatch. Mr. Chairman, I will call up Amendment Number C-13.

The Chairman. All right.

Senator Hatch. This is called the Conscience Protection Act. Mr. Chairman--and this would be the last amendment I am going to offer in this area. Mr. Chairman, my amendment is identical to one offered and accepted by Congressmen Stupak, Pitts, and Terry to the Health Reform Bill considered by the Energy and Commerce Committee in the House. The amendment includes the Hyde-Weldon conscience protection language approved by
Congress every year since 2004 as part of the Labor-HHS appropriations bill to the Finance Committee Health Reform bill.

Now, the amendment was accepted by the House Energy and Commerce Committee members by voice vote, and I hope that will be the case here. To be clear, the Hyde-Weldon Labor-HHS appropriations language states that "none of the funds made available in this Act may be made to a Federal agency or program or to a State or local program if such agency program or government subjects any institutional or individual entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

My amendment clearly states that the Federal Government, a State government, or a local government may not force health care providers, such as hospitals and physicians, to provide abortions. The Hyde-Weldon appropriations language prohibits Federal agencies or State and local governments from receiving any Federal funds if they take action against any health care provider because the provider does not cover, provide, or make references for abortion.

In other words, my amendment only prohibits governmental bodies receiving Federal dollars from discriminating against those who do not want to perform,
cover, or make references for abortion. Naturally, we are trying to take care of those nurses and doctors who have deeply-felt feelings about this issue. My amendment is different from the Hyde-Weldon language in one very important way.

Instead of Federal agencies or State and local governments being prohibited from receiving Federal funds, which would occur under their amendment, it would designate the Office for Civil Rights in the Department of Health and Human Services to receive complaints of discrimination and coordinate the investigation of such complaints.

Now, let me be clear about what my amendment does not do. It does not restrict the activities of any provider willing to do abortions. It protects providers that object to abortions. It does not prohibit anyone from talking about abortion. Information and counseling related to abortion are not addressed in the amendment. It does not affect Rowe v. Wade or subsequently abortion decisions. Under these decisions, the government is obliged not to interfere in an abortion decision, but it is not required to facilitate abortion or fund it.

Now, my amendment is exactly the policy already covering all funds under the Labor-HHS Appropriations Act for the last five years and has long been in effect with
absolutely no problems. It does not call for any
discriminating entity to lose its Federal funds.
Instead, the HHS Office of Civil Rights will address the
complaints.

President Obama has repeatedly pledged his support
for the statutes themselves and consistently called for
"robust" protection of conscience rights. In his recent
speech to the joint session of Congress, President Obama
reaffirmed that health care reform should maintain
conscience protections. The same amendment was accepted
by voice vote by Representative Henry Waxman's Energy and
Commerce Committee as part of the House bill.

Now, without this amendment I believe that providers
who object to abortion could face discrimination,
therefore, I strongly urge that members of this committee
vote in favor of this amendment. I personally believe
that no one should be subjected to being called a person
committing discrimination just because they hold views
different from some others on this particular issue. I
think it is basically a clean, clear-cut amendment. I
hope that the committee will accept it.

Senator Grassley. Mr. Chairman?
The Chairman. Senator Grassley?
Senator Grassley. Yes. I would have to repeat all
the things that Senator Hatch said, so I am not going to
do that. But he did refer to what President Obama has said on this issue, and I want to bring emphasis to it by one more quote from the President that Senator Hatch did not give. But in his address before Congress the President said, "Under our plan, no Federal dollars will be used to fund abortions and Federal conscience laws will remain in place." So the Hatch amendment is about making sure that that does happen, and I hope we can address his amendment, accept it, and do it without controversy.

The Chairman. Ms. Henry-Spires, could you explain the conscience protections that are in the modified mark?

Ms. Henry-Spires. Specific to Weldon --

The Chairman. And do we have the basic Weldon conscience protections provided for? If so, please outline them.

Ms. Henry-Spires. We do. The Chairman's mark not only keeps existing conscience protection laws like the Weldon conscience law intact, but it extends it. Where Weldon says that no Federal, State, or local government or agency can discriminate against a provider or facility for its unwillingness to provide abortion, the Chairman's mark adds to that, no private health insurance can discriminate against a provider for their willingness or unwillingness to provide abortion. So we maintain Weldon
and extend it to private health insurers, and also make
it neutral by saying for willingness or unwillingness.
That is in the underlying bill.

Senator Hatch. So do you codify the Hyde-Weldon
language in the mark?

Ms. Henry-Spires. The mark does not codify any
language, it references all conscience protection
languages.

Senator Hatch. Well, as I see it, the Baucus mark
does cover providers and facilities but does not, as you
have stated--clearly stated--include conscience
protections for health plans that do not want to cover
elective abortion and could undermine pro-life health
plans by making them keep pro-abortion providers or
health facilities in their network. Further, if you want
to maintain current conscience laws, then you should
codify this amendment. I do not see anything wrong with
that because it would clarify this and solve the problem
for us.

Ms. Henry-Spires. I am sorry, Senator. Perhaps I
misspoke. If I did not say, then I meant to say, that
the Chairman's mark extends Weldon to include private
insurers, that private insurers cannot discriminate
against persons, providers, or facilities for their
willingness or unwillingness to provide abortion
coverage.

The Chairman. All right. Senator Stabenow? We are ready to vote.

Senator Stabenow. Thank you, Mr. Chairman.

The Chairman. Senator Stabenow? Are you finished, Senator?

Senator Hatch. If I could just --

The Chairman. Why do I not go to Senator Stabenow first, and then you can --

Senator Hatch. That would be fine.

The Chairman. All right.

Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman. I just, once again, Mr. Chairman, want to thank you for really providing a balanced compromise in this mark. In fact, you have gone farther, as staff has indicated, in covering the facilities, like Catholic hospitals, making it very clear that conscience clauses are clear and available for everyone.

My concern is this, that if the amendment were to be adopted we would offer no patient protections. In my estimation, from what we have been able to determine, it would actually undermine women's access to health care, it would codify what I believe is a bad policy, permitting insurance companies to refuse to cover
abortions even in cases of rape or incest, or even in the case of the woman's life being in danger.

It does not even require that the insurance companies tell patients if their health plan will not cover the care medical professionals say that they need.

So to do this without offering any protections for patients, I believe represents an unbalanced and discriminatory approach to what is a very complicated issue.

The Chairman. All right.

Senator Hatch, you can close.

Senator Hatch. There is a real question whether full health care plans are covered. The language is, "health benefits plans participating in State exchanges would be prohibited from discriminating against any individual health care provider or health care facility because of its willingness or unwillingness to provide, pay for, provide coverage of, or refer for abortions."

Admittedly, there is no conscience clause in here. I put a conscience clause into the bill that would solve that problem and not have to worry about the ambiguities in that particular sentence. The mark states, "plans would be prohibited from discriminating." But Weldon, under current law, prohibits discrimination against the plans themselves.
The mark contains no such prohibition. This amendment would do that. I think it is a defect that we need to correct, because I do not think anybody in their right mind would want to take away the right of a person who has deeply-held religious, philosophical, or other beliefs and force them to do something, to participate in, or do abortions. I do not know why anybody on this committee would feel that way. This amendment clarifies that and I think resolves that problem that I do not think the conceptual language of the bill does.

The Chairman. All right.

The Clerk will call the roll.

The Clerk. Mr. Rockefeller?

The Chairman. No by proxy.

The Clerk. Mr. Conrad?

Senator Conrad. Aye.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

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?

The Chairman. Pass.

The Clerk. Mr. Nelson?

Senator Nelson. No.

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 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 Grassley.  Pass for now.

The Clerk.  Mr. Enzi?

Senator Enzi.  Aye.

The Clerk.  Mr. Cornyn?

Senator Cornyn.  Aye.

The Clerk.  Mr. Chairman?

The Chairman.  No.

Senator Cantwell?

The Clerk.  Ms. Cantwell?

Senator Cantwell.  No.

The Clerk.  Mr. Ensign?

Senator Ensign.  Aye.

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

The Chairman.  The amendment does not carry.

Are there other Senators who wish to offer amendments, especially on the Democratic side since the last amendment was a Republican amendment? Any Senators wish to offer any amendments?

[No response].

The Chairman.  All right. Let us come back to the Republican side. Anyone on this side wish to offer an amendment?

Senator Enzi.  Mr. Chairman?
The Chairman. Senator Enzi?

Senator Enzi. I would have an amendment. I would call up Enzi Amendment Number C-1.

The Chairman. Senator Enzi is recognized, Amendment C-1.

Senator Enzi. This is an amendment that will lower the cost of health care by increasing benefit flexibility, something I mentioned in our group of six quite a bit. We have the four plans and the lowest actuarial value that we presently allow is 65 percent. This would drop that down to 60 percent. One of my concern is, we are about to tell the Nation, everybody in the Nation, every person in the Nation, what the minimum insurance is that they can have, then we are going to institute a penalty if they do not buy the minimum insurance that we say they ought to have.

I want to see if there is any flexibility at all of going from 65 percent as the lowest down to 60 percent as the lowest. I talked to a lot of people during the August break and everybody asked me what I was doing to bring health care costs down. This would bring it down. Other provisions in the bill make the price go up, particularly if we go to 65 percent, particularly in my State, but I am sure I am not the only State that is in that situation.
This amendment would change that. We provide more flexibility with this. If folks want to buy coverage they can, but there are three other plans with higher premiums. So if they want more they can buy more, but if they want less we are saying, no, the Federal Government said you cannot buy less. So I think what we are doing is too proscriptive.

I would like to go lower than that. I think that we ought to go lower than that. But I am checking to see if we can even get down to 60 percent. When we create a floor of 65 percent as this bill does, it means that people will see higher prices in the marketplace as a result of this reform and they will consider it to be because of this reform, and it will reflect on the whole reform.

The average cost for a family policy in the group market is already $12,000. Do we want it to cost more by adding mandates and setting a very high floor? I think 60 percent is a more reasonable floor. It is still richer than many products in certain markets, but it would result in much more affordable options if this bill became law.

As I mentioned, if individuals want a richer plan, that is available. There just is not anything below the 65 percent mark that we are allowing, or even allowing to
appear on the exchanges. That is another consideration we probably ought to give, is to let everybody be on the exchange; a lot of transparency, people could see what the prices were.

It could mark whether they meet the 60 percent, or 65 percent, or 70 percent, or whatever actuarial value they do and people would be aware of what they were buying. But we are only going to allow people that meet the minimum requirement, which means 65 and above, at the present time. I think that people will notice it, particularly if they are sending a kid to college or paying higher electrical bills now, or saving for retirement.

Some people, of course, will say that that will mean that Americans will not be protected from high health care costs. The primary one that we have got to protect people on is catastrophic. Catastrophic, you are going to be covered at virtually any level and could go even further down than that and still be covered.

So I did notice that an overwhelming majority of enrollees in Massachusetts are enrolled in their bronze plan, and I would mention that their bronze plan is 60 percent. I would challenge people to take a look at their State and see what the average-person actuarial value is that they are enrolled at. It is a little hard
to get, but it is possible to get it.

I would contend that most of you are below the 60 percent mark, which means that if you pass 65 percent you are raising the amount that people in your State are going to have to pay, and I suspect that they are going to notice that. So, like I say, this is not where I would like to have it. I would like that exchange to cover all plans and just mark what the actuarial value is and provide the transparency so they know what they are buying.

I suspect that some companies would be innovative enough that they would even list on there some mandates at a specific cost that you could pick up in addition, if you wanted those. But instead, we are going to be very proscriptive, and so I hope the committee would adopt this amendment.

Senator Conrad. Mr. Chairman?

Senator Grassley. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, I think Senator Enzi -- and if I could get Senator Enzi's attention. I think Senator Enzi has a worthy amendment here. This is kind of a follow-on to some of the discussion we had last night. I asked for plans, for Blue Cross Blue Shield, across the country. They sent us an analysis of 36
plans, half of them in the individual market, representing the Northeast, the Midwest, the South, and the West, and in the small group market, 18 plans, Northeast, Midwest, South, and West.

What jumps out at you -- let me just give some examples. In the Midwest, in one State, one of the major plans, 55 percent are below 60 percent. Now, that is an outlier. Most of them are not that way. But in the South, there are three States that have plans, one at 66 percent or below 60 percent; one, 35 percent are below 60 percent; one, 79 percent below 60 percent.

The same is true in the small group market, although those, admittedly, are outliers because most of them are higher, have higher actuarial values. Nonetheless, this tells me that at the bottom rung--not quite the bottom rung because we also have the plan for the young invincibles--that Senator Enzi is correct and that we need to adjust, on the lowest level, downward to 60 percent. I think that would then have a smoother spread so you would have a 60 percent plan, 70 percent, 80 percent, 90 percent, coupled with a young invincible plan for those who are under 25. I think we need to probably think some more about that as well. But I think Senator Enzi has an amendment that deserves support.

Senator Grassley. Mr. Chairman?
The Chairman. Senator Grassley?

Senator Grassley. This is a subject that we discussed quite a little bit during the group of six, and I agree with Senator Enzi. It is true that higher actuarial value will expose consumers to less out-of-pocket spending, but consumers pay for that in lower cost-sharing with higher premiums. I have already shared with the committee that in a lot of States--and Senator Conrad just went over that material with you--the average actuarial value is way below the 65 percent proposed in our mark.

This means that if health reform passes and our constituents are expecting lower prices when they go to buy new coverage, many will end up seeing higher prices than they would have under current law. So if you are really concerned about affordability and if you are worried about, people are going to be facing stiff penalties or other things for not purchasing coverage, then lowering the required actuarial value is very much a common-sense way to provide consumers with lower-cost options. That still protects them from catastrophic health care spending.

The Chairman. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman.

I appreciate what is being offered here and what my
friend from North Dakota said. I guess I come at this from a different perspective. My hope is that we are going to actually improve affordability for people in terms of plans. When we say 60 percent value, that means 40 percent is being paid by the family or the individual rather than 35 percent. When we look at a typical employer-sponsored HSA right now, minus the employer's contribution, that is at 76 percent and that is not full coverage.

So I was assuming that we were trying to move that up and offer people more comprehensive insurance. I understand that across the country it is very different in different places. We are offering options to States, we are offering the catastrophic option with prevention that has been expanded upon from the young invincibles now to, more broadly, the individuals that cannot afford it that need an affordability waiver.

But I guess from my perspective I just come at this differently. The more we lower that actuarial value, the more the individual or the family will have to shoulder the cost of their plan. Personally, I would like to go in the other direction. Thank you.

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman?

Senator Bingaman. Mr. Chairman, let me just ask
staff to respond, if Ms. Fontenot could clarify a few things for me here on this. My understanding is similar to Senator Stabenow's in this in that the subsidy or the tax credits that we are providing here, those will be reduced to the extent that we reduce the actuarial value of the plan being purchased. Is that right or not?

Ms. Fontenot. The tax credits are actually tied to the level of the silver plans, so the second-lowest cost silver plan in a person's area. So if we reduce the level of minimum credible coverage, it should not affect the tax credits and, therefore, the score at all.

Senator Bingaman. So if the tax credits are tied to the silver and we change the actuarial value of the bronze and a person says, I want the bronze plan --

Ms. Fontenot. Right.

Senator Bingaman. How does that work out? They still get the same subsidy regardless of what actuarial value we apply to the bronze?

Ms. Fontenot. If they buy down to the bronze plan, then to the individual it becomes a zero premium plan. Then the tax credit only covers the amount of the premium. So in other words if the tax credit then exceeds the amount of the premium they do not get to keep that money, it is just a reduction in the amount of the tax credit.
Senator Bingaman. So is it fair to say, as Senator Stabenow did there, as I understood her comments, that the amount that would be left over for the individual or the family to pay in the way of deductible, or co-pay, or whatever would increase if we reduce the actuarial value of the plan that they are purchasing?

Ms. Fontenot. Yes. That is exactly right, because the actuarial value speaks to the cost-sharing level. So a 60 percent value indicates that the plan has to cover 60 percent of the costs for an average individual, and the individual pays the rest of that cost.

Senator Bingaman. So the individual is on the hook for the other 40 percent.

Ms. Fontenot. Correct.

Senator Bingaman. And there is no subsidy for that, or tax credit available for that?

Ms. Fontenot. There is a cost-sharing subsidy, depending on your poverty level. But for those over 200 percent of poverty, there is no subsidy for that.

Senator Bingaman. All right.

Well, am I also right that all of the various plans that Senator Enzi, Senator Conrad, and all were referring to that are currently in place that have a lower actuarial value than the 65 percent, those would all be grandfathered? Anyone who had one of those could keep
that?

Ms. Fontenot. That is correct.

Senator Bingaman. So it is just people who obtain
a new policy in the future that would have to meet the 65
percent minimum, unless they qualified for the young
invincible plan.

Now, Senator Snowe proposed an amendment that I
believe was agreed to as part of the modified mark?

Ms. Fontenot. Yes. That is right.

Senator Bingaman. Which said that the young
invincible option would be available to anyone,
regardless of age, if they did not meet a certain
affordability level. How did that work? Could you
explain that to us?

Ms. Fontenot. That is right. So if you were
eligible for the affordability waiver which says that the
lowest-cost option available to you would have exceeded
10 percent of your income, then you can enroll in the
young invincible plan regardless of your age. So if the
plan that is available is still not affordable to you,
then you can buy a cheaper plan regardless of how old you
are.

Senator Bingaman. So under the mark as modified,
the way it currently exists, a person who could not buy a
bronze plan at 65 percent of actuarial value, for 10
percent of their adjusted gross income or less, could
instead buy the young invincible plan, regardless of
their age.

Ms. Fontenot. Yes.

Senator Bingaman. Could buy the young invincible plan. And what actuarial value would that have?

Ms. Fontenot. The young invincible plan is probably around 50 percent actuarial value.

Senator Bingaman. So that option is available to anybody who meets that affordability test?

Ms. Fontenot. That is right.

Senator Bingaman. Thank you, Mr. Chairman.

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe?

Senator Snowe. Thank you, Mr. Chairman.

I would like to pose a question to staff as well regarding this issue, because obviously it consumed a considerable amount of our discussions, as you well know, Ms. Fontenot, about this because we want to, at the end of the day, create affordable plans at a better standard. I know the State of Maine has been mentioned with respect to -- I think yesterday Senator Grassley mentioned that 87 percent of the plans in Maine come under the bronze value, and that is because we have a distorted market basically, with few insurance companies that have a
market concentration that leads to very little competition.

We have family policies for four at $24,000. In fact, I met a woman just very recently who told me, for her family of four, she pays $24,000, and in addition, another $11,000 in medical expenses for her sick daughter. So there you go: in one year, $35,000 for an average wage earner. I mean, that is what we are talking about, and that is what is happening in Maine because there is very little competition. Obviously we want to elevate that standard. How can we do that, keeping the standards, improving those standards in the exchange with these plans, and at the same time not add to the cost?

So now we are talking about reducing the actuarial value to 60 percent. What would that mean in terms of a premium for a bronze plan? Do we know? What would that mean? What would the premium be in a bronze plan at 60 percent?

Ms. Fontenot. Senator, I am not entirely sure. It is not quite a linear function, which is why we always check back with the actuaries on these questions. I think CBO is currently estimating that for an individual in a bronze plan, the premium would be probably around $3,500 annually. It would be, depending on that person's age, lower than that. It is not exactly 5 percent lower,
but somewhere around there.

Senator Snowe. So you would have to be pretty healthy. For example, if you are getting a bronze plan, you have to be pretty healthy because otherwise you might have a lot of cost-sharing involved here, where the cost-sharing would be, obviously, much higher in a bronze plan.

Ms. Fontenot. Right. Well, the premium would not vary based on health status under these new rules.

Senator Snowe. Right. Right. But the cost-sharing would.

Ms. Fontenot. The cost-sharing would.

Senator Snowe. So you could get consumed by cost-sharing unless you are almost 100 percent healthy in any respect.

Ms. Fontenot. Absolutely.

Senator Snowe. Second, on the use of the subsidies tied to the silver plan, so in some instances at certain income levels that subsidy could be used to buy a bronze plan in its entirety?

Ms. Fontenot. Right. There could be a situation where the second lowest-cost silver plan in your area, the premium from that actually exceeds the amount that if you bought a bronze plan you would get a tax credit that would cover the whole amount.
Senator Snowe. Thank you.

Senator Wyden. Mr. Chairman?

The Chairman. Senator Wyden?

Senator Wyden. Mr. Chairman, I think this is an extremely important issue. I find myself attracted to the arguments of Senator Stabenow and Senator Bingaman, and at the same time sympathetic to what Senator Enzi wants to do in terms of choice. So I would like to ask counsel a question with respect to the waiver provision, and specifically whether it would be possible for a State, again, to meet the minimum coverage requirements and be able, for example, to look at what Senator Enzi is interested in doing.

As I look at the second-to-last sentence in the waiver provision that I authored, it says that if a State can provide affordable choices for its citizens, in effect the State has a lot of flexibility to go take its own initiative, and presumably pursue what Senator Enzi is talking about.

So my question is, under that part of the waiver provision, if the State said that it wanted to go to the Enzi standard as a way to get to affordable choices for all of its citizens, could it do so?

Ms. Fontenot. Similar to the conversation I think we had about the personal responsibility requirement, the
way I read this is that a State could do that as long as it can show that it is still providing affordable choices for its citizens and expanding protections against excessive out-of-pocket costs. So if the State can better strike this balance, then they could do so in a waiver.

Senator Wyden. All right.

Mr. Chairman, thank you for the chance to clarify that. I want the Senator from Wyoming to know that I intend to work with him throughout this mark-up, throughout all the time that we consider this on the floor, because what he wants to do is provide choices. I think that is something that is clearly going to help hold down health care bills in this country, it is going to create competition. We all know that there is a dysfunctional marketplace. We have just got to find a way to do it without causing problems in terms of affordability.

Counsel, thank you for that answer. Thank you, Mr. Chairman.

Senator Cornyn. Mr. Chairman?

The Chairman. Senator Cornyn?

Senator Cornyn. Mr. Chairman, I want to tell Senator Enzi, I appreciate the intent of his amendment and I, like he, wish he could go further and provide more
flexibility and more choice, and thus lower costs for consumers of health care. Because the Chairman's mark, respectfully, mandates higher coverage than many people have now, which they like, they will not be able to keep what they like at the price that they are currently paying. They will all pay more money for what they have now.

In Texas, for example, the individual market benefit levels, 91 percent of people in the individual market do not have plans that are rated at 65 percent of actuarial value; 79 percent of those 91 percent have plans that are 51 to 60 percent of actuarial value. Many individuals who have health savings plans that they like a lot now—for example, the employees at Whole Foods in Austin, Texas, who vote on their plan every year, overwhelmingly vote for a health savings plan with wellness accounts. They will not be able to keep that, certainly at the same levels that they have now, because of the mandates contained here.

I just think it demonstrates how the President's promise that "if you like what you have you can keep it" is demonstrably untrue, because you cannot force an insurance company to sell the policy next year. All of us know that, even under the Federal Employees Health Benefit plan we have now, that we have basically a one-
year contract for health care at the price that they sell it.

Each year we re-negotiate and make another decision: are we going to stay with that plan or someone else? But the fallacy, I think, in the proscriptive approach is that the government can force people to have minimally credible plans, but ultimately will increase their costs. So instead of bending the cost curve and making health insurance more affordable, this will make it more expensive and it will not allow people to keep what they have. So I agree with the amendment. I just wish that we could provide even more flexibility, and I hope that there will be other amendments that will provide that.

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman.

I would like to amplify a little bit the point that Senator Cornyn just made, and go back to the original point that Senator Enzi raised here. We, in our wisdom, are deciding that the average of what people do today is not good enough. So we are deciding that the very least that they can purchase in this plan is 65 percent actuarial value insurance, but we are forgetting that this is just a choice.

There are four specific choices. From our side, we
would not limit it to four specific choices, but there are four choices offered here, only one of which is the bronze. The subsidy is tied to the silver. So let people make the choice. Under the statistics that I read yesterday, according to the Congressional Budget Office, the actuarial values of individual insurance today ranged from 40 percent to 80 percent, with an average value that is between 55 and 60 percent.

So, Senator Enzi is setting the value at the top end of that average, according to CBO. It is right on the button in my State. As he pointed out, most of us will be slightly under 60. My State is right on the button at 61 percent. Milliman, the independent actuarial firm, found that the average actuarial value of a high-deductible plan is 48 percent. So even at 60 percent, Senator Enzi's amendment, we are still making a determination to go above the averages.

To Senator Cornyn's point, Milliman also found that with the provisions of the mark at 65 percent, you are going to have an increase in health insurance premiums by 35 percent for those with high deductible plans. I thought we were not going to increase people's insurance. Well, according to the mark, with 65 percent, we are. Senator Enzi is trying to do something about that. Finally, Milliman says individuals enrolled in individual
health plans with a lower actual value than 65 percent will see their premiums increase by 18 percent.

So, Mr. Chairman, Senator Enzi's amendment is wise in that it gets us closer to the average, and in any event the objections that people have that maybe they would not do it that way do not take into account that everybody has a choice here, that this is simply the minimum choice. We would rather leave it up to people to decide what is best for them than to tell them that they have to buy a plan that is going to be rated at an actuarial value of a specific amount, namely 65 percent, which is above the average today.

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe?

Senator Snowe. Yes. Thank you, Mr. Chairman.

Just to follow up, because it is a crucial discussion in terms of affordability and elevating those standards to meet the public's expectation. So many people today, individuals or small business owners, what they are facing, at best, is catastrophic coverage in terms of being able to purchase a health insurance plan. Can we do better? I think that is what we were striving for in developing this approach within the group of six, is to provide affordable options with reasonable coverage.
As I was discussing with one small business owner recently, five years ago his premium was $250; today it is $5,000. So that kind of appreciation in cost has been devastating to small business owners and to individuals. So the point is, we can we provide affordable options with reasonable coverage? Now, some people might want that choice. We want to create the choices here. I also want to make sure that if people expect to get a good plan at an affordable price, that we can do it to the best of our ability.

I think, Mr. Chairman, it would be important to get a CBO analysis on the bronze plans. We did get an excellent analysis from CBO on the silver plan because the subsidies are tied to the silver plan, but now I do think it is important. I am sympathetic to Senator Enzi's amendment. I think it is important. We need to provide choices to people at the best cost and the best price. Yet at the same time, we want to make sure people are not just finding the status quo in terms of, all they are able to buy is catastrophic coverage.

So I hope that we could get an analysis in the meantime. This is important. You have the lowest price plan that is a good plan for people, it meets their goals, but at the same time we do not want them to feel compelled to buy that plan because that is all they can
afford and it does not provide the kind of coverage they need for that moment in time in their lives. So I would hope we could get that analysis, Mr. Chairman. I hope we can request it, because it will be important and central to this debate. Thank you.

The Chairman. I appreciate that, Senator. We will ask CBO for that. I think I will let Senator Enzi close on his amendment, unless others want to speak.

Senator Enzi. I was hoping that I could be a part of some of the discussion a little bit earlier too, but I think I am sitting in a little invisible place here, because I have had problems throughout this whole thing of being recognized.

The Chairman. Senator Enzi, you are recognized.

Senator Enzi? 

Senator Enzi. Senator Stabenow has left now. I could have cleared up what she had to say, and I am glad Senator Snowe is still here, and Senator Wyden. We are confusing taking care of the low-income people with what we are going to require of all people. The low income are going to be taken care of. They are going to get a subsidy. They are going to get the silver plan and they are going to take their subsidy. They are not going to back off to the bronze plan and give up their subsidy. So they are going to be taken care of.
But the average person--we are talking about the average person in America, that we are going to tell them what their minimum credible coverage is going to be, because that is all that is going to be allowed to be on the exchange. First of all, it sounds better if you have got 60, 70, 80, and 90 percent levels instead of 65, 70, 80, 90 percent levels. But if those people with the silver plan -- if we are still talking low income, if they were at a silver plan they go down to bronze, that is going to save us money, so CBO is going to say, yes, that would save money.

Of course, nobody is going to do it because they can get a better plan with less to pay in. But the argument was that this was going to cost them 40 percent. If it is only 60 percent coverage, it is going to be 40 percent. Yes, that is true. That is a choice that they can make. They get lower premiums, and then if something happens they will have more to pay in, except--except--under the amendment, the pocket costs are capped at $6,000 for individuals and $12,000 for families, and there are no annual or lifetime limits.

They are going to buy a catastrophic policy no matter what. If it is catastrophic, you have got to remember that under what we are setting up here not only are these things portable, but they get to make the
decision every year. So if I pick one of these 60 percent policies and then I find that I have got a problem, what do I do next year? I switch to a 90 percent one and then I only have to pick up 10 percent of the costs.

See, we are forgetting that we are setting up something here where people not only have it portable, but they get to pick annually. That is what we had under Medicare Part D, too. They get to pick every year. So if they find out they have got a lot more drug costs and some other company is going to provide it cheaper, they switch. So I really think we ought to go down to at least the 60 percent level.

I did some checking in my State. For a 35-year-old person in Wyoming—and some of these get paid quite a bit. I know the kind of work they are doing. Some of it is pretty risky, but they are getting a lot of money. But they figure that anything that is going to happen to them, they get covered under Worker's Comp, so they are not buying the insurance. They would have to buy the insurance under this. Those that are buying the insurance that are in that category are paying $63 a month.

Now, the actuary estimates for that bronze plan would be $323 a month. If I tell people that I am going
to make their insurance more affordable and I raise their rate from $63 to $323, I think they are going to notice. I think they are going to say, what kind of a job did you do? Why did you make me go that high? Now, it is still going to drive up the cost of their insurance, but I am trying to get it down just a little bit more reasonable. It is a choice that they make.

People still have the choice to buy richer coverage if they want it, but we need to give them a choice of picking the lower premiums. The argument that this "up to age 25" that we have increased now so that if it exceeds 10 percent of their income, they can buy this other policy. By the time it exceeds 10 percent of their income, they are going to switch to a higher actuarial value the next time that their plan comes up. So that 10 percent is not going to affect them. That is not going to be the plan they are going to pick. So this amendment brings it down a little bit.

I do not think it gives the kind of choice that we would like people to have. We are talking about adults who can make decisions on their own and make this decision every year, so if they do not have anything the matter, they can pick a lower one. If they have something happen, they can pick a higher actuarial value. But what we are setting here--and we have got to keep
that in mind—is the minimum credible coverage that they can buy. If they do not, we are going to penalize them.

    The Chairman. All right.

    Senator Ensign? We have aired this out. This is virtually a repeat of an amendment yesterday, too. We have all had this discussion, and various variations too, I might add.

    Senator Enzi. And there probably ought to be a lot more variations because this is really a key to the whole bill.

    The Chairman. All right.

    Senator Ensign?

    Senator Ensign. It is, Mr. Chairman. I want to associate myself with the remarks of a few of my colleagues. Basically, what we have here is a situation where the mark is saying that Washington knows best. What we are saying is, we would like to provide transparency and then allow people to choose, take their own responsibility and be able to choose the kind of plan that fits best for them and their family.

    What this mark is saying is that Washington knows best. Because Washington is not trusting the people to make their own decisions; well, I have a little alert to tell Washington: the people do not trust us. They do not trust us to make these decisions. I mean, that is what
we are hearing all across the country, that we may not be trusting them in this bill, but certainly they are not trusting us.

I actually would put more faith in the people than I would put in Washington, DC. That is the reason that we should give people the ability to make good choices and then live with those choices. That is about freedom. That is about the freedom that we talk about. Senator Enzi has talked about here that he caps out-of-pocket expenses.

We learned last night--and I think it is important to repeat some of these things--is that they do not know the studies. I asked, where did the 65 percent number come from? Well, it was kind of a judgment call, but it was not based on bankruptcies in certain parts of the country. I even asked if we knew whether certain parts of the country that had higher bankruptcy rates due to health care problems, and was that associated with the lower-cost plans, the lower-cost actuarial plans.

Nobody has that information. They did not do that study to find out, to see whether this correlates or not. Why do we set a 65 and not a 60? The bottom line is, I think what Senator Enzi is trying to do is at least a step in the right direction. We would like to just allow the plans to be set up so the people would have
transparency, and then they determine the cost and the actuarial value of what they want to buy.

The other point that needs to be made today is what we learned last night, is this whole idea of keeping the plan that you want. For small employers, if they have a plan and the plan goes out of business, the insurance company goes out of business and they have a plan that is under the 65 percent value today, then the next year when they change their plan, they cannot buy the same plan, the same kind of a plan that they had last year with a different company. They will be required to buy a more expensive plan. The same thing with individuals in the individual market. They will be required to buy the more expensive plan.

Now, what we learned from the Joint Committee on Taxation was, if people do not buy the more expensive plan, they will be subject to up to one year in jail and a $25,000 fine for not paying, for not buying their plan. They get hit with a tax. If they do not want to pay the tax, then they are hit with this potential $25,000 fine and one year in jail. So, Mr. Chairman, I think what Senator Enzi is trying to do is at least a step in the right direction. It makes it more affordable for those people. It trusts the American people more to make the kind of decisions that they need to make.
The Chairman. All right. We have already had this debate.

Senator Ensign. And so that we are not --

The Chairman. We have had this debate many times.

I am ready for a vote.

Senator Ensign. We are not, Mr. Chairman.

The Chairman. The Clerk will call the roll.

Senator Ensign. Mr. Chairman?

The Chairman. We have had this debate many times,

Senator.

Senator Ensign. Mr. Chairman, you did not cut anybody else off today.

The Chairman. Well, this is so redundant. This is a filibuster you are doing here today.

Senator Ensign. Mr. Chairman, you have said so many things in this debate that are redundant, it is ridiculous. And for you to say that about somebody else is really, really with an unfair --

The Chairman. You have been speaking at great length and a lot is repetitious. Why do you not go ahead and make your point, then we are going to vote on this.

Senator Ensign. Thank you, Mr. Chairman.

My final point is really about trusting people. That is, are we going to trust people to have more personal responsibility? There was a Gallup poll that
was out this morning that basically said that the American people think it is more their responsibility for their health care decisions than the government's responsibility, and that is what this amendment and this whole debate is about -- trusting people more than you trust the government.

Thank you, Mr. Chairman.

The Chairman. The Clerk will call the roll.

The Clerk. Mr. Rockefeller?

The Chairman. No by proxy.

The Clerk. Mr. Conrad?

The Chairman. Aye by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

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?
The Chairman. Pass.
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. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. Aye.
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 Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

Senator Cantwell?

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Chairman, the final tally is 11 ayes, 12 nays.

The Chairman. The amendment does not pass.

Senator Grassley?

Senator Grassley. My amendment is C-8. I am revisiting a provision in the Children's Health Insurance bill from earlier this year that Congress got wrong. In the Deficit Reduction Act of 2005, Congress passed a law requiring States to do a better job of confirming citizenship of people applying for Medicaid. The Inspector General at the Department of Health and Human Services found that most States were not really checking, most relied simply on self-attestation.

In the Children's Health Insurance Program bill, Congress tried to improve upon the Deficit Reduction Act provision of 2005. The provision on citizenship documentation in the Children's Health bill works so long as a person making application for benefits is, as you
would guess, actually the person making application for benefits. The citizenship documentation provision that was amended in the Children's Health bill remains dearly lacking when it comes to identification.

My amendment requires that a valid, government-issued photo ID be submitted with an application for benefits. So it is quite obvious it does no good to require somebody to submit a valid name, Social Security number and place of birth match if there is no proof that the person is actually that person that is submitting the information.

I know I do not have to explain the concept of identity theft to anybody in this committee meeting. A stolen credit report has more than enough information to allow someone to skirt the citizenship documentation provisions in the mark. Frankly, I am very perplexed as to why anyone would object to the amendment. Think about all the restrictions in modern life that require a valid photo ID.

For instance, try getting on an airplane without an ID matching you to your ticket. Think about all the times that you are asked for a photo ID before you can walk into a building, or use your credit card, or write a check. Think about coming into this building every morning. Now, most of the time Senators are easily
identified, but every once in a while a policeman asks me for my ID and I am very glad to get it out of my billfold and show them that I am actually Chuck Grassley.

Just think of the mundane life tasks that require photo ID. I am sure that the Chairman understands that Montana requires a valid driver's license or a valid photo ID that is required for just purchasing a fishing license. But it is not just Montana that requires a driver's license or valid photo ID before you can buy a fishing license. After a quick check of other States' web sites, I also note that Arkansas, Florida, Michigan, New Jersey, New York, Oregon, and West Virginia require a valid photo ID for a resident to get a fishing license. These are the ones that my staff could find just around the Internet.

So is there any question that when you are getting the benefit of a Children's Health Insurance Program or Medicare, Medicaid, that there is really nothing wrong with requiring a photo ID? Should States really require more to prove the identification of people buying a $10 fishing license in order to be eligible for that than people getting Medicaid? Should we not also care about people assessing thousands of dollars of government benefits through identity theft?

So I think the amendment is not only legitimate,
there ought to be the same requirement for accessing
these very expensive Federal programs just like it is
going a fishing license in several of our States. I
urge the adoption of the amendment.

Senator Kyl. Mr. Chairman?
The Chairman. Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman.

Mr. Chairman, this is a really important point in
the debate because a lot of the numbers do not add up if
Congress does not do what we say we are going to do in
the legislation, some of which is not easy politically to
accomplish. For example, the President, in his big
speech, talked about how we are going to take out waste, 

fraud and abuse. A lot of skeptics said, never happen.

You have got to watch Congress around here. They do not

have the courage to do that.

Little things like eligibility requirements, that
you actually are eligible for the government benefit that
you are applying for. Congress said, surely we will have
requirements in the statute so that people do not defraud
the government. Skeptics say, you watch: it will not
happen. Well, here is Exhibit A.

This is the test, and I will have a follow-on test
after this one. Are the skeptics right, that Congress
does not have the courage to ensure that taxpayers are
not ripped off by ensuring that people demonstrate their eligibility for Federal benefits? Is that not the least that people who are asking their fellow taxpayers to give them some of their money could be asked to do, to verify that they are eligible for the program?

That is all that Senator Grassley is asking us to do here. If we do not adopt his amendment, we will be saying--here is the first exhibit to demonstrate--that the numbers that CBO assumed would balance this out so that it would be deficit neutral are not really going to be true. We will, in fact, have a deficit because Congress will not do the minimal steps to make sure that the taxpayers are not ripped off. The Grassley amendment is a bare minimum of what Congress needs to do.

Senator Menendez. Mr. Chairman?

The Chairman. Senator Menendez?

Senator Menendez. Mr. Chairman, there is a difference between a fishing license and what we are doing in this bill, which is mandating, as a matter of law, that individuals get coverage. If they do not, unless they are exempted, they have a penalty. Fundamental difference.

Now, about verification, already current law gives the States the option to satisfy the citizenship documentation requirement in Medicaid and CHIP by
checking people's Social Security numbers through the
data exchanges with SSA, and if there is not a match,
therefore they are denied. There is also the opportunity
for someone to bring a birth certificate, which now a
birth certificate is not the basis of citizenship in this
country, but a photo ID is the basis of citizenship in
this country. We have come a long way, the wrong way.
The last time I checked, citizenship is by birth or
naturalization.

Now, the other thing is that this amendment would
bar, I view, legal children from coverage. This
amendment requires a child's parents to present photo ID
when applying for insurance for the child. Now, if you
read the amendment, children usually do not have a photo
ID at the end of the day, and in many cases even the
parents of those children do not have photo IDs.

When you look at the universe we are talking about,
people on Medicaid, for example, the average photo ID, to
the extent that an American has one, is a driver's
license. In this universe of Medicaid, clearly that is
many people who do not possess a driver's license because
they do not possess a car. They take multiple means of
public transportation to simply try to get the work and
sustain their family every day. So parents should be
able to produce documentation, like their child's birth
certificate, in order to have the validation that we want.

This creates a new barrier to coverage for everyone. It requires applicants to present the government-issued photo ID in a way that is a significant barrier, even for citizens. Right now, in States across the country, you either mail in your application or you, in fact, can go online. Well, obviously, you are not going to put, to the extent that you have a photo ID, it in the mail and send it to them because you are not going to take a photocopy as proof of ID.

So now you are going to have to take your driver's license and send it to the location of your Medicaid office to get verified, or you have to take off from work, which people in this category already are suffering pretty badly in terms of those who qualify for Medicaid but are still struggling in some type of work for their children, or in the CHIP program.

So now, since our offices are only open Mondays through Fridays, I have got to take off from work so I can show the photo ID of myself, not my child, by the way, who does not have a photo ID. This impact is on the most vulnerable groups in our society, the most vulnerable groups in our society: people living in rural areas, people who are homeless, people who may have been
the subject of foreclosure, now changed, and their ID is not even valid at the moment. Even the Real ID regulations allow States to provide for exceptions to photo identification requirements because it understands that those vulnerable groups exist.

Finally, Mr. Chairman, there have been some studies about this. What it says is pretty alarming. The Wisconsin Department of Health and Family Services reported that, between August of 2006 and January of 2008, nearly 33,000 individuals had their Medicaid denied or terminated because of the documentation requirement. In 62 percent of those cases, the sole reason for denial and loss of coverage was lack of identification. All of these individuals—all of these individuals—had provided documents showing that they were citizens. So because they did not have a photo ID, they became second-class citizens. There are studies that have a number as high as 21 million American citizens who have no photo ID.

So I think this puts children at risk. That is what the amendment does, it puts some of the most vulnerable at risk. I think there should be documentation, and certainly Social Security, birth certificates are the standard. But if not, we have changed the whole paradigm in this country about how you become a citizen. It is not by a certificate of birth or naturalization, it is by
some photo ID, and that is fundamentally, fundamentally wrong.

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

The Chairman. Who seeks recognition?

Senator Kyl. Would the Senator yield?

The Chairman. Senator Kyl?

Senator Kyl. Yes. The last comment, Senator Menendez, that you just made was that this photo ID requirement is not a good substitute for Social Security numbers and a birth certificate, which after all is the ultimate confirmation of citizenship, and I agree with you about that.

What would be your view about adding the birth certificate requirement, or even substituting it for the photo ID?

Senator Menendez. I understand it is already required. Mr. Schwartz, would you answer that for us?

Mr. Schwartz. I would be happy to. The list of documents that Senator Grassley referenced that were included in the Deficit Reduction Act include a birth certificate. That list was originally created for the Medicaid program, and the CHIP Reauthorization Act signed earlier this year extended that to the CHIP program. So the birth certificate, as I understand it, applies in
both programs.

Senator Kyl. It is a permissible document. It is not required.

Mr. Schwartz. That is correct. There is a list of several permissible documents.

Senator Grassley. Could I interrupt here, Senator Kyl? The issue is not citizenship. The issue is, is the person that is applying for it the person who says they are, and only photo ID is going to show that.

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman?

Senator Bingaman. Mr. Chairman, let me speak in opposition to the amendment. As I see the amendment, it is a solution looking for a problem. The idea that we have got a lot of fraud in Medicaid because people are showing up and misrepresenting who they are in order to get medical treatment, it just is not reality. The fraud in Medicaid is provider fraud.

It is providers who are charging for services they are not providing. When I was Attorney General in my State many, many years ago, we used to prosecute people for committing fraud against the Medicaid system. We did not prosecute anybody I can recall who tried to misrepresent who they were in order to get the health care that the person that they were claiming to be would
have been entitled to get. That is just not a real
problem that this amendment is trying to solve, in my
view.

In New Mexico, when the Deficit Reduction Act was
adopted, I believe it was 2005, and the various
citizenship documentation requirements were put in place,
the estimate is that 10,000 children in my State lost
coverage under Medicaid because of those new
identification requirements. There was no evidence that
undocumented children had been receiving coverage.
Instead, those were citizen children who lost coverage,
many on the Indian reservations in my State.

So I think it would be a mistake to add one more
requirement and say not only must you show a Social
Security number or birth certificate or some document to
prove who you are, you have got to show this additional
requirement as well. I think it is just one more
barrier. It will result in that many fewer individuals,
and particularly children, obtaining the Medicaid
coverage that they are otherwise eligible for, and for
that reason I would oppose the amendment.

Senator Grassley. Mr. Chairman?
The Chairman. Senator Grassley?
Senator Grassley. In response to Senator Bingaman,
not there is fraud from applicants, as well as from providers, and I do not disagree with what Senator Bingaman said about, probably the major source of fraud does come from the providers. But just today there was a GAO report out that said, for instance, Medicaid is paying claims for people who are dead. So photo ID, and are you alive, and all that is pretty darn important, it seems to me. So I do not disagree that there is a lot of fraud by providers, and maybe vast majority of the fraud by providers, but there is also fraud by applicants as well.

Senator Bingaman. Mr. Chairman, I would just point out --

The Chairman. Senator Bingaman?

Senator Bingaman. To the extent Medicaid is paying for people who are dead to get health care services, it is not because those people are applying for those services, it is because providers are billing for services for people who are dead. That is the problem we ought to stop.

The Chairman. All right.

Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman.

I think we may want to just amend this to say that we will not allow Medicaid to pay for anyone that is no
longer living. There is no question that there is Medicaid fraud, but I think this does not tackle it in the right way.

I guess I have a question for staff, to make sure I understand this right. Under Medicaid right now—and you may have already said this, I apologize if you did—citizenship documentation requires a passport or a birth certificate and photo ID, except when we passed Children's Health Insurance we said if you are in the Social Security database, that could be used instead. Is that correct?

Mr. Schwartz. That is correct, Senator.

Senator Stabenow. All right.

Given that, I guess, Mr. Chairman, I appreciate what the focus of this is. I think there is no question about it, that none of us want someone who is here illegally or someone who is defrauding the public or the government to be getting Medicaid, or any other public service, period.

My question would be, going beyond what is the current citizenship documentation, a passport, birth certificate, a photo ID, or Social Security number, when we look at who is on Medicaid and we look at the fact that we have eight million low-income seniors, the bulk of Medicaid is really costs for seniors in nursing homes.

You have someone that has, possibly, the beginning
of Alzheimer's. They may or may not have a family, may have not worked for years, may have not driven for years. The idea that we would somehow put a barrier to a senior citizen being able to get care in a nursing home because they did not have a photo ID is really concerning to me, very, very concerning to me.

We spent a lot of time talking about Medicare and Medicare Advantage and making sure seniors do not lose what they have. It seems to me that this amendment, in fact, could cause however many -- if there are roughly eight million seniors right now, low-income seniors, most of whom are in nursing homes, it seems like we are putting a tremendous barrier up to low-income seniors being able to get the care that they need, which I know we all want to make sure that they have. So given the strong provisions already in the law, I certainly do not want to take that a step further and have low-income seniors being blocked from being able to get the care that they need.

The Chairman. I think we can vote on this.

Senator Ensign. Mr. Chairman, can I ask a question?

The Chairman. We have aired this out pretty fully.

Senator Ensign. Can I ask some questions? In this bill we expand Medicaid coverage to adults.
Mr. Schwartz. That is correct.

Senator Ensign. Without children.

Mr. Schwartz. That is correct.

Senator Ensign. The Chairman has some provisions in there about verifying citizenship for the exchanges. Do those apply to the Medicaid population?

Mr. Schwartz. No. The current-law Medicaid requirement in Title 19 would apply, so the provision Senator Grassley referenced earlier.

Senator Ensign. Which are stronger, the Medicaid provisions or the provisions in the mark, as far as verifying that somebody who is applying is here legally in this country?

Mr. Schwartz. I think they are similar and I think I have to try to get a colleague of mine to help answer.

Senator Ensign. That is fine.

Ms. Baker. The requirements for determining eligibility in the exchange are to supply a Social Security number -- name, date of birth, Social Security number, citizenship status. If you are a legal resident but do not have a Social Security number you could supply an alien number and a Form I-94 number. It does not require specifically a birth certificate or other sorts of documentation unless the initial verification check comes back negative.
Senator Ensign. How do they verify it?

Ms. Baker. With the initial information?

Senator Ensign. Yes.

Ms. Baker. The exchange would receive the information from the applicant and then would--technical term--ping the information off from the Social Security Administration's databases and Department of Homeland Security databases, whatever would be applicable to determine if the numbers checked out with the other information.

Senator Ensign. So to verify, in other words, they may have a valid Social Security number, but it may be somebody else's Social Security number. What Senator Grassley is trying to get at, in other words, trying to prove that this is the person. There is no point at which you are verifying that this is the person, is that correct?

Ms. Baker. The other information, the name, and the date of birth. It is not just a Social Security number, the applicant also supplies income information to the exchange, so there is a compilation of the information that is received from the feedback from Social Security and DHS, if applicable, and also confirmation from IRS that the income data matches.

Senator Ensign. So that gets back to my first
question: is that stronger than what is required under Medicaid? I mean, it sounds stronger than what is required under Medicaid.

Ms. Baker. I am not familiar enough with Medicaid.

Mr. Schwartz. I think it is actually very similar, Senator. We have the Social Security option, you will remember, that we added as part of the Children's Health reauthorization earlier this year, and that works basically the same way.

Senator Ensign. But does it go to Department of Homeland Security and all that kind of a thing?

Mr. Schwartz. If I understand it correctly, the people that are pinged to the Department of Homeland Security are people who are not claiming citizenship status, but they are claiming to be in the country legally. Is that right? So we do not typically have that population present in Medicaid because there was the five-year bar for legal permanent residents and other categories until earlier this year when we gave States the option to start covering segments of that population, at least the pregnant women and the children, in Medicare and CHIP. So that is a newer group for us, but that is clearly a larger group in the exchange.

Senator Ensign. Under the expansion, would we not pick up some of those people?
Mr. Schwartz. The Chairman's mark does not make any changes to the five-year bar in Medicaid or CHIP for legal immigrants to this country. So I do not anticipate that that is a larger group that we are going to deal with.

Senator Ensign. But you said last year we made the changes so that States could allow that?

Mr. Schwartz. It is a State option for children and pregnant women, so it would not --

Senator Ensign. Not the adults coming in?

Mr. Schwartz. Correct.

Senator Ensign. All right. Thank you.

The Chairman. All right.

Senator Grassley. I am ready to vote.

The Chairman. Senator Grassley says he is ready to vote.

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?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
The Chairman. No by proxy.
The Clerk. Mr. Schumer?
The Chairman. No by proxy.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
The Chairman. Pass.
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 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 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 Grassley. Aye by proxy.
The Clerk. Mr. Chairman?
The Chairman. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. 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 does not pass.
Senator Kyl, I see, has an amendment. It is virtually identical to the last. I mean, I might ask the Senator, do you want to debate it or we can vote on it right now.
Senator Kyl. Well, the word "virtually", I would not use to describe it. It is similar, but it is not
virtually identical. If you like, I can go ahead with it.

The Chairman. How much time do you think you want to take on this amendment?

Senator Kyl. I would assume that in 10 or 15 minutes we can be done with it.

The Chairman. All right. I am going to hold it over until after the break.

I want to end on a very high note here. We have another actuarial event today, as it is Senator Lincoln's birthday today.

[Applause].

[Whereupon, "Happy Birthday" was sung.]

[Applause].

The Chairman. The committee stands in recess until 2:15.

[Whereupon, at 12:47 p.m. the meeting was recessed.]
AFTER RECESS

[2:47 p.m.]

The Chairman. The committee will come to order. We now have a quorum.

Senator Kyl, you are recognized to offer your amendment.

Senator Kyl. We have a quorum?

The Chairman. I am told we have a quorum. Go ahead.

Senator Kyl. I thought a quorum was eight, and I only counted seven.

The Chairman. It is eight. We had eight. We had eight. Why do you not start and we will make sure we have eight when it comes time to vote.

Senator Kyl. Thanks, Mr. Chairman.

Just before the break, we had concluded work on the Grassley amendment, which would have added a photo ID to the requirement for verification for Medicaid benefits. I indicated I had a similar amendment, but it was not the same. There are two key differences between the situation Senator Grassley was dealing with and the situation I am dealing with in my modified amendment, Number C-15.

C-15 adds a photo requirement to receive the tax
subsidy benefits, as well as the Medicaid benefits. In that regard, the amendments are similar. But here are the two differences. Medicaid already has the requirements for verification that staff had discussed in answer to questions, even though most of them are optional, they are not mandatory. Nonetheless, they exist in the CHIPRA 2009, which by the way cut back from the requirements that existed three years before then.

In the case of the tax subsidy, that is not the case. Also in the case of the tax subsidy there is a presumption -- and I will simply read it to you, because this is the only thing that is included in the Chairman's mark relative to eligibility verification. It is simply one paragraph that starts on page 21, and the relevant part reads as follows. Here is what you have to supply in order to be eligible for the tax subsidy: your name, Social Security number, and date of birth. That is it.

They will be verified with the Social Security Administration data. Then it says, "For individuals claiming to be U.S. citizens, if the claim of citizenship is consistent with the Social Security data, then the claim will be considered substantiated", period, end of discussion.

So I guess it is even more than a presumption, it is the determination if the information is consistent with
Social Security data. The problem is, Social Security only can verify one thing, namely that that particular number was issued on a particular date to a particular person. That is it. They may have the birth date of the individual to whom it was issued. What they cannot do is verify that the person applying for the benefit is that person.

I know that when we worked three years ago on the comprehensive immigration reform and had numerous meetings with the Chief Counsel of Department of Homeland Security, he made the point over and over again that, for a valid verification system, you needed a minimum of two key things. You needed the Social Security data to actually be run through the system, and it had to be tied to a photo ID that was a valid photo ID. A Real ID driver's license would work, for example. There were other things that could work as well. But without the photo ID, there was no way to connect up the applicant to the person whose number you had.

Now, we are all aware of the fact that for about 35 bucks you can get a Social Security card and it can have a number on there. The number can be run through the system and validated, but it is not the number belonging to the person who has stolen it. So, fraud is still possible under this. My only point in supporting Senator
Grassley was, why would we have a lesser standard to protect taxpayer dollars than we would to ensure that a person applying for a fishing license in Montana, for example, would have to demonstrate?

Employers are required to file I-9s, and we put the burden on the employer to verify the information on there and we hold them accountable if the information is wrong. They can actually be prosecuted under certain circumstances. And yet, government bureaucrats are not going to be subject to that same requirement. It seems to me that when we are dealing with taxpayer dollars, our obligation should be greater, not less than we impose on others when dealing with their own money.

And certainly I know Senator Menendez said, well, a driver's license is different than the benefits under this legislation. To be sure, that is true, very true. I would argue that the difference argues that there should be at least a stronger standard for taxpayer benefits here than there should be for a fishing license, even though I am sure Montanans take their fishing very, very seriously.

But when you are talking about, potentially, billions of dollars of taxpayers money, I guess I would say, would we not want to have a standard at least as strong as the system that most States have to issue a
fishing license, or anything else? So that is the reason why I think this amendment is necessary, both because of what we talked about with regard to Senator Grassley's amendment, and because the language in the mark makes it very clear that there are not any other optional documents as there are with Medicaid. This is it. When the information is consistent with Social Security data, the claim will be considered substantiated, period. So I think based upon that, it is important for us to add this photo requirement, Mr. Chairman.

The Chairman. Thank you, Senator. Before I turn to, I think Senator Rockefeller wants to speak, we in Montana want a Montana driver's license to get a fishing license because we want to charge you more. That is the whole point of the requirement of the showing of a driver's license in Montana, is to make sure that I, and everyone else in Montana, is really from Montana, because Montana charges out-of-Staters who want to fish in Montana much more than they charge folks in our State. We make sure that we are legit so we do not have quite the same --

Senator Kyl. And you have got a beautiful State.

The Chairman. Senator Rockefeller?

Senator Kyl. And I did not mean to demean what the State would need.
The Chairman. Senator Rockefeller? Thank you.

Thank you.

Senator Kyl. But surely this is at least as important.

The Chairman. I just wanted to point out the reason for the photo ID. All right.

Senator Rockefeller?

Senator Rockefeller. I think this is really, with all due respect, Senator Kyl, a rather dreadful amendment. I say that for the following reasons: we already have requirements for people, undocumented immigrants, et cetera, taking advantage of Medicaid and CHIP who want to do that. The whole idea of having a driver's license, or a photo identification, the reason that does not work is there is something about saying if the parent does not have photo ID, that the kid cannot get into CHIP, which goes against my grain very strongly, and I would hope that we would defeat this amendment.

The Chairman. I think this is the same discussion we had on the last amendment. We probably should vote it.

Senator Kyl. Yes. That is fine. But I am not sure Senator Rockefeller was here. This is not the Grassley amendment that deals with Medicaid and kids, Senator Rockefeller.
Senator Rockefeller. No. This is Kyl C-15.

Senator Kyl. That is right, as modified.

Senator Rockefeller. As modified.

Senator Kyl. And this amendment deals with the benefit that one receives, the tax credit, the subsidy to obtain insurance. That is one of the two differences. The Grassley amendment only dealt with Medicaid. That is what you were speaking to.

The Chairman. Senator Bingaman?

Senator Bingaman. Mr. Chairman, for the reasons I stated in connection with the Grassley amendment, I think this is a bad policy for us to adopt. It is my view that this is a solution looking for a problem. There is no serious issue here. I cannot believe somebody would go into an exchange and claim a tax credit, which the IRS is only going to provide to the name of the person who they are claiming to be. I do not see that that benefits the person who is making the claim.

The mark that you have presented to us, Mr. Chairman, says "appropriate penalties will apply to the use of fraudulent information or stolen identity information in the State exchange". I think that is adequate to the purpose. Clearly, if we had a serious problem here I would feel differently about it, but I do not think we do. I recommend we oppose the amendment.
The Chairman. 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?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

The Chairman. No by proxy.

The Clerk. Ms. Stabenow?

The Chairman. No by proxy.

The Clerk. Ms. Cantwell?

The Chairman. Pass.

The Clerk. Mr. Nelson?

Senator Nelson. No.

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 Grassley. Aye by proxy.

The Clerk. Ms. Snowe?

Senator Grassley. Pass for now.

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. We can now cast the vote for Senator Snowe. It would be aye by proxy.

The Clerk. Mr. Chairman, the final tally is 10
ayes, 12 nays, and 1 pass.

The Chairman. The amendment fails.

Senator Nelson, are you ready? Good. You are recognized.

Senator Nelson. Mr. Chairman, it is the modification to F-1, Nelson F-1.

Senior citizens--that is, 65 and older--and their spouses would be eligible to claim the Section 213 deduction if their medical expenses exceed 7.5 percent of adjusted gross income. This amendment would apply in the years beginning 2012 and would end before January of 2017. Now, it has been a joint effort in putting this together, and I want to thank the Chairman and the staff. We made several changes, and one of those changes in the underlying bill was a new provision to raise the income floor for the medical expense deduction.

The medical expense deduction provides relief for taxpayers that experience extraordinary out-of-pocket medical costs during the year. It has been at 7.5 percent of adjusted gross income, and taxpayers may deduct their medical expenses, but to the extent that they exceed 7.5 percent of their adjusted gross income in current law.

But what we find is that more than 80 percent of the taxpayers claiming the medical expense deduction also
have fairly low incomes, incomes under $75,000. This
deduction was designed in the Tax Code to exclude
predictable, recurring expenses, as well as the surprise,
the extreme medical hardship beyond an individual's
control, such as major surgery, severe chronic disease,
catastrophic illness.

And so from the 1950s until 1982, the income floor
on this medical expense deduction was 3 percent, and then
it was increased to 5 percent in 1983, and to the present
7.5 percent in 1987. Now under the Chairman's mark the
income floor would rise to 10 percent, and because that
is that much less deductible from taxable income, it is
going to raise $22 billion in the Chairman's mark.

Well, you peel back the pages and you find that more
than half of this benefit goes to senior citizens. Those
same senior citizens tend to live on fixed incomes and
they are the ones that are more likely to experience the
extraordinary medical cost. As a result, their medical
expenses exceed the income floor of 7.5 percent more
often than others.

Now, there was a period when seniors were fully
exempt from the income floor, and that was back in 1951,
until 1966. Well, the purpose of this amendment, which
has been jointly worked out with the Chairman, is that we
should not raise taxes on the seniors to pay for health
reform, particularly in this case seniors suffering extreme medical hardships.

So the new out-of-pocket limits will apply in other parts of the bill to private insurance offered in the exchange, however, these same out-of-pocket limits -- remember, this is the limits that went from 2 percent to 12 percent, that premiums cannot be 2 to 12 percent of income. We put limits on that. But that does not apply to any out-of-pocket limits on Medicare beneficiaries. Now we are back to the seniors. So as a result, many seniors will continue to rely on this medical expense deduction to offset the high impact of high medical costs, that they get a surprise in a particular year, or a recurring.

So in working with the Chairman's staff, what this amendment does, it would carve out seniors from the 10 percent income floor. Individuals aged 65 and older would continue to deduct their medical expenses, but deduct them as they do under current law, those in excess of 7.5 percent of adjusted gross income. What that means in dollar terms in the pockets of senior citizens is $7 billion.

We have a revenue offset. The revenue offset would make payments under the Employer Fair Share provision, non-deductible as a business expense. Now, what do I
mean by that? In the underlying Chairman's mark, for example, there is a complicated formula that an employer is going to have to make if his employee goes into the exchange, but there is an overall cap, for example. You remember, $400 per employee times the number of employees is the cap that the employer would ever make in his fair share contribution.

Well, the offset here is, instead of that being a deductible expense, that it would be a non-deductible expense. This tracks so many other things that are expenses that are also non-deductible, such as taxes on mutual funds are non-deductible, real estate investment trusts, certain of their expenses are non-deductible, and likewise, taxes on tax-exempt foundations are non-deductible. So in order to meet the requirement of the revenue neutrality, the amendment is going to sunset in 2017.

Now, of course what I would like is, as we get on closer to the floor is to continue to work with you so that that carve-out for the seniors would be extended to cover the last three years of the budget window, but for purposes of this amendment, it goes just until 2017. That is the amendment, Mr. Chairman.

Senator Bunning. Mr. Chairman?

The Chairman. Go ahead.
Senator Bunning. All right. Thank you.

I have a couple of questions I would like to ask about this amendment from the Chairman's staff at the table and from Mr. Barthold from the Joint Tax Committee.

For the Chairman's staff, let me say, someone in the exchange becomes severely disabled and has long-term care expenses from being in a nursing home. Would these people with disabilities be protected from a tax increase under the Nelson amendment for their catastrophic long-term care expenses?

Mr. Barthold. Catastrophic long-term care expenses would be qualifying medical expenses.

Senator Bunning. I am having --

Mr. Barthold. Sorry, Senator. Catastrophic care expenses would be qualifying medical expenses, which any taxpayer could deduct. So the extent to which the Chairman's mark, as modified by Senator Nelson's amendment, would depend upon their age. Senator Nelson's amendment has one threshold if you are 65 or older and the higher threshold of the Chairman's mark, as modified, if you are under age 65.

Senator Bunning. Also under the Chairman's mark, 25 million people will be still uninsured. Let us say a child in one of those uninsured families is stricken with cancer. Will this family be protected from a tax
increase on catastrophic expenses under the Nelson amendment?

Mr. Barthold. Again, Senator Bunning, Senator Nelson's amendment keys off the age of the taxpayer or the taxpayer's spouse.

Senator Bunning. Are you saying they will be covered?

Mr. Barthold. In your case, I am presuming that the child's parents are probably under age 65. If that were the case, then they would test for the itemized deduction relative to the higher 10 percent adjusted gross income floor.

Senator Bunning. Ten percent? In fact, that uninsured family with a child with cancer may also have to pay a penalty tax for being uninsured. Mr. Barthold, would that penalty tax be considered a medical expense for the purposes of the medical expense deduction that the Chairman is limiting? In other words, is it possible this uninsured family will be paying higher taxes because the Chairman is raising the threshold for the catastrophic medical expense deduction, and on top of this they would have to pay a penalty tax that would not count as one of the catastrophic medical expenses?

Mr. Barthold. The deduction under present law is for medical care, and remember, the only thing that is
being amended is the threshold under present law.

Senator Bunning. Yes, sir.

Mr. Barthold. The deduction under present law is for medical care received, health insurance, prescription drugs, and the like. The penalty tax that you discussed would not fall into any of those categories.

Senator Bunning. It would not be covered?

Mr. Barthold. It would not be covered, sir.

Senator Bunning. Last question. Mr. Barthold, is it fair to say that people who take this medical expense deduction, especially those who are not seniors, tend to be sicker than the rest of the population?

Mr. Barthold. Do you mean on a year-to-year basis?

Senator Bunning. Yes.

Mr. Barthold. I could not actually say on a year-to-year basis, so I am sure that there would be some people claiming that would have chronic disease. I do not know whether the people with chronic diseases are more highly represented in those who claim the itemized deduction, but it is certainly true, as Senator Nelson had explained, in any one year if someone has unusually high medical expenses which relates to some sort of health problem, that that increases the probability with which one is able to claim the itemized deduction.

Senator Bunning. Is that a yes?
Mr. Barthold. Well, it was a sort of yes.

Senator Bunning. Sort of?

Mr. Barthold. Because I do not know if people with
chronic --

Senator Bunning. Do we have that?

Mr. Barthold. I do not have it with me. I can
check with my colleagues to see if we have any data that
would be on point and I can follow up with you later,
sir.

Senator Bunning. Thank you very much.

Senator Nelson. Would the Senator yield for a
question?

Senator Bunning. Certainly.

Senator Nelson. If I followed the line of your
questioning, what you are arguing for is not increasing
the deduction limit from 7.5 percent to 10 percent on --

Senator Bunning. I am not arguing that. I want to
know about, who is covered?

Senator Nelson. I see. What I am trying to do is
just carve out the seniors from that increase from 7.5
percent to 10 percent.

Senator Bunning. I am trying to point out the
fact that some people are not covered and some people are
covered, and I was trying to extrapolate from our staff
out there and from Mr. Barthold who is and who is not
covered. Thank you.

Senator Kyl. Mr. Chairman? Did Senator Grassley wish to speak? If not, I would like to speak.

Senator Grassley. Yes, if I could speak. Well, no.

Senator Stabenow. Thank you. Thank you very much.

First of all, I want to thank Senator Nelson for this excellent amendment. I would like very much to be added as a co-sponsor. I think this is exactly right. When we are talking about seniors on Medicare, the goal of this bill is to be adding to quality care, prevention, making sure we are making prescription drugs more affordable, and so on. We certainly do not want this provision that will particularly hit seniors that are sick more frequently, have more severe health problems, we certainly do not want them to be penalized by this cap. So, I think it is the right amendment and I strongly support it.

I would go, though, and ask Mr. Barthold, in response to Senator Bunning's question that goes further about others, would it not be fair to say that right now those that do not have insurance, the only thing that they have is the medical deduction? I should not say the only thing, but those who do not have insurance are the ones right now that we are trying to help in the
exchange, so they right now have a medical deduction.

But under the bill, they will have limits on out-of-pocket costs. They will have limits on premiums, which I am going to continue to push to get down as far as we can. But is it not true that, for many people who now currently only have the medical deduction, they will instead have limits on out-of-pocket expenses and premiums and access to more affordable health care?

Mr. Barthold. Senator, it would certainly be the case that if someone would have been claiming the itemized deduction by reason of a catastrophic medical expense for which they had no insurance and so were drawing down their savings or funding from whatever source, if they now had insurance which covered that catastrophic illness they would not be making those payments, so they may not qualify for the itemized deduction.

Senator Stabenow. So the hope -- and I would just say to my colleagues, the goal of this legislation is to make sure that we have fewer people using that deduction because they, in fact, have insurance that is affordable to them and their families. For many, many people, the majority of people who do not have insurance now, they would be limited in how much they would have to pay, cutting down on those catastrophic experiences that are
terrible for families right now and often lead to bankruptcies and so on. So the goal is to make sure that we do not put families in that particular situation.

Senator Bunning. Will you yield?

Senator Stabenow. I would be happy to.

Senator Bunning. Even under the Chairman's mark and, God willing it passes, there will still be 25 million uninsured people. My question was to directly find out if they were going to be covered or not. That is the question I asked, even knowing that there was going to be covered for other people.

Senator Stabenow. I see.

Senator Bunning. Thank you.

Senator Stabenow. Yes. Thank you.

The Chairman. Further debate?

Senator Grassley. Yes. Could I have the floor?

The Chairman. Sure. Senator Grassley?

Senator Grassley. Yes. Yesterday we heard a lot of talk about preventing medical bankruptcies. For examples, members on my side of the aisle were told that, in order to prevent medical bankruptcies, the actuarial value of insurance plans cannot be less than 65 percent. This was the reason given for voting against my amendment to allow HSAs, high-deductible health plans, to meet the personal responsibility requirement.
We were also told how important it is to have out-of-pocket maximums in health insurance plans. Senator Ensign introduced an amendment that was clearly germane because it amended the Internal Revenue Code to protect health savings accounts in bankruptcy. So with all the talk about preventing medical bankruptcies, which, make no mistake about it, we all ought to want to prevent—and I do—I was surprised to see a proposal in the Chairman's mark that would raise the 7.5 percent AGI floor for itemized medical expense deductions to that 10 percent.

And so the medical expense deduction was put into the Tax Code to provide protection from catastrophic medical expenses. We all agree that catastrophic medical expenses lead to medical bankruptcies. Last Tuesday, I asked staff, CBO, and Joint Tax what taxpayers would be affected under the proposal to increase the 7.5 percent AGI floor. Staff informed me that most taxpayers would not be affected by this proposal. I was told that the new out-of-pocket maximums in the exchange plans would eliminate, or at least mitigate, any adverse effects on individuals or small business.

Staff also stated that most employer plans have out-of-pocket maximums, so those with employer coverage would not be affected either. I agree with staff that these protections will help individuals, but individuals below
age 65. But what about individuals 65 and older? It seems that the Chairman's mark forgets about them. It forgets that there is no out-of-pocket protection for Medicare cost-sharing expenses. It also forgets that Medicare does not pay some long-term care expenses. So what does this mean? It means that the tax increase falls most heavily on seniors.

The proposal raises $21 billion. Guess where that half of the revenue is coming from? Well, it is coming from seniors 65 or older. I hope you will not take my word for it, because Joint Tax told us that about one-half of the revenue comes from seniors in 2013. This would increase to 53 percent by 2019, and the largest concentration of seniors affected are middle income seniors earning between $50,000 and $75,000. Seniors then are clearly exposed, yet the Chairman's mark would take a tax benefit intended to provide catastrophic protection away from seniors.

Now, Senator Nelson has offered an amendment to exempt individuals 65 and older from the proposed increase. His amendment would allow seniors to continue using the 7.5 percent floor. I agree with the Senator that seniors must be protected, and I thank the Senator for his amendment. But what is troubling is how my friend from Florida proposes to pay for his amendment.
When my Republican colleagues offered their amendments, they were not accepted because the proposed offset was unacceptable to the other side. For example, one offset called for reducing the richness of the tax credit for individuals between 300 percent and 400 percent of Federal poverty. This offset was denounced as paying for the amendment on the backs of the middle class.

Let me point out to my colleagues then that the Chairman's mark pays for new government spending on the backs of all taxpayers, or maybe you could say all Americans. That is because the fees proposed under the Chairman's mark raise revenue to pay for spending under the mark. CBO and Joint Tax have told us that these fees will increase premiums for all Americans. I will also note that this new government spending will be "paid for" on the backs of business.

Senator Nelson's amendment would be paid for on the backs of business. How? Because Senator Nelson's amendment would make the free rider penalties for employers non-deductible. This is just a tax increase on business. It is merely a move to raise revenue. It is not good tax policy, it is not fair, and I urge my colleagues to oppose the amendment. I urge my colleagues to vote for the Kyl amendment to strike this proposal.

Senator Kyl. Mr. Chairman?
The Chairman. Senator Kyl?

Senator Kyl. I appreciate the chance to finally talk here, because I think Senator Nelson's amendment was intended to be a side-by-side with my amendment. I gather my amendment, then, I can make as a side-by-side to his. The difference between the two, in addition to the offset, is that my amendment would simply restore current law. It would protect not only seniors who need to be protected, as everybody here has pointed out, but it would also protect young families who are no less deserving of protection than seniors. They are affected actually a little bit more even than seniors as a result of this.

The score is $21 billion. Now, supposedly the numbers are about half and half. That is to say, about half of the benefit of the current law goes to seniors, about half goes to people who are less than 65 years of age. The cost of that to the Treasury is $22 billion. The savings under the Nelson amendment are supposedly -- or not savings, but the savings to seniors put to the cost to the Treasury at $7 billion. So you are still talking about $15 billion.

I assume that part of that is attributable to the fact that, under the Nelson amendment, seniors would be protected for only four years, but the offset is
permanent. Under my proposal, seniors and non-seniors
would be protected forever, they are not just protected
for four years. The way it is accomplished is to just
simply leave the law the way it is. We all appreciate
the fact that if your expenses are above 7.5 percent of
your income you can have a deduction off of your adjusted
gross income.

What the mark does is to take that up to 10 percent,
so you would have to have a lot higher medical expense in
order to take any kind of a deduction. Now, recognizing
that that is not good policy, it hurts people and we
ought not do it, Senator Nelson's amendment says, for
seniors, we will not do it. My argument is, why should
we not do it for everybody? If it is bad policy for
seniors, it is bad policy for everybody.

Now, it is true that you have got different
categories of people. It is true that seniors are
generally more sick than people who are not seniors. But
that is simply a reflection of general policy. If half
of the benefits of the law go to people who are not
seniors, what that means is that you have enough people
claiming the deduction currently under law that you have
half of the benefits of that go to people who are under
65 years of age. You also have a lot larger cohort
there.
Above 65, you have fewer people than below 65. So the reality is here, we are talking about a lot of Americans who are going to suffer if that limit goes up to 10 percent rather than leaving it where it is at 7.5 percent. Are these wealthy Americans? No. According to the statistics, in the year 2013, about a quarter of the people are less than 200 percent of poverty. In other words, they make less than $40,000 a year, about 1.5 million people, approximately. Between $40,000 and $50,000, there is about another million people. In fact, 87 percent of the people who are not seniors earn less than $100,000.

So we are not talking about wealthy families. While seniors are mostly concerned about their medical expenses, as we all appreciate, younger families have a lot of other expenses to worry about, too, the expenses of their kids, the expenses of sending their kids to college, having a larger family and larger home generally, and all of those factors.

So we ought not to be discriminating against people below 65. Why not set this at 55? We have a lot of folks in Arizona that come to our great State, and I am sure is true in Florida, too. They are 55 years of age, or 60 years of age. What is fair about drawing the line at 65? It is an arbitrary line. It is not fair for
them. So I agree with my colleague Senator Grassley that instead of having half of a good policy to protect seniors for four years, we should protect everybody forever.

Let me just close with this point. I want to quote something CRS says. This is an important point of income tax law that we will occasionally run across here in this committee. It represents the difference between tax treatment of people who have made a particular financial decision, and therefore we tax based upon that decision.

If you invest and you lose money, there is a tax consequence. If you invest and you make money, there is a tax consequence.

People know what those consequences are, but there is a small category of losses that are unpredictable and have nothing to do with your decision-making process. Those are your catastrophic losses, a hurricane blows your house down, somebody steals all of your property, or you get sick and have this kind of catastrophic expense.

According to CRS, and I am talking now about the 7.5 percent, the income tax deduction for catastrophic expenses under current law, "the deduction can ease the financial burden imposed by costly medical expenses. For the most part, the Federal Tax Code regards these expenses as involuntary expenses that reduce a taxpayer's
ability to pay taxes by absorbing a substantial part of income, and so we have generally treated these involuntary expenses differently than losses from other kinds of decisions that taxpayers make, in most cases providing a generous credit or deduction."

I would argue—in fact, I had had an amendment prepared that would have actually reduced the threshold from 7.5 to 5 percent, but that is obviously a bridge too far. I think what we should do, at least, is retain current law, 7a.5 percent, not just for seniors for four years, but for everybody forever.

Mr. Chairman, I would like to make one other point, but I know others would like to talk as well.

The Chairman. I am sorry, Senator. I did not hear what you said. Is there further debate on the Nelson amendment? The Nelson amendment is now pending.

[No response].

The Chairman. Any further debate on the Nelson amendment?

[No response].

The Chairman. I might just say a couple of points. I think it is clear that the current itemized medical deductions are less necessary under this bill for several reasons. One, under the bill, many more people will have health insurance. The current provision in the law is in
the nature of a catastrophic, that is, it helps people
who have very high medical expenses. But the legislation
provides for health insurance market reform, to get rid
of preexisting condition denials. That is one reason
people have high health care bills and maybe have to use
the current 7.5 percent.

The current bill also prevents companies from
denying coverage based on health status generally. I
suppose that is another reason people currently have to
utilize that 7.5 percent provision in the law. In
addition, this legislation provides coverage so people
will have good health insurance. There has been earlier
debate about actuarial value. If a person's actuarial
value is, say, at 65 percent rather than zero, I think
there is much less of a chance that a person will have to
think about potentially using the current 7.5 percent
provision. So, there is much less need.

The issue here is, what about seniors, because
Medicare does not have a limit on out-of-pocket loss?
This legislation provides a limit on out-of-pocket loss
for non-seniors. It is about $6,000 for an individual,
and that should go a long, long way to prevent
catastrophic payments and help prevent people from going
into bankruptcy, going to the ER, which all the rest of
Americans are paying for. But because this does not
apply to Medicare, that is, the out-of-pocket loss does not apply to Medicare, this Nelson amendment makes good sense. It exempts seniors from raising the limitation from 7.5 percent to 10 percent.

We are trying to find balance here. It is balance all the way around. I think about a quarter--maybe less, maybe a third--of the funds to help provide coverage are on the revenue side, and even there, most of the insurance industry gets huge benefits from this legislation, especially universal coverage. The other is on fees on providers that, by and large and for the most part, all agree to. It has all been agreed to. This provision with respect to raising the itemized medical deduction to 10 percent is meant to be part of that balance.

The current 7.5 percent is much less needed for the reasons I indicated and it will help put this bill together. I frankly believe that, altogether, if the provisions in this bill which do not require 7.5 percent, nearly as much along with the Nelson provision with respect to seniors, is a good balance and I urge its adoption.

Senator Kyl. Excuse me, Mr. Chairman?

Senator Hatch. Mr. Chairman?

The Chairman. Senator Hatch?
Senator Hatch. Mr. Chairman, I want to express my hearty support for the Kyl amendment to strike --

The Chairman. We are talking about the Nelson amendment right now.

Senator Hatch. Yes. But do you not have your amendment up?

The Chairman. The Nelson amendment is pending.

Senator Kyl. Mr. Chairman, just to clarify, would it be appropriate to have the two amendments pending together or do you want to dispose of them separately?

The Chairman. I would ask the Senator from Florida, see what his views are on that subject. I do not want to disadvantage the Senator from Florida, so pretty much I want to consult with him.

Senator Hatch. Well, let me talk about the Kyl amendment, first. I would prefer them to be side-by-side, but if not --

The Chairman. Does the Senator from Florida want it side-by-side? Does the Senator want to vote on his amendment? What does he prefer?

Senator Nelson. I would never want to deny the esteemed Senator from Utah, for him to share his wisdom with us.

Senator Hatch. Now, that is a nice statement, I think. I like that.
[Laughter].

The Chairman. I might say, before I recognize you, Senator, another point here.

Senator Hatch. All right.

The Chairman. There is some concern whether this provision would be permanent or just for four years. I have committed to interested Senators that, by the time we get to the floor, this is going to be permanent, this seniors provision. It is not just going to be four years as provided for in the bill, but when we get to the floor we will find ways to make this permanent. I know that is important to certain Senators.

Senator Hatch. Well, let me at least express my support for the approach Senator Kyl is taking. His amendment would strike this $22 billion tax increase, which will fall primarily on lower and middle income taxpayers, and especially on senior citizens. Now, with all respect for our Chairman, who knows that I admire him for his perseverance and diligence in putting together this mark, I think this is the worst idea in an ocean of bad ideas.

I cannot for the life of me understand why we would want to raise the cost of health care for some of the most vulnerable in our society. Look, the itemized deduction for medical expenses is already configured in
such a way that it benefits only those who have
catastrophic or near-catastrophic medical expenses during
the year. The current-law threshold of 7.5 percent of
adjusted gross income is a very high bar already. Moving
this bar even higher to 10 percent would badly hurt
millions of Americans who are struggling with medical
expenses.

For those with such high medical expenses in
relation to their income, the deduction serves as an
ultimate backstop. For those who are elderly or who work
for employers that do not offer health insurance or a
health insurance plan, the medical expense deduction
represents the only tax benefit for health care expenses
that these taxpayers receive. The vast majority of the
costs of this proposal would fall on those who the
President promised would not face tax increases, those
making less than $200,000 per year as singles, or
$250,000 per year as couples.

In fact, in 2017 alone this provision would raise
almost $4 billion from 13.8 million tax returns. Of
these 13.8 million tax returns, only 86,000 will have
income above $200,000. This means that 99.6 percent have
incomes below $200,000. In other words, these are people
who absolutely need this type of benefit. I admit, there
is an insatiable desire to try to find ways of paying for
this very expensive bill. You do not like to lose $22 billion, but when you consider that you are putting $22 billion on the backs of some of the most vulnerable people in our society, it just does not seem like a wise thing to do. Yet, this bill, along with a whole bunch of other provisions, does exactly that. So I support Senator Kyl, and I think he is right on this. I hope we listen to him.

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

The Chairman. Senator Kyl?

Senator Kyl. Thank you.

Mr. Barthold, my information is that, under the Chairman's mark, with all of the various provisions that he indicated would in one way or another attempt to provide protection for lower income people as a result of his mark, the effect of the raising of the bar for claiming the deduction from 7.5 to 10 percent would have scored at just a little under $22 billion. Is that correct?

Mr. Barthold. The estimate that we reported to the committee in our document, JCX-36, is $21.7 billion for the Chairman's mark, as modified.

Senator Kyl. It is $21.7 billion. Did you determine or verify the number? Senator Nelson indicated
that under his proposal there would be a $7 billion reduction in that, as I recall?

Mr. Barthold. Our estimate for Senator Nelson's amendment is that it loses $6.4 billion relative to the Chairman's mark and his offset raises approximately $7.1 billion relative to the Chairman's mark.

Senator Kyl. All right.

So, Mr. Chairman, I think that makes the point that responds to your question. It is true that the mark has a variety of things in there designed to try to provide insurance to people, lower income people so that they do not have as much out-of-pocket expense, and so on. But the net result is in the numbers. That is that the people under 65 are still paying $15 billion if you raise the deduction amount, as you do in your mark, from 7.5 to 10. As a result, I think it is hard to argue that the cumulative effect of all of the things that you are trying to accomplish in the mark are going to provide that much help.

The reality is that only about 25 million of the 280 million with insurance are estimated to go through the exchange. Some number of the 15 million grandfathered people are still going to purchase non-group insurance according to CBO. You still have 17 million people who will remain uninsured, and that does not count the 8
million in legal residence.

So while it is true that there are attempts in the mark to provide protection for people against the kind of catastrophic expenses that this income tax provision is designed to ameliorate, the fact remains that if for people under 65 you raise it from 7.5 to 10, you are still causing enormous pain to those people, many of whom, as Senator Hatch just pointed out, over 98 percent of whom make less than $200,000, and a large percentage of which make under $50,000. In fact, the number is about $15 billion if you take the help for the seniors out of there.

So it may only be $15 billion, but $15 billion is a lot of money to the people who are under 65 who would have to pay that money because we have increased from, 7.5 to 10 percent, the limit for them to claim the deduction. So I support what Senator Nelson is trying to do for seniors, but if it is good for the goose, it is good for the gander, and there are a lot more ganders in this case, namely people under 65, who are going to be hurt as a result of raising the bar under the Chairman's mark.

Senator Bunning. Mr. Chairman?

Senator Stabenow. Mr. Chairman?

The Chairman. Senator Stabenow?
Senator Stabenow. Thank you, Mr. Chairman.

First, a question for Mr. Barthold. Would it be accurate to say this provision would benefit families who itemize all of their taxes? That is correct? You have to itemize your taxes?

Mr. Barthold. It is an itemized deduction.

Senator Stabenow. It is an itemized deduction.

Mr. Barthold. Yes, Senator.

Senator Stabenow. Is it also fair to say that those who itemize all their deductions will be predominantly upper income individuals and families?

Mr. Barthold. Among taxpayers, this will be, at least 60 percent claim the standard deduction, so it is only a little over a third itemized. Of those who itemize, middle income and above is more heavily represented.

Senator Stabenow. So 60 percent of the people take the standard deduction.

Mr. Barthold. That is correct.

Senator Stabenow. I think it is probably fair to assume that those would be individuals at $50,000 or less, or $60,000 or less. We were talking about low-income --

Mr. Barthold. That is generally correct, Senator.

Senator Stabenow. Correct. So given that, the
reality is that what we are talking about is a tax policy that would affect predominantly upper income families. At the same time, we have had amendment after amendment trying to cut the tax credits, the refundable tax credits in this bill, from middle income families. Mr. Chairman, I find that interesting, that over and over again we have seen amendments with a pay-for that would cut the very people we are hearing now there is concern about, people who make $50,000 a year, a family of four, or $60,000 a year.

I would welcome, working with colleagues on the other side of the aisle, to actually focus on those, most of whom do not have itemized deductions, most of whom are not affected by this provision but are affected by the tax credits in the bill where we are trying to focus on helping those very families.

Senator Bunning. Mr. Chairman? Mr. Chairman?

The Chairman. Sorry. Senator Bunning?

Senator Bunning. Thank you.

This is for the staff. A claim has been made that people in the exchange will have catastrophic expenses. This may be true for regular health care expenses but it is not true for long-term care expenses. If someone in the exchange becomes so disabled that they must live in a nursing home, they will not be protected under the Nelson
amendment. They will be protected by the Kyl amendment. Can someone verify that or discredit it? Some staff member?

Mr. Barthold. Senator Bunning, I am not quite clear what your question is.

Senator Bunning. The question is, does the Nelson amendment cover someone that has become so disabled that they live in a nursing home and will not be protected under the Nelson amendment, or will they? Or will they be protected under the Kyl amendment?

Mr. Barthold. Well, as I think has been noted, the difference between the Kyl amendment and the Nelson amendment is that the Kyl amendment would maintain present law.

Senator Bunning. Correct.

Mr. Barthold. Which is --

Senator Bunning. 7.5.

Mr. Barthold. Would claim an itemized deduction for expenses in excess of 7.5 percent of your adjusted gross income. The Nelson amendment, which modifies the Chairman's mark, would have an age break for taxpayers 65 and above such that those for the taxpayer and the taxpayer's spouse who is age 65 or above, they would continue under present law with a 7.5 percent floor --

Senator Bunning. But my question was --
Mr. Barthold. A taxpayer under would have a 10 percent --

Senator Bunning. My question was this. Someone made the claim that people in the exchange will be protected from catastrophic expenses. That may be true for the regular health care, but it is not true for those that are in a long-term care facility. They will not be able to take what it costs to go into the long-term care facility and/or above their medical expenses.

Mr. Barthold. I believe that is correct.

Senator Bunning. Thank you.

Mr. Barthold. I mean, the exchange is not providing long-term care insurance. It is providing health insurance.

Senator Bunning. I appreciate that. Thank you.

Senator Nelson. Mr. Chairman, may I just say a comment before we vote, please?


Senator Nelson. I just wanted to point out that Joint Tax has come up with an estimate, and this is going to involve 8.7 million senior citizens. I think all the gentlemen on the left side of the Chairman over there who have made cogent arguments of how you want to protect the seniors. From your standpoint, I do not know why you
would note vote to support the Nelson amendment. Then we are going to go to the Kyl amendment and you can vote how you want on that.

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. Aye by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. Aye.

The Clerk. Mr. Kerry?

The Chairman. Aye by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. Aye by proxy.

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?

The Chairman. Pass.

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?
Senator Grassley. No.
The Clerk. Mr. Hatch?
Senator Hatch. No.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. No.
The Clerk. Mr. Bunning?
Senator Bunning. No.
The Clerk. Mr. Crapo?
Senator Grassley. No by proxy.
The Clerk. Mr. Roberts?
Senator Grassley. No by proxy.
The Clerk. Mr. Ensign?
Senator Grassley. No by proxy.
The Clerk. Mr. Enzi?
Senator Enzi. No.
The Clerk. Mr. Cornyn?
Senator Cornyn. No.
1 The Clerk. Mr. Chairman?
2 The Chairman. Aye.
3 The Clerk. Mrs. Lincoln?
4 Senator Lincoln. Aye.
5 The Chairman. Senator Cantwell.
6 The Clerk. Ms. Cantwell?
7 Senator Cantwell. Aye.
8 The Clerk. Mr. Chairman, the final tally is 14 ayes, 9 nays.
9 The Chairman. The amendment does not pass.
10 It would probably be good now, if you wanted,
11 Senator Kyl, to vote on yours.
12 Senator Kyl. Yes. I think the amendment is --
13 The Chairman. I think we know what it is.
14 Basically it is to strike that --
15 Senator Kyl. I believe it is Amendment Number F-8, as modified. I just had a couple of other comments to make about it.
16 The Chairman. Can you describe it, please, so we know what it is?
17 Senator Kyl. Yes. This simply returns the Internal Revenue Code to existing law, or retains existing law. The mark changes the existing law, raising the bar from 7.5 percent of adjusted gross income to 10 percent before you can claim a deduction for catastrophic
medical expenses. The amendment would simply leave the law where it is for everybody, seniors and non-seniors alike, at 7.5 percent.

The Chairman. And how is it offset?

Senator Kyl. The offset is the provision of the original mark. We simply reinstate the original mark with respect to the penalty on the income cap. The cap, you will recall, ranged from 3 percent to 13 percent. The modified mark took that down to 2 percent and 12 percent. We would simply return to the numbers of the original mark.

The Chairman. And what is the total amount of that income shift, that dollar shift? How much?

Senator Kyl. Let me see.

The Chairman. Is it 20 something?

Senator Kyl. It is $45 billion, I am told. I do not know. Forty-five billion dollars, according to staff.

The Chairman. Forty-five?

Senator Kyl. I am sorry?

The Chairman. Forty-five?

Senator Kyl. That is what I am told by staff.

The Chairman. All right. Thank you.

Senator Kyl. Thanks, Mr. Chairman.

Let me just make two points. One, in response to
the line of inquiry by Senator Stabenow about who itemizes. While it is generally true that people with more income are more likely to itemize, anybody who has this kind of catastrophic medical expense is going to want to itemize, and I presume most of them do. That is why you have so many people who do not make very much money who nonetheless itemize and take advantage of the deduction under current law.

Let me cite the statistics. Income levels from $10,000 to $20,000 a year--these are people I think we want to help--133,000 who took advantage of that, this is just in one year, 2013; between $20,000 and $30,000 in income, 470,000 people, or I should say filers; $30,000 to $40,000, 813,000 people. The total there is just under 1.5 million people. That is the number that I cited before. These are the number below 200 percent of poverty, below $40,000 in income.

If you just take the $10,000 range between $40,000 and $50,000, you have another 958,000 people; between $50,000 and $75,000, 2.17 million people; between $75,000 and $100,000, 1.246 million people, for a total here of, about 87 percent of the people who itemize for this deduction, earn under $100,000 a year. The point is that there are a lot of people who do not make very much money who are, in fact, itemizing regardless of what somebody
might theorize about who itemizes and who does not.

These are people who really did, and they did not make very much money. And we are going to hurt them under this bill. When we talk about not raising taxes for people under $200,000, the President made that pledge over and over and over again, the mark raises taxes because it increases the amount of the medical expense that you can claim based upon your adjusted gross income. It goes from 7.5 percent, and now the catastrophic expense would have to exceed 10 percent. That represents a tax increase.

Now, the committee has just voted by majority vote to say that is not fair for seniors. Well, it is not fair for juniors either. To the argument that, well, we are doing some things for people to make sure that they do not have as much in the way of expenses--and several of those things have been mentioned--while it is true that some of those things have effect, it is also true that there are still millions of people who will not have the benefit of those particular items, whether it be preexisting condition or the other things that we are doing here, who nevertheless will still be subject to the penalty that the mark imposes upon them by raising from 7.5 to 10 percent.

The proof of that is the Joint Tax Committee score,
verified just a moment ago—or estimate, I should call it—that you have just about $22 billion, and you would still have close to $15 billion even if you take the seniors out. That is $15 billion that is being paid by these people, 87 percent of whom earn under $100,000 a year.

How can we not, as Senator Hatch said, take into consideration the adverse consequences of that policy on middle income families and low-income families in the United States? If the whole idea here is to help people with their health expenses, we go in exactly the opposite direction when we say, but we are going to raise the amount that you have to be out of pocket before you can claim an income tax deduction.

We ought to be lowering it, as I said before, not raising it, because in virtually every one of these cases you cannot determine whether or not you are going to get sick or not. It happens to you and you probably did not do anything to cause it to happen, but it happened. As a result, the income tax Code in the past has recognized that there should be a deduction for that. It ought to be lower than it is.

Senator Cornyn. Mr. Chairman?

The Chairman. Senator Cornyn, you were first to seek recognition. Senator Cornyn?
Senator Cornyn. Thank you, Mr. Chairman.

Mr. Chairman, this relates generally to what we are talking about here in terms of carve-outs and cuts. And the Chairman made the comment about balance in the bill, and I appreciate that. I would just like to point out that the difficulty--because it is an important part of the integrity of the process here, that was an issue that was highlighted in an article that appeared this morning with regard to Medicare cuts exempting hospitals over and above a certain level.

We know the purpose of the Medicare Commission is implementing additional Medicare cuts in future years, and Senator Rockefeller has spoken eloquently about his views about the importance of the Commission being able to do its job, and we have discussed that at some length.

Naturally, many health care providers are very concerned about what kind of cuts the Commission might recommend and implement. But as we know, during the time this bill was being negotiated at the White House and here in Congress, there were a number of deals put together with industry groups. The deal with PhRMA is probably the one most often talked about. But apparently now the hospitals also cut a special deal. They agreed to $155 billion in Medicare cuts and no more. The one thing they did not want is the Medicare Commission
looking at their operations and cutting more than the agreed-upon amount.

Well, the consequence of that—and it does not appear in the Chairman's mark. You cannot read the conceptual language there and see what kind of deal or carve-out was cut.

The Chairman. I am sorry, Senator. Are we talking about the Kyl amendment?

Senator Cornyn. I am talking about the debate in--

The Chairman. No, we are on the Kyl amendment right now.

Senator Cornyn. --carve-outs and cuts in the bill.

The Chairman. No, no. We are talking about the Kyl amendment which repeals—which changes the 10 percent in the bill back down to 7.5 percent. That is the subject of the Kyl amendment.

Senator Cornyn. Mr. Chairman, I am talking about--

The Chairman. You are talking about a whole different subject.

Senator Cornyn. --an $11 billion mistake in CBO's scoring, and as we talk about exceptions for different groups, many of which we agree are good, as we talk about that, what I am suggesting is it is impossible for those of us reading the Chairman's mark to know what kind of deals were cut with various industry groups that
apparently are revealed in things like today's story.

And so it just makes the point--and I will close
with this--that it is absolutely imperative that we get
not only concept language, we get legislative language,
we know what kind of deals were cut, and we need CBO to
give us an accurate score, because this is an $11 billion
mistake.

The Chairman. Is there further discussion on the
Kyl amendment?

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe.

Senator Snowe. Thank you, Mr. Chairman. I would
like to pose a question to staff. I do not know if it is
Mr. Barthold or others. Do we have an estimate in terms
of the fact that in the current proposed coverage of
plans in the exchange, there are no--it is going to
prevent insurers from establishing a lifetime cap, so
obviously we are going to be approving the catastrophic
coverage. Would there be less of a need for Americans to
use the itemization?

Mr. Barthold. Senator Snowe, you actually raise a
very important point. In most of--a number of the
provisions we may deal with in financing today, when I
report some estimates, they are in the narrow context of
not having been run as part of the totality of the
changes that the Committee is contemplating. As we have
talked about over the past couple of days, a change in
one area can affect coverage, take up who gets to claim a
credit, who may be subject to a penalty.

That is a long answer to your question, and
intuitively the answer would be if more people are
covered, there would be fewer large out-of-pocket
expenditures, so you might expect that.

Now, if you buy insurance coverage on an after-tax
basis, though, you can deduct the insurance coverage
against--under Section 213. So I do not have a clear-cut
answer to your question. But in terms of the large out-
of-pocket expenditures, if one were insured, you would
expect that to reduce the number of taxpayers who would
be able to itemize under Section 213.

The Chairman. Senator Kyl--sorry, Senator Snowe.

Senator Snowe. Just to follow up on that point, I
think it would be essential to have that analysis. I
mean, obviously the itemized deduction is an insurance of
last resort for many individuals, and I support the
Nelson amendment because it is not critical for seniors.

We do not have catastrophic coverage in Medicare, so it
is an essential element for them to have that backdrop.
I represent one of the oldest States in the country. It,
in fact, ranks third behind Florida and West Virginia
projected in 2010. So I do think it is important. It
hits middle income. As I have seen the numbers, more
than 40 percent of the people claiming this deduction
have household incomes between $40,000 and $100,000.

So we are presented with a series of tough choices
here, between those on seniors, on the other hand
everyone else who might depend on this itemization. The
bill before us obviously might mitigate some of those
issues because now we are not going to have lifetime
caps. We are elevating the actuarial value of many of
the plans that are going to be offered in the exchange.
That will be important.

But I hope, Mr. Chairman, that somehow we can
resolve these issues between now and at least when this
bill goes to the floor, because, one, the Nelson
amendment is temporary. It expires in 2016. I know you
mentioned that in our discussions. And also to evaluate
the effects it has on everybody else as well.

Senator Kyl. Would you yield for one question?
Senator Snowe. I would be glad to yield.

Senator Kyl. The point that you have raised about
the lifetime cap I think is an important point. I
presume that whatever the effect of that was, or is, was
including in your estimate of the $21-plus billion loss.
So you would still have--
Mr. Barthold. Not completely included, Senator, again, because there are a number of things in the proposed mark and the amendments that have been made that are changing.

Senator Kyl. Well, excuse me. Let me just ask the question. The lifetime cap that Senator Snowe was talking about was in the mark. It was in the original mark. I do not think that has been changed in the modified mark, has it?

Mr. Barthold. That is correct. But when the amendment was proposed, we did not jointly with the Congressional Budget Office rework how that would affect all the taxpayers that we project in our individual model.

Senator Kyl. So the number--

Mr. Barthold. We do not know the exact number. The estimate reported is our best estimate given the current information that we have, but it does not fully reflect all changes.

Senator Kyl. I understand what you are saying, and I think this is a great Exhibit B for Senator Snowe's crusade here to make sure we have the numbers before we vote.

The Chairman. Okay. Is there any further debate?

Before that, one point of clarification, for me anyway.
As I understand it, Senator Kyl, changing the 10 percent to 7.5 percent, it scored about $21 billion, something like that? But your amendment actually is about—is an offset of about $45 billion. Is that correct? I thought I heard you say that earlier. I am just trying to--

Senator Kyl. That is correct.

The Chairman. Okay. Well, then, I think it is important to point out what the effect of this amendment is, namely, it is taking money away from lower- and middle-income people and transferring it to higher-income people. Then it goes a next step further. It takes even more income away from lower-income people. That is the net effect of this amendment. And I do not think that is something we want to do, so for that reason I urge that we do not adopt this amendment.

Senator Kyl. Mr. Chairman, if I--

The Chairman. The clerk will call the roll.

Senator Kyl. --could just close the argument, since it is my amendment.

The Chairman. Sure.

Senator Kyl. I thought that the numbers in your original mark were not unfair, and so when you talk about returning to the numbers in your original mark as being unfair, I think you are taking on a burden or making a confession that is really not necessary.
The Chairman. That is a little oblique and abstract for me. Let us vote. All those in favor of the Kyl amendment—okay, the clerk will call the roll on the Kyl 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. 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?

The Chairman. Pass.

The Clerk. Mr. Nelson?

The Chairman. No by proxy.

The Clerk. Mr. Menendez?
1. The Chairman. No by proxy.
2. The Clerk. Mr. Carper?
3. The Chairman. No by proxy.
4. The Clerk. Mr. Grassley?
6. The Clerk. Mr. Hatch?
8. The Clerk. Ms. Snowe?
10. The Clerk. Mr. Kyl?
12. The Clerk. Mr. Bunning?
14. The Clerk. Mr. Crapo?
16. The Clerk. Mr. Roberts?
18. The Clerk. Mr. Ensign?
20. The Clerk. Mr. Enzi?
22. The Clerk. Mr. Cornyn?
24. The Clerk. Mr. Chairman?
25. The Chairman. No.
The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Ensign?

Senator Ensign. Aye.

The Clerk. Mr. Chairman, the final tally is 9 ayes, 14 nays.

The Chairman. The amendment does not pass.

Senator Grassley, I think you have an amendment.

Senator Grassley. Yes, it is F-1, modified.

The fees imposed on health insurance providers will definitely be passed on to consumers. It is pretty plain and simple. For verification, CBO and Joint Tax confirmed this fact last Tuesday. Dr. Elemendorf said so. Let me remind my colleagues what was said.

It starts with Senator Cornyn asking, "Would these fees be passed down to health care consumers?"

Dr. Elemendorf responded by saying, "Our judgment is that that piece of the legislation would raise insurance premiums."

In a letter to the Chairman dated September 22nd, CBO stated that premiums for exchange plans would increase by roughly 1 percent as a result of the fees. Informal staff analysis indicates that the original proposal, the $6 billion annual fee on health insurers, would increase premiums by 2 percent.
So I was surprised that this proposal was included in the Chairman's mark. After all, when this proposal was brought up during the Gang of Six discussions, I explained why these fees were a bad idea.

After discussing this idea, I thought it was ultimately discarded, only to find life again when the Chairman was given no choice but to lay down a mark without bipartisan agreement. Not only was this fee given life in the Chairman's mark, it was, in fact, increased in the Chairman's modification.

The goal of health care reform is to lower premiums. All of our constituents expect that they will have lower premiums when you talk about health care reform. Not tomorrow, not 2013, but I think they get the idea that it ought to be right now. Premiums will increase immediately as a result of these fees. That is opposite what our constituents think will happen, or at least what they expect to happen.

Now the Chairman may tell me that because his mark increases competition among insurers that the fee will be less likely to be passed on. He may also tell me that he has statistics that show the premiums will go down under the mark. But those statistics would be the net of these fees and the health insurance reforms.

So what the Chairman cites might be accurate, but it
is not a sound defense of the fees. The reason, because a majority of the health reforms in the mark do not go into effect until 2013. The fees go into effect 2010. This means premiums will increase for at least 3 years before the reforms would begin to start helping. This means premiums will go up before they ever go down.

Now, we may be told and argue that some of his reforms will go into effect before 2013. But even so, these reforms will change behavior over time, not overnight. CBO says so. And if the Chairman is relying upon CBO statistics which enable him to say that premiums will go down under his mark, these statistics are based on 2016 assumptions.

So what is going to happen then in 2010, 2011, 2012, and so on? What is going to happen is that premiums are going to go up. So it may be true that premiums may ultimately stabilize and then go down. After all, that is the goal of health reform. But no one can tell me with a straight face that premiums will not go up in the years immediately after enactment along the lines that I have said one of the political problems with dealing with health care reform and not a justification on my part for not doing anything about it, but it is that all the hard decisions that have been to be made are up-front decisions that are going to be immediately noticed, and
the long-term positive effects of health care reform are
going to be down the road several years. And what does
the public look at now? They look at what is happening
now or in the near future. They are not going to be
looking down the road 10 years.

So when premiums go up, every members of this
Committee who supported this proposal is going to have to
answer to his constituents. So I urge my colleagues to
vote for my amendment to strike the fees from the mark.

I am ready for whatever you want to say.

The Chairman. Okay. Is there further discussion?

Senator Rockefeller.

Senator Rockefeller. I am a little bit baffled by
this. I think it is a message amendment, but I am not
sure. It certainly takes on legal immigrants and
Medicaid in a very sharp way.

Senator Grassley. You do not really believe that
this is a message amendment, do you?

Senator Rockefeller. Well, from you I could not
possibly believe that, no. You are right. That was be a
rascally thing to do. But could the honorable Senator
explain to me how you cut Medicaid administrative costs
by 50 percent since it is at 2-percent now? That just
hit me because they exist on nothing.

Senator Grassley. Well, we have to raise $45.3
Republican Senator Rockefeller. You have got to raise money.

Senator Grassley. The Medicaid offset would raise $20 billion. The 5-year waiting period for legal immigrants would raise $4.6 billion. Adjusting the tax credit would raise $10 billion, and making the effective date consistent with Medicaid expansion would easily raise $10.7 billion. The modification to the Chairman's mark pushed back the tax credit effective date by 6 months. My amendment would probably involve a less significant movement on the effective date.

So in order to ensure that this amendment is deficit neutral against the modified Chairman's mark, the adjustment of the effective date for the tax credits for health insurance would be proportional to the amount of savings needed to make the amendment deficit neutral in addition to the specifics that I just gave you.

Senator Rockefeller. And so how would you cut Medicaid's administrative expenses by 50 percent? How would you do it?

Senator Grassley. We do not do that. Where did you get that idea that we do?

Senator Rockefeller. Reducing the Medicaid administrative reimbursement rate to 50 percent. That does not sound friendly to me. Why do you do that?
Senator Grassley. To offset this amendment.

Senator Rockefeller. I know. I grant you it gets you the money. But what about the people?

Senator Grassley. Well, it is not the people being served. It is the administrative expenses of the program that is being cut.

Senator Rockefeller. I know that, but that also interacts with people for things like outreach, for example. It is a serious question with me. I think it affects Medicaid people seriously, and I have a problem.

Senator Grassley. Okay. Then I guess the answer to your question is by reducing the matching rate from 75 to 50, you save Federal dollars. And if the State needs the money, they are going to spend their own money.

Senator Rockefeller. Right, and you know very well that the States will not spend that money.

Senator Grassley. Well, all I know is if there is a match of 75, you know, my State for the whole program only gets a 62-percent match.

Senator Rockefeller. My State gets 78 percent, and the Governor does not want to spend, you know, the match. We will not get into an argument on this, but it just is an odd amendment.

The Chairman. If no further Senators seek recognition, let me just--
Senator Kyl. Mr. Chairman, I just had a question.

The Chairman. Let me just say very basically, I know this is not to--basically, this amendment is a shift from lower-income people and States to the insurance industry. Let me make it clear. That is the effect of this amendment. The effect of this amendment is to take money away from lower-income people, take money away from Medicaid, in effect, and shift that income, give it to the insurance industry. That is the effect basically of this amendment.

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl.

Senator Kyl. I respectfully disagree with what you just said.

Senator Grassley. Well, I hope you will say that for me, that it is not affecting people that are getting the money. It is affecting the administrative costs, which administrative costs go to bureaucrats. It does not go to people that are low-income and need the assistance from the State and Federal Government.

Senator Kyl. Amen, Mr. Chairman. And let me also just quote CBO. I am talking now about the fees that Senator Grassley is dealing with here, and I am quoting CBO. Those fees would increase costs for the affected firms, which would be passed on to purchasers and would...
ultimately raise insurance premiums by a corresponding amount.

What is really hurting people, what is really adding to their bills are the fees that Senator Grassley is dealing with here. As CBO says, the insurance companies just pass those on to their consumers and premiums go up a corresponding amount. That is the problem Senator Grassley is trying to get at here.

The Chairman. As I just said, I would observe it is curious that the insurance industry, it is claimed, will pass fees on to consumers, whereas it is implied, if not directly stated, that imposing greater administrative costs on administrators of Medicaid in States will not pass those on to Medicaid recipients. I just find that curious, that inconsistency.

Senator Kyl. Well, Mr. Chairman, I am just quoting CBO.

The Chairman. Okay. Let us vote on the amendment. All in favor of the Grassley amendment--well, 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?
Senator Bingaman.  No.
The Clerk.  Mr. Kerry?
The Chairman.  No by proxy.
The Clerk.  Mrs. Lincoln?
The Chairman.  No by proxy.
The Clerk.  Mr. Wyden?
Senator Wyden.  No.
The Clerk.  Mr. Schumer?
The Chairman.  No by proxy.
The Clerk.  Ms. Stabenow?
The Chairman.  I guess we pass.
The Clerk.  Ms. Cantwell?
The Chairman.  Pass.
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.  Aye.
The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Grassley. Aye by proxy.

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. And Senator Cantwell.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Chairman. And Senator Stabenow is no by proxy.

The clerk will tally the vote.

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

The Chairman. The amendment does not pass.
Senator Grassley. Mr. Chairman, I would like to have 15 seconds.

The Chairman. Absolutely.

Senator Grassley. I think that your last statement was very unfair from the standpoint that what the facts are is you have got a separate pool of money that is a separate match coming from the Federal Government to the States for administrative costs. And then you have got another set of money over here going to the State to help recipients. So you said that if we take money out of this pool, it is going to affect this pool over here. And there is no way that can happen.

The Chairman. I am not going to get into a big debate here, but also the amendment provides for reducing the tax credits which go to middle- and low-income Americans. You want to take that money away from them and give it to the insurance industry. I do not want to get in any tit for tat, but that is true. That is what effect of the amendment is.

Senator Enzi. Mr. Chairman?


Senator Enzi. I would call up Enzi amendment C-4. This is one to make sure that Americans are protected from dramatic cost increases. That has been one of the
primary things that people have talked about at town
meetings and other places, and I wanted to assure that on
a State-by-State basis. You know, we tend to work by the
averages around here, and those are national averages.
But this one goes State by State.

The amendment requires that prior to a State
implementing the rating rules in the individual market or
the rating rules in the small-group market specified in
the Chairman's mark, the State insurance commissioner--
logical person--must certify that the health insurance
premiums in the State will not increase for a majority of
the residents. I think this would give people a lot of
assurance of whether the rates are going to be going
down. I noticed that a lot of people during the August
break talked about that.

Again, we are talking about middle America. I think
my previous amendment, had it been adopted, would have
taken care of most of this, but since it was not, I think
this is an important amendment. Of course, this one
deals with the rating reforms, and it will give the
seniors a break, but it will increase costs for the
younger healthier people, the ones that this program
could go broke before they ever get a chance to take
advantage of the money that they have already paid into
it.
So the mark says that the issuers in the individual market could vary premiums based only on the characteristics of tobacco use, age, and family composition, and those same rules applied to the small-group market. The modified version also brings that rating factor down to 4:1. I was concerned that 5:1—the HELP bill I think has 3:1. There are people pushing for 2:1. But that will make a huge increase in some of the States. And, again, I think it will be noticed.

I have got a lot of other things I could say on it, but since I know you would want to accept this one, I will just expedite my remarks.

The Chairman. Well, just a couple things, without a prolonged debate here. I think this is a dangerous amendment, and the reason is because anybody can do anything with figures and numbers, as we all know, and you as well as anybody as a CPA. That is, an unelected bureaucrat can just make a determination using numbers in any way whatsoever to conclude whether a majority of premiums will go up or down. Also, is that net? Is that gross? What is the offset? What is the definition? And so on and so forth. We are talking about an elected bureaucrat essentially taking away benefits from people provided for in an act of Congress. We are talking about pre-existing conditions. We are talking about--
talking about rating reforms, excuse me. You require
that prior to a State implementing the rating rules in
the individual market—that goes back to my same point.
It is wrong, I think, for a single bureaucrat—not even
the legislature—some single bureaucrat, some
commissioner, who can do anything with numbers, to make a
certification which, in effect, would deny people the
reforms that I think they need.

For that reason, I think this is—it is more than
dangerous. It is just not good policy.

Senator Enzi. Well, Mr. Chairman?
The Chairman. Yes, Senator Enzi.

Senator Enzi. We do not have confidence in those
insurance commissioners, but they deal with this on a
daily basis, and they have a pretty good idea what will
happen in their market. But yet we turn around and in
numerous instances we expect the Secretary of Health and
Human Services to do the same kind of calculations, even
more so in the Health, Education, Labor, and Pensions
bill. And that is another unelected official that is
making decisions.

So I have a lot of confidence in the insurance
commissioners. I have had to work with them over the
years through the HELP Committee, and they have testified
before us, they have given information. It has always
been helpful information. It is not always what I wanted to hear, but it was what I guess I needed to hear. So that is why I selected them instead of some other group, like the legislature. But I do know our constituents were complaining about this every weekend when I am home, and particularly over the August break, that there are changes here that are going to increase their rates, and they are very concerned about that. And this is one way that if we are not, the State insurance commissioner can quell that and give them some confidence that it is not. So I think we can--I do agree with the Chairman that we need to do reform. The group insurance market and the individual market need to be reformed, and I support the goals on eliminating pre-existing conditions and making sure there is catastrophic coverage and making sure people do not get dropped from their health. And we need to do that. But those parts they are interested in, but they also want to know that their costs are not going up. And I do think with these rating bands that we are probably going to raise the cost for most of the people, more than a majority of the people. And if that is the case, again, we are going to have that revolt that I am worried about. So I would hope everyone would accept this amendment.

The Chairman. Is there any further debate?
Senator Grassley.  Mr. Chairman?

The Chairman.  Senator Grassley.

Senator Grassley.  Mr. Chairman, I will bet you that Senator Collins and Senator Nelson and Secretary Sebelius, who have all been former commissioners of insurance, would probably disagree with you that they are capable of making these determinations.  I just point that out, but I think that this is a pretty simple amendment.  We have seen lots of modeling and lots of back-of-the-envelope predictions.  But at the end of the day, we do not know who some of the reforms in the Chairman's mark will actually affect the cost of health insurance.

This has been something that we have all been concerned about for months.  It is one of the major goals of the legislation.  We are restructuring 16 percent of the economy and something that personally touches every American based upon artificial deadlines and political promises.

This is something that with the writing of this legislation it seems to me ought to be given consideration because we will not have these answers before a bill gets to the President.  And if the Democratic leadership and the White House refuse to give us the time to do it right, then at least we can is put
in some safeguards to protect our constituents.

This amendment will make sure that if we get it wrong and more than half the people we are trying to help here see a premium increase, then we can undo the mistakes that have been made. I have often heard from you, Mr. Chairman, and other people—in fact, I have probably said it myself. You know, this bill does not go into effect for 4 years. You have got time to correct things. But this is one of those things that with some of these premium increases being passed on because of the tax, we will not know; we will not have 4 years to correct. Washington cannot be assumed to have all the answers, and we do not always get it right the first time.

So this is a very straightforward amendment that will hold us and this proposal accountable. So that is why I urge support for the amendment.

The Chairman. Okay. Well, I agree with the Senator; Senator Collins, Senator Nelson, and others have been commissioners. We trust them. I am just not sure about the others. I suggest we vote. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?
The Chairman.   Pass.
The Clerk.   Mr. Bingaman?
Senator Bingaman.   No.
The Clerk.   Mr. Kerry?
The Chairman.   No by proxy.
The Clerk.   Mrs. Lincoln?
The Chairman.   No by proxy.
The Clerk.   Mr. Wyden?
Senator Wyden.   No.
The Clerk.   Mr. Schumer?
Senator Schumer.   No.
The Clerk.   Ms. Stabenow?
The Chairman.   No by proxy.
The Clerk.   Ms. Cantwell?
Senator Cantwell.   No.
The Clerk.   Mr. Nelson?
Senator Nelson.   No.
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. Aye.
The Clerk. Mr. Kyl?
Senator Grassley. Senator Kyl, aye by proxy.
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 will tally the vote.
Senator Conrad. Mr. Chairman? May I be recorded?
The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Chairman, the final tally is 10 ayes, 13 nays.
The Chairman. The amendment does not pass.
Senator Conrad. Mr. Chairman?
The Chairman. Senator Conrad.

Senator Conrad. Might I just have a chance to explain my absence? I want to apologize to colleagues, but my long-term defense aide was sworn in as the Assistant Secretary of the Air Force for Finance this afternoon, and I obviously wanted to be there for that. So I wanted to explain my absence.

The Chairman. Thank you, Senator. I bet you are very proud of him.

Senator Conrad. Very proud.

Senator Cornyn. Mr. Chairman?

The Chairman. Senator Cornyn.

Senator Cornyn. Mr. Chairman, I would like to call up my amendment D-7 as modified.

The Chairman. D-7, modified.

Senator Cornyn. It has been distributed. And I was wondering where Senator Conrad was, so I am glad he explained that.

Mr. Chairman, the Chairman's mark, as we know, cuts $409 billion in Medicare payments, but it does not permanently ensure that seniors under the program will have a stable access to a doctor. And, of course, what I am talking about is the doc fix. The Chairman's mark provides a 1-year fix to the sustainable growth rate for 2010. But we know that in 2011 physicians will suffer a
25-percent cut. And we know from recent history that the Congress will not let that happen.

The problem is that the doctors I talk to in my State say they do not year for year what Congress is going to do, and what my amendment would do would be to provide basically a 2-year solution that would provide at least three consecutive years of a half-percent increase in the sustainable growth rate.

Well, of course, the reason why we are not doing a full 10-year fix is because it would add more than $200 billion to the cost of the bill, even though we know that we will come back and do that as the cuts take place. Instead of reducing the deficit by $23 billion, the real solution would result in a bill that, of course, substantially increases the spending and the deficit.

We need to be honest, I think, about the real costs of keeping our promises to seniors. We need to be honest with the American people about the reality of spending reduction targets which are plan price controls on the health care system that, when the rubber meets the road, Congress steps in and reverses.

The sustainable growth rate is essentially a price control on physician services. We know from experience that this approach has not worked, and we all know we need to fix it and fix it permanently.
The problem is not only the formula. The problem is that Washington is setting the price for physician services instead of physicians competing on price and quality in a transparent market. Government price setting is one reason more why I oppose the Government plan we debated yesterday. Price controlling physicians' services has not worked in Medicare, and the problem would only get worse if we create a new Government-run plan for all Americans.

Instead of creating a new Government-run program, we need to fix the ones that we have now that are broken, and my amendment seeks to do that by ensuring that seniors have access to physician services in Medicare, at least for another year, before we have to come back and fix it again. I think it is not responsible to create a new Government program and take money away from Medicare to pay for it, especially when Medicare is on a fiscally unsustainable path.

So, specifically, my amendment would ensure that Medicare patients have access to a doctor beyond the 1-year fix in the Chairman's mark. My amendment would give physicians serving Medicare patients a half-percent payment update in 2011 and 2012. And, Mr. Chairman, I know this is—I am sounding a little bit like a broken record, but I learned yesterday that once again we are
pushing CBO beyond the fast safe speed, because last week CBO estimated a similar amendment would cost $38 billion, but yesterday they came back and told me, told us that my amendment would cost $28 billion--$10 billion less or a $10 billion mistake.

My amendment is paid for by reducing spending under the Chairman's mark and by reducing the amount of money the Federal Government spends on administrative costs for the Medicare program. I hope my colleagues will join me in supporting it.

The Chairman. Senator, I think I speak for all members of the Committee in saying I am very sympathetic with the problem, namely, the SGR formula and how it works today and how it is important that we provide more certainty and stability to doctors' reimbursement under Medicare.

It is true that in the mark we provide there be no cuts in fees. I think it is a 5-percent update for the first year. But it is also true that the mark is silent for years thereafter. Really, we have to fix this, and I intend to work with you and all other Senators to address this question, this problem.

Many doctors say the same thing to me: Gee, we cannot afford this cut. And I have the same conversation I am sure you have; namely, well, you are right, and we
will figure out a way to make sure that there is no cut.

Yes, but the current provision only applies for a year.

I know. The Congress' history is on this. We always do come back. In fact, I think there has only been one—in the last I do not how many years, one brief period of time when it lapsed.

But in my judgment, this is not a good way to fix the problem, that is, by essentially taking the money away from, again, middle- and lower-income people for doctors, then this 50-percent provision we talked about earlier, back to Medicaid administrative reimbursements, and we had another provision here to further reduce the premium tax credit beginning with the wealthiest individuals.

I just do not think it is right to shift money away from them to fix the doctors' SGR. But in the meantime, we have to fix the SGR, and I am quite confident over the next several stages as this bill progresses we will find a way to fix it, but I hope in a fairer way.

Senator Cornyn. Mr. Chairman, I will not prolong the debate, but let me just point out that the tax credits that are a part of the pay-for here do not start until 2013, and the fix here is for 2011 and 2012.

The Chairman. Thank you. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman.
First of all, I think, as you indicated, share the concerns raised by the Senator from Texas. Senator Kyl and I have worked for more than one Congress introducing legislation that would permanently repeal the current physician formula and replace it with a more accurate measure of physicians’ true costs. And I strongly support that.

I would ask, though, if we might work together on the floor to do more than just continue this temporary fix, but to work together to really make the change that needs to be made.

An important step was taken earlier this year at the urging of many of us. Secretary Sebelius with HHS did take prescription drugs out of the physician formula, so it does now create a more accurate cost in terms of what we are dealing with. So step one was done, and I know that the Chairman, because your original white paper and original efforts were to replace this outdated formula, the SGR, and that there is still great interest in doing that, actually permanently fixing this problem for physicians and for patients.

So I would hope, rather than just continuing to put a Band-aid on, as this amendment does, and, I should also add, going right back to the same place, paying for it by taking away tax credits for middle-income families--and
we have all been hearing now concerns about—in former
debates about middle-income families. Well, this goes
right back there trying to take away tax credits, tax
cuts from middle-income families. Rather than doing
that, I would urge us to work together on the floor to
find a permanent solution that is not paid for by taking
away tax cuts for middle-income families we are trying to
help in the bill.

Senator Bunning. Mr. Chairman?

The Chairman. Senator Bunning?

Senator Bunning. Mr. Chairman, I took note of what
you said, that we are going to do a fix on this and we
must do a fix on this. And my question is: Who is going
to take care of the Medicaid and Medicare people if we do
not pay the doctors and they refuse to take care of these
people who Senator Stabenow just mentioned as part of the
pay-fors? What doctors will accept patients if we do not
pay them at least 75 to 80 percent of what they are
supposed to be paid for the care they are giving to these
very people that you are suggesting that we not use as a
pay-for?

The Chairman. We will make sure the SGR formula--

Senator Bunning. But he does not take it until

2013.

The Chairman. Well, I still think it makes good
sense for us to give some certainty to the medical profession.

Senator Bunning. I agree with you 100 percent.

The Chairman. And I pledged to try to find a way to accomplish that.

Senator Bunning. Okay.

The Chairman. So there is not a reduction in the formula—not a reduction in the payments.

Senator Bunning. Well, I just think it is very important that we take care of them.

The Chairman. I do, too. I do not think there is any disagreement here.

Senator Cornyn. Mr. Chairman, if I could just close on my amendment.

The Chairman. Yes, Senator Cornyn.

Senator Cornyn. If we are not going to do it now, the history of the Congress has been to kick it down the road to next year and next year and next year. And there are two ways to establish budget neutrality: one is to raise the revenue and the other is to cut spending. So I think we know what the choices are, and obviously there are no easy choices. But I would just urge my colleagues to support a 2-year solution rather than a 1-year solution. We know we are going to do it anyway. We know we are going to have to either raise revenue or cut
spending. So I think the responsible thing to do would be to do that today.

The Chairman. Senator Rockefeller.

Senator Rockefeller. I recognize that this does not solve the immediate problem. But I want to make a point, and that is, by a vote of, I think, 15-3, or something, we passed a modified MedPAC America which is meant to—in this Committee, and that is meant to take the problem that you are talking about, Senator Bunning, and which I am talking about—you and I both know in eastern Kentucky and southwestern Virginia what happens to primary care physicians and how much they get paid and how long they can stay. Actually, a lot of them stay longer than they can afford to stay because they are loyal to their geography. But that is the point of having a neutral group of people who can take primary care physicians in Harlan County, Kentucky, and increase what they make so they will stay. That is the point of MedPAC. Everybody says they are going to cut. In many cases, they are going to increase, because they have to, if they are doing their jobs right.

I agree it does not solve your problem, but that is—when Senator Cornyn said the long-term future, that is the long-term future, is better decisionmaking.

The Chairman. Okay. Let us conduct this vote, and
maybe one other right after this, because there is a vote that just started.

The clerk will call the roll on the Cornyn amendment.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

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?
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 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. The clerk will tally the vote.
Senator Schumer. Mr. Chairman?

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Mr. Chairman, the final tally is 9 ayes, 14 nays.

The Chairman. The amendment is not agreed to.

We are hoping that maybe Senator Lincoln might be ready for an amendment. Failing that, Senator Snowe, do you have an amendment?

Senator Snowe. Yes. Senator Lincoln is part of my amendment.

The Chairman. Oh, Senator Lincoln is part of it.

Senator Hatch, do you have an amendment?

Senator Hatch. Yes, I do. Do you want me to call it up?

The Chairman. Yes, why don't you?

Senator Hatch. Okay, I will call up amendment F-17 to the bill. Now, I have slightly modified this amendment to match the change the Chairman made in his modified mark. The modification is a small one. The modified mark struck one of the health industry segment fees, the one for clinical laboratories. Likewise, I am modifying my amendment to also strike the mention of clinical laboratories.

Now, Mr. Chairman, my amendment is simple. It
merely provides that the annual fees on the health industry segments not take effect until the General Accounting Office has certified that no portion of the annual fee is likely to be passed on to consumers or the products manufactured or imported by the companies upon which the tax is levied.

Based on my understanding of the Chairman's rationale for including these industry fees in the mark, the idea is that these health industry segments are going to enjoy a windfall from the provisions of this bill. This windfall would ostensibly come from having millions of new customers who presently do not receive health insurance or adequate health care who would under the bill be brought into the system. Therefore, my understanding of the theory goes these industry segments would contribute to the cost of the bill out of the largesse that they receive.

Now, I am certain that the Chairman does not intend that the cost of these fees would be passed on to the consumers of these industry segments. After all, why would he try to pass a reform bill to lower the cost of health care by placing higher costs on the components of health care? This makes no sense, and I know the Chairman's intentions are good.

However, I do not agree that the effect of these
fees would fall only upon the companies in the affected industry segments. Rather, I believe that these fees, at least in part, would indeed be passed through to the consumers of the products of the companies so taxed. Therefore, even though the provision to assess the industry segment fees is well intentioned, I believe they will increase the cost of health care to the American people. And I do not see why this amendment would have a score. After all, if the costs are not going to be passed on to consumers as intended, this should have no effect on expected revenue. However, to the extent that there is a cost to the amendment, the offset would be to reduce spending in the bill proportionately as needed to cover the lost revenue.

So this amendment should be an easy for supporters of the Chairman's mark to support. If Committee members do not believe that the industry fees will increase the cost of health care by being passed on to consumers, then what is the harm in allowing GAO to certify as much?

Now, I am sure that none of my colleagues on the Committee want to see health care costs go up, and they would not vote for a measure that they believe will cause them to go up. This amendment would make sure that this would not happen. So I hope that I can get a vote for the amendment.
The Chairman. Okay, Senator. Maybe we can vote on this. I hope we can because we just started a vote.

First of all, this amendment is unconstitutional for the same reasons that we discussed earlier; that is, it is unconstitutional for a congressional body to make executive findings. You need an executive branch official to make executive findings under the Bowsher v. Synar Supreme Court case as well as the Chadha case. So it is clearly unconstitutional.

On the merits, I just believe that it--fees are important. They basically pay for this bill. The fees I mentioned earlier are generally agreed to by the industry so that the certification that you asked for is really a poison pill that would effectively block fees to finance health care reform from being implemented. And as I said earlier, this is unconstitutional, anyway, and I just do not think it is wise to adopt an unconstitutional amendment.

Senator Hatch. Well, first of all, I do not believe it is unconstitutional. We use GAO all the time. But if that is the concern, then I will just modify my amendment to have Treasury make the analysis. I think that would remedy your--

The Chairman. The rest of my argument I stand by. I just think it is not good to make that--have Treasury
certify no portion of the annual fee in each industry is likely passed on, I mean, that is an impossible calculation to make because, clearly, it is complex. There are stockholders, there are consumers, there is executive compensation, there is sales. It is the markets, the economy. I mean, it is an impossible calculation to make. I just think, therefore, this is a mischievous amendment that should not be adopted. In fact, I think we could dispose of it right now by voting on it, although we need a quorum.

Okay. We do have a quorum. 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?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?
The Chairman. No by proxy.
The Clerk. Ms. Stabenow?
The Chairman. No by proxy.
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?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
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 will tally the vote.

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

The Chairman. The amendment does not pass.

The Committee will now recess until 6:30.

[Whereupon, at 4:49 p.m., the Committee recessed, to reconvene at 6:30 p.m. this same day.]
AFTER RECESS

[7:03 P.M.]

The Chairman. The committee will come to order. I recognize the Senator from Kansas, Senator Roberts?

Senator Roberts. Well, good evening, Mr. Chairman. I thank you very much for getting me in the queue. This is the Roberts/Hatch –

The Chairman. You are not in the queue, you are the head of it.

Senator Roberts. Pardon me?

The Chairman. You are not in it, you lead it.

Senator Roberts. Oh, I am leading it. If that is the case, I have got about five more that we could talk about.

Mr. Chairman, I call up Roberts/Hatch Amendment Number F2 as modified. This amendment would exclude flexible spending accounts, health reimbursement accounts, health savings account, dental, vision and other supplemental plans from the threshold amounts established for high cost insurance plans.

Placing these accounts under the threshold amounts effectively limits how families can direct their health care dollars and would effectively raise taxes on middle class families as the value of their contributions to
these accounts is reduced, and to avoid exceeding the
threshold amount.

These accounts are an important part of many
family’s health care. They allow families to direct
health care dollars in a way that is most beneficial to
them. They set the priorities. For example, families
with a member who has a chronic disease can choose to set
aside pre-tax dollars and a flexible spending account to
pay for necessary health expenses. Or families can use
funds from these accounts to pay for important preventive
care, something about which we have had a great deal of
discussion and we recognize as importance.

Vision and dental policies are also absolutely vital
to maintaining an individual’s overall health and should
not be limited by being placed under the threshold
amount.

My amendment preserves the existing treatment of
these important health care accounts for all participants
including middle class families by excluding FSAs, HRAs,
HSAs, dental, vision and other supplemental plans from
the threshold amount for excise tax on high cost
insurance policy.

Mr. Chairman, my amendment is not offset for the
simple reason we should not have to raise taxes in order
for families to keep the health care benefits that they
currently have. This amendment preserves existing
benefits that allows families to direct their health care
dollars as they see fit rather than subjecting them to a
one size fits all health care benefit.

Unlike the Chairman’s mark that takes away benefits
from families and gives them less choice about how to
spend their health care dollars, the Roberts/Hatch
amendment preserves consumer choice and ensures that
these important health care benefits remain available and
can be fully used by families to manage their health care
expenses.

The Chairman. Senator, as you state -- so this
amendment is not germane.

Senator Roberts. I would appeal the ruling to the
Chair and ask for a vote.

The Chairman. 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. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Bunning?
Senator Bunning. 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. Chairman?
The Chairman. No. The clerk will tally the vote.
The Clerk. Mr. Chairman, the final tally is five ayes, eight nays.
The Chairman. Two-thirds members present not having voted in the affirmative. The ruling of the Chair is sustained.

Senator Carper. Mr. Chairman?
The Chairman. Senator Roberts, do you have a second amendment?
I would recognize Senator Roberts for another amendment, but --

Senator Carper. Would you just yield to me for 30 seconds going back to the amendment we just considered?

The Chairman. Certainly.

Senator Carper. It has been shared with me that as we work with flexible spending accounts I understand in current law there is no cap. In the legislation we put in the cap about $2,500. We do not index it at all going forward and as we go forward if not here in mark upwards we go into emerging the House in two different Senate bills as we consider what it would do on the floor, what it would do in conference.

I would hope that the issue of flexible spending accounts, the question of indexing the $2,500 cap that we could maybe find a way to --

The Chairman. I understand. It is kind of interesting to me that most people do no spend up to their limits in the bill as it is already today. So the thought is that by capping it and then indexing there is a way to further help the cost, but in a way that does not bring any undue pressure to people. I think, I might be wrong, about ¾ of the amount up to $2,500 is spent on average. Now of course that is just average.

I appreciate what you are saying, Senator. We will
work on it. Senator Roberts?

Senator Roberts. Since the distinguished Senator asked me to yield, I would respond.

The Chairman. I’m sorry.

Senator Roberts. In that I think he raises a good point. I have a separate amendment on exactly what the gentleman is talking about, but that is not in order at the present time.

Mr. Chairman, I call up Roberts Amendment Number F4 as modified. Mr. Chairman, this amendment strikes the provision in the Chairman’s mark that prohibits the cost of over-the-counter medicine from being reimbursed through a health FSA/HRA/HSA or Archer MSA unless the patient has a prescription from their doctor for the over-the-counter medication.

Yes, I am talking about over-the-counter medication. Under the mark, you have got to go to the doc for a prescription. This provision strikes me as counterintuitive when we are trying to put downward pressure on health care costs and make certain that if folks like the health care benefit options they have, they can keep them. Rather than maintaining current law which gives consumers the option to purchase over-the-counter medications on a tax favored basis through an FSA or other similar account, the Chairman’s mark instead
directs them to more costly alternatives and increased
device of the health care system and limits consumers’
ability to fully use their accounts.

Further, it injects confusion and complexity into
the existing system that is straightforward and easy for
consumers to utilize. Here is the practical effect of
this provision. It creates a disincentive for consumers
to shop for the cheapest over-the-counter medication and
instead may encourage them to turn to prescription
medications that are covered by insurance.

This means that multiple additional layers of health
care costs could be added -- the visit to the doctor, to
obtain a prescription, the trip to the pharmacy to have
the prescription filled and the pharmacists’ time to
provide counseling and the cost to the insurance company
to process the claim.

Even if the over-the-counter medicine is prescribed
by the doctor and thus eligible under the Chairman’s mark
for reimbursement, it would seem that health care costs
would still increase because the patient would likely
need to visit the doctor to obtain the prescription.
This is yet another attempt to further limit consumer’s
choice and involvement in their health care by
restricting how contributions to these accounts may be
used.
I urge my colleagues to support this amendment to ensure that participants can continue to fully benefit from these accounts.

Mr. Chairman, my amendment again is not offset for the simple reason again, we should not have to raise taxes in order for families to keep the health care benefits that they currently have. This amendment preserves existing benefits that the Chairman’s mark significantly reduces by excluding important and necessary medications from eligibility for reimbursement under an FSA/HSA or HRA. This provision will do nothing to drive down the cost of health care. In fact, it very well may raise costs and it will take away a benefit that millions of Americans use to manage their health care costs.

The Chairman. Senator, there is no offset here and consequently it is not germane.

Senator Roberts. I appeal the Chairman’s ruling and ask for a role call vote.

The Chairman. Clerk will call the role.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Carper?
The Clerk. Ms. Snowe?
Senator Snowe. No.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. 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. Chairman?
The Chairman. No.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Chairman, the final tally is five ayes, nine nays.

The Chairman. Two-thirds of the members present not having voted in the affirmative, the ruling of the Chair is sustained.

Senator Roberts, do you have a third amendment?
Okay. Senator Snowe, I understand there is some original understanding that you might be next?

Senator Snowe. Yes.

The Chairman. Okay. Senator Snowe?

Senator Snowe. Thank you, Mr. Chairman. I call up Amendment F9 as modified. I also want to thank my colleagues Senator Bingaman and Senator Lincoln for joining me as co-sponsors and also for their amendments that are included, so it is a collective amendment from the three of us regarding three separate initiatives that are all about making sure that people keep the benefits that they have today.

The initial component of this amendment would exclude from the excise tax on high cost health insurance indemnity insurance policies that are paid for by employees with after tax income. These are insurance policies that Americans buy to protect themselves from lost wages and increased expenses after they have had an accident or are hospitalized or diagnosed with a
particular disease.

These indemnity insurance policies pay a set amount based on the severity of the claim. These help individuals to address costs and expenses that are not associated with health insurance. These policies are not health insurance, but most people equate these policies with disability insurance which is already excluded from the excise tax in the Chairman’s mark.

Senator Bingaman’s two components of this amendment are issues in which we have collaborated in concern inequities in health care delivery. The first of these address the fact that federally qualified health centers today are capped in the amount that they are paid for in treating Medicare beneficiaries regardless of the services performed.

Last year, for example, Rural Health Center was paid a maximum of $100 regardless of whether the amount of services provided. This arbitrary and unfair payment system cost the average health center $85,000 in lost reimbursements on an annual basis and as more and more Medicare beneficiaries rely on health centers, this inequity threatens their ability to meet the needs of seniors.

So I am pleased that the provisions of this legislation which Senator Bingaman and I have championed
to eliminate this cap and bring health centers a fair perspective payment system is included in the amendment.

Also this amendment incorporates another measure on which Senator Bingaman has championed. That is to say that those Medicare beneficiaries with HIV/AIDS who rely on patient assistance programs to obtain vital medications have those contributions credited towards their Part D out of pocket spending.

Given that the Chairman’s mark includes provisions to credit seniors who receive help purchasing drugs in the donut hole coverage gap. We should not treat those obtaining assistance, obtaining HIV medications differently.

Senator Lincoln and Senator Cantwell have also added a provision to this amendment that will allow small business that have a large number of seasonal employees to remain eligible for the Small Business Tax Credit.

For instance, the amendment would allow summer camps that may have only two or three year round employees to offer health insurance to those employees and not be disqualified because in the summer months they have dozens of employees. I know in our state of Maine, tourism generates more than $10 billion in sales of goods and services and more than 140,000 jobs and $3 billion in earnings.
Much of that tourism is facilitated in small businesses supported by seasonal workers. So this amendment is an incredibly important contribution to this legislation as well and certainly to the people who work in these facilities across the country. So I want to thank Senator Lincoln and Senator Cantwell in joining me in this effort. Thank you, Mr. Chairman. I understand you will be recognizing both Senator Bingaman and Senator Lincoln. Thank you.

The Chairman. Right. Senator Bingaman?

Senator Bingaman. Thank you very much, Mr. Chairman. Let me congratulate Senator Snowe for this amendment. I am very glad to co-sponsor it with her.

I will not repeat all the points she made about the different provisions in it. I will point out that the effect of the amendment as I see it is to shore up the Medicare program for some of the most vulnerable beneficiaries under that program, specifically those that seek services at community health centers, those with AIDS, and also the Native American population.

I think that it is an excellent amendment and I urge all colleagues to support it.

Senator Lincoln. Mr. Chairman?

The Chairman. Senator Lincoln?

Senator Lincoln. Thank you, Mr. Chairman, and I am
so pleased to be a co-sponsor of this amendment.

I have heard from a number of Arkansans this week with concerns about the inclusion of fixed indemnity coverage being included in the high premium excise tax and I’m glad that with Senator Snowe’s leadership we have been able to work to address those concerns. I appreciate the work that she has put into this before and now including it in the bill I think is incredibly helpful and I am grateful to her for her leadership there.

I also want to thank my colleague, Senator Bingaman, for his continued effort on behalf of our nation’s safety net providers, the federally qualified health centers also known as community health centers. Arkansas’ 12 community health centers operate all around our state and they provide valuable services to Arkansans who currently have no place else to go for quality medical care.

The provisions in this amendment regarding the FQHCs will ensure continued access to these vital services. I would also like to take a moment to thank the Chairman and my colleagues offering this amendment for working with me to make some changes to the mark regarding eligibility for small business tax credits. Senator Snowe and I have worked together for years on small businesses and the issues that they face and I appreciate
so much her tireless work on behalf of the millions of small businesses in Maine, but she does not exclude the small businesses from Arkansas either. She works tirelessly for small businesses all across the country.

Particularly the businesses that require the use of seasonal workers as she mentioned. During harvest, farms in Arkansas and across the country oftentimes bring on additional temporary help. Those jobs can last as little as just a few weeks. But under the Chairman’s mark, those workers’ hours would be counted in calculating whether a farm qualifies for that small business tax credit.

The provision included in this amendment would exclude temporary workers hours for purposes of determining whether a business qualifies under the mark as a small business for the tax credit. This can be enormously meaningful for our small businesses. Whether or not they qualify for that credit or being excluded from that credit just based on as Senator Snowe mentioned, an addition of workers for only a few weeks out of the year, but ensuring that our traditional small businesses can continue to require, that will continue to require that help and to have them included here I think is enormously meaningful to them.

The language tracks the agreement reached in the
Help Committee in their bill. When a similar amendment was offered by Senator Kay Hagan from North Carolina and I am pleased that we worked to address these issues in the Finance Committee mark as well, Mr. Chairman. I would just add in the sheet that was handed out, we worked with the Senate Finance Committee Staff and it actually should have excluded the piece on shared responsibility to ensure that it actually could meet the cost estimates that were given to us. So we just want to make sure that that was clear. Thank you, Mr. Chairman.

Senator Ensign. Mr. Chairman? Mr. Chairman? I have just been asked to say, I do not know that there would be any problems with the bill, but several Senators are missing, including Senator Grassley, and if we could just set it aside so they could have some time to look at it if that would be okay.

The Chairman. Senator Cantwell? First let Senator Cantwell speak.

Senator Cantwell. Thank you, Mr. Chairman. I do want to thank my colleague, Senator Snowe and my colleague from Arkansas, Senator Lincoln, for offering these amendments. Seasonal and temporary workers do contribute immensely to the economy of Washington State, everything from our fishing fleet to our farmers employ thousands of seasonal and temporary workers to harvest
fish, shellfish and 250 different crops.

Under the Chairman’s mark in order to qualify for the small business credit, a small business employer must have no more than 25 full time employees employed during the employer’s taxable year.

By excluding seasonal workers from this calculation, our amendment would ensure that these small business owners and family farms are not disqualified from eligibility because they have workers who may only have been employed for a few weeks each year. So I am proud to be a co-sponsor of the amendment and I urge the committee to adopt it.

I know that Senator Lincoln is also working with the Chairman to clarify how these workers would be treated for, these temporary workers, for the purposes of shared penalty, shared responsibility penalty. So I want to raise a related issue about temporary staffing firms and how their employees are calculated.

I filed an amendment, Cantwell Number C13 to address this, but I understand the committee and staff are working on possible scorings. But I did want to bring up to the committee’s attention just briefly the shared responsibility penalty in the Chairman’s mark as calculated based on each time an employee receives a tax credit in the state health insurance exchange. The mark
defines full time employees as those working 30 hours or
more each week.

I do not believe the Chairman intended this fee to
apply to employees who are not full time employees on an
ongoing basis. And so I wanted to get definition and
clarification for full time employees that some companies
like those who place temporary workers in other firms for
short period of times have employees, have unpredictable
and fluctuating work patterns, so the definition of full
time employee needs to be a little more refined. I hope
that we can clarify this definition so that full time
employee is someone who works at least 30 hours per week
over a course of a calendar quarter which is 390 hours
total, 13 weeks, and make sure that this fee is assessed
quarterly but still capped at $400.

So I thank the Chairman and the staff for helping to
clarify this issue.

The Chairman. Just to be even more clear, you are
seeking further clarification, is that correct?

Senator Cantwell. Yes.

The Chairman. Okay. I will work with you. We
will further clarify.

Senator Cantwell. On the definition on full time
employee so that those organizations that are involved in
manpower that do not necessarily have full time employees
but rotating employees, so that they have clarity to the statute.

The Chairman. Okay. So it is seasonal, right.

Fine.

Senator Cantwell. Yes.

The Chairman. Correct. So Senator Ensign, you would like to have the amendment withdrawn? I mean, not withdrawn, just temporarily aside?

Senator Ensign. Yes.

The Chairman. Okay. Next, Senator Bunning?

Senator Bunning. Yes. Let me call up Amendment F4 as modified.

The Chairman. F4 modified.

Senator Bunning. Thank you, Mr. Chairman. This is a very simple amendment that prohibits any of the tax increases in Title VI of the mark from going into effect unless the Secretary of Veteran Affair certifies to the Department of Treasury that none of the tax increases will increase the cost of providing medical care to veterans or cause veterans to lose access to any medical device or branded drugs.

The majority of this committee may be unwilling to protect ordinary consumers from the escalating cost of health care caused by these taxes. But I hope that my colleagues have some sympathy for our veterans, many of
whom have lasting injuries because of their service to this country.

Most of us on this committee are used to dealing with entitlement programs where people get a benefit, as long as they qualify under the law. This bill creates another entitlement program. But veterans health care is not an entitlement. It is subject to the whims of the appropriation process.

There is no federal guarantee for veterans health care. That is why we should be especially concerned about the impact of cost increased on our veterans. The tax increases in this mark will cause health care costs to increase. It is a fact. No one disputes that. That is why we should not rush to pass new taxes until we understand the full impact on veterans. But the cost should not be our only concern.

We should also ensure that these tax increases do not threaten veterans' access to life saving treatments. Let me explain why access is a real concern. Just some background about veterans access to branded drugs.

It is my understanding that because the Veterans Administration sets drug prices, this has resulted in a very narrow list of approved brand name drugs available to veterans. As a result, many veterans who are seniors have left the VA system and enrolled in Medicare Part D.
plans so they can get brand name drugs they need.

Other veterans who are not Medicare eligible do not have that option. So our veterans already have very limited access to branded drugs. That is why I was surprised when I saw the conceptual language about the new annual tax on manufacturers and importers of brand name drugs.

Under the Chairman’s mark, the brand name drug tax will be based on sales to government programs including the VA and Tricare. What rational company would want to increase their taxes by selling to the VA where the price controls are already well below market rates. It would be a terrible business decision.

Let me ask the Chairman’s staff at the table, are there any provisions in the legislative language we have not been able to see yet that would prevent the branded drug tax from causing other drugs to fall off the VA’s narrow list of approved brand name drugs, which would cause our veterans to lose access to even more of the brand name medications they need? Anyone? Well, if there is no one ready to respond --

Mr. Clapsis. I have never heard of any provisions.

Senator Bunning. Sorry?

Mr. Clapsis. We are not aware of any provisions.

Senator Bunning. I did not hear what you said.
Mr. Clapsis. There are no provisions like that.

Senator Bunning. There is no provision? Well, that is exactly why we should not rush to pass these tax increases without understanding the impact on veterans. There should also be an analysis on whether the medical device tax will cause our veterans to lose access to prosthetic legs and other critical innovations.

My amendment provides a basic safety check. We need to ensure our veterans do not become the victims of unintended consequences. If the VA Secretary gives the green light, then the tax increase will move forward. If CBO declares that this amendment has a cost, then this is an admission that these tax increases will indeed damage veterans health care.

In the event that an offset is required, my amendment delays the effective date of the penalty tax on uninsured Americans. In the event that a further offset is required, my amendment would delay the effective date of the mandates that states expand their Medicaid programs.

Let me point out that the Chairman has already delayed effective dates in order to find revenue. The least we can do is consider a delay in order to protect our veterans. Maybe some of my colleagues believe that veterans should be a part of the shared responsibility
this bill -- forces on Americans. It is my belief that the men and women who have been willing to make the ultimate sacrifice to defend our country have already contributed their shared responsibility.

I hope my colleagues will agree with me and support the amendment. Thank you, Mr. Chairman.

The Chairman. You are welcome. Let me ask Mr. Barthold, what is the revenue effect of this?

Mr. Barthold. Well, we have not been able to estimate the effect of this, Mr. Chairman. It relies on a determination by the Secretary of the Department of Veterans Affairs about what will happen. I imagine the intent is mainly market prices of drugs, medical devices and other expenditures by that department.

I have not had a chance to consult with Mr. Elmendorf of the Congressional Budget Office, but from our earlier discussion we did talk about how the basic economics would be that you would expect some price increases of some of the covered devices. That would seem to say that this would have a revenue consequence. But we have not estimated.

The Chairman. But you do not know?

Mr. Barthold. I do not know. And I do not know if under sort of the scoring, I should add that I do not know if under the scoring guidelines if the Congressional
Budget Office would say there is a 50 percent likelihood or that definitely the Secretary of Veterans Affairs would certify one way or the other.

The Chairman. Frankly I think it is wise to make sure veterans are protected here for all the reasons that we know. I am inclined to accept the amendment.

Senator Bunning. Thank you, Mr. Chairman. I appreciate that.

The Chairman. With no objection, the amendment is agreed to.

Senator Bunning. Thank you.

Senator Ensign. Mr. Chairman? I have an amendment.

The Chairman. Senator Ensign?

Senator Ensign. Mr. Chairman, I would like to call up Ensign Number C8 as modified.

The Chairman. Okay.

Senator Ensign. It is the healthy behaviors amendment. Mr. Chairman, this amendment has been scored by CBO and has no significant revenue effect.

Senator Conrad. Is this the amendment with Senator Carper?

Senator Ensign. Yes, it is. Number C8. Mr. Chairman, as this amendment is being passed out, I want to thank my colleague, Senator Carper, for introducing
this amendment with me. I will describe the amendment in fairly good detail and will also explain why I think the amendment is important.

During our health care reform round tables and walk throughs, I spent a lot of time talking about voluntary wellness programs that are offered by health plans and by employers. While I appreciate your efforts to add a new subtitle to the mark called Strengthening Employer Sponsored Wellness Programs, I am disappointed by the language.

Based on my reading of the language, it appears that the mark would keep the amount employers can use to reward employees for adopting healthy behaviors at the current 20 percent HIPAA threshold. The Chairman’s mark would then give the Secretaries of Health, Labor and Treasury discretion to increase the amount employers can use to reward employees from the existing 20 percent threshold to 30 percent. But in all practical terms, the Chairman’s mark is current law.

Mr. Chairman, this language takes a significant step away from the Harkin language that was inserted into the HELP Committee bill. As you may know, the Harkin committee language immediately raises the threshold from 20 percent to 30 percent and then allows the Secretaries of Health, Labor and Treasury to take the percentage up
to 50 percent if such an increase is deemed appropriate.

Mr. Chairman, as we debate health care reform it is critical for us to discuss using market-based solutions that achieve savings by providing individuals rewards for engaging in healthy behaviors.

When you offer financial incentives to individuals, they will respond. In fact, I believe that people are more likely to change their behavior if the rewards are higher. Although I would like to offer an amendment to increase the existing HIPAA threshold from 20 percent to 50 percent, we have compromised and we are going to offer this amendment with Senator Carper to increase the existing threshold from 20 percent to 30 percent and then give the Secretaries the ability to go higher.

Our amendment would strike the employer-sponsored wellness language in the underlying Chairman’s mark and insert language very similar to the Harkin Amendment. Our amendment focuses on healthy behaviors, not on genetics. Let me emphasize that point which is incredibly very important. We reward healthy behaviors. We do not penalize people for a genetic problem that they may have or a disease that they get.

Mr. Chairman, many factors are driving up health care expenditures including of course the unhealthy behaviors of people. Research shows that risk factors
like smoking and obesity contribute to a long list of chronic health conditions like heart disease, cancer, stroke and diabetes which in turn drive up health expenditures.

Let me show you this chart. This chart shows the estimated annual direct medical expenditures for smoking and obesity. According to the Centers for Disease Control and Prevention, smoking costs this nation more than $96 billion per year in medical expenses. Obesity also poses a serious problem. In fact, a recent study has estimated that the annual medical cost of obesity has risen to almost 10 percent of all medical spending and may be as high as $147 billion a year.

Senator Roberts, you are a very capable assistant. Vanna White I guess we would call you.

Factors such as smoking and obesity contribute to a long list of chronic health conditions such as heart disease, cancer, stroke and diabetes which in turn drive up health expenditures. If I could have the next chart held up, please.

This is really important, Mr. Chairman. About 70 percent of health care costs are driven by behavior. As you can see from this chart, the incremental medical cost of a tobacco user is about $1,400 a year for smokers and $1,400 a year for someone who is obese. In other words,
it cost $1,400 a year more to insure somebody and the
health care costs are $1,400 more for somebody who smokes
or for someone who is obese. Both of them cost about
$1,400 a year.

For somebody with uncontrolled hypertension it is
about $600 a year. The incremental medical costs for
uncontrolled cholesterol is around $500 a year. As you
know from our multiple meetings and discussions, I
believe that a key to achieving savings in the health
care systems is to provide rewards to people engaging in
healthy behaviors. Thank you for your assistance.

I believe that we need to encourage these types of
incentives in the group and individual markets. We also
need to have these types of incentives in the federal
employee health benefit program, which we are all part
of.

Over the past six months, I have talked to multiple
companies about their wellness programs. Throughout this
process, I have learned about a myriad of complex federal
laws and regulations. The most important legal
provisions involve HIPAA which I previously mentioned.

Some of my colleagues may not be familiar with this
law. The HIPAA wellness regulations allow group plans to
offer wellness programs if certain requirements are met.
There are strict rules for programs that provide
incentives based on participation in a wellness program.

In addition, there are rules for programs that provide incentives based on the achievement of a particular goal such as meeting a particular body mass index or a simple way to explain that is height/weight ratio.

Some employers offer incentives for voluntary participation in wellness programs. Pitney Bowes, for example, pays $100 cash rewards to employees who participate in the company’s learn and earn program. Under this program, employees earn financial incentives for taking classes covering topics such as weight management, stress management and emergency preparedness.

Other employers like Safeway offer financial incentives on the basis of voluntarily, let me repeat that, voluntarily meeting a particular health goal.

Under current HIPAA wellness program regulations, health plans can offer financial rewards to individuals based on achieving a certain health goal only if five criteria are met. The most important of these principles is that the reward is limited to less than 20 percent of the total cost of the employee’s coverage.

The reward can come in the form of discounts or rebates of the premiums and waivers of all or part of any cost sharing requirements under this plan. If it is
“unreasonably difficult” or “medically inadvisable” for a person to satisfy the particular health goal because of a medical condition, then that person must be offered a reasonable alternative or waiver. We keep that protection in our amendment. Most employers design the alternative based on the individual’s specific situation.

Safeway, the large grocery store chain is currently using the HIPAA wellness regulations to encourage its employees to adopt healthy behaviors through a voluntary wellness program. Safeway has found that four chronic conditions comprise 74 percent of all health care costs.

These conditions are smoking, lack of exercise, obesity, uncontrolled hypertension, uncontrolled cholesterol. Obviously obesity is a driving factor in all four of these chronic conditions.

To improve employee health and lower costs, Safeway provides its employees with discounts of $260 for participating in a voluntary health assessment. The company also provides up to $780 in discounts on health insurance premiums for achieving certain health goals.

Under a voluntary program called Healthy Measures, Safeway rewards its employees for achieving certain goals related to smoking, obesity, blood pressure and cholesterol. Employees who choose to participate in Healthy Measures program can receive discounts on the
premiums of up to $6 a week or $312 a year for achieving a certain body mass index that is less than 30 or meeting a certain waist measurement. They can also receive discounts of about $300 a year for not using tobacco products. On top of that, employees can receive discounts for meeting certain blood pressure and cholesterol levels. You see, they do not penalize people for having high cholesterol or having high blood pressure. The company rewards employees if they keep levels controlled with medication.

As a result of these changes, Safeway’s health costs have been flat while most American companies costs have increased nearly 40 percent over the same four-year period of time. In fact, according to a company executive, Safeway’s health care costs will even go down a bit this year.

The way Safeway has done is through wellness and prevention. To assist employees in meeting their health goals, Safeway provides free on-site fitness centers, deeply discounted gym memberships, subsidized healthy meals in the company cafeteria, free smoking cessation tools and other on-site wellness programs.

Safeway has learned that when consumers bear more responsibility for the true cost of covering employees who do not take responsibility for their own health, they
are motivated to change. This results in improved health for the employee, higher productivity, and lower health care costs both for the employee and for the employer.

Today, however, Safeway is constrained by current laws. The company would like to do more. Because Safeway offers rewards, it is only able to discount up to 20 percent of their policies; they would like to provide greater discounts in order to change behavior even more dramatically. In other words, Safeway would like to do more in order to get more people to stop smoking and to get more people to lose weight.

Mr. Chairman, comprehensive health care reform legislation needs to raise the federal HIPAA limits so that incentives can better match the true incremental benefit of not engaging in unhealthy behaviors.

I appreciate the work that Senator Harkin has done to incentivize healthy behaviors. That is why I believe that this committee should codify the HIPAA wellness regulations and increase the existing 20 percent HIPAA limit to 30 percent and allow the Secretaries of Health, Labor and Treasury at their discretion to take the percentage up to 50 percent.

The Ensign/Carper amendment does just that. The amendment provides protections to plan participants who cannot meet the applicable standard due to a medical
condition or because it is medically inadvisable to do it.

Specifically, if it is unreasonably difficult to do due to medical standard or medically unadvisable to attempt to meet the otherwise applicable standard, then that person must be offered a reasonable alternative standard or a waiver and still be entitled to receive the reward.

This amendment also allows carriers to participate in the FEHPB program to reward individuals for engaging healthy behaviors. It also creates a 10-state pilot program to encourage those who obtain health insurance in the individual market to adopt healthy behaviors.

Mr. Chairman, we need to encourage the use of incentives in this health care reform bill in order to motivate people to adopt healthy behaviors. I encourage my colleagues to support this amendment.

Just to close, Mr. Chairman. We know that the more we pay for things, the more we are going to get. So we basically need to pay for healthy behaviors. We know if we can change the behavior related to obesity and to smoking, there will be dramatic cost savings to this country. Unfortunately, CBO’s models do not show the savings because they are not capable in the modeling to show.
But by common sense, we know that if we change those
two things in America, we can dramatically change the
cost curve in health care spending in this country and we
also know that obesity in our children is an epidemic.

As a matter of fact, 42 percent of Americans today
are obese. Let me repeat that: 42 percent of Americans
today are obese. And, Type II diabetes, which is not
insulin dependent, this is the type that is mostly
behaviorally caused, it is not always, but mostly
behaviorally caused is epidemic in this country and it is
going to get worse in the future as our kids age.

So we need to tackle this issue, and we need to
tackle it now. We need to applaud companies like Safeway
and others who are engaging in efforts to encourage
healthy behaviors. We need to talk about these examples,
and we need to encourage other companies to engage in
these types of activities so that we can change behaviors
in the United States.

Senator Kerry. Would the Senator yield for a
question?

Senator Ensign. Sure. I would be happy to yield.

Senator Kerry. Well, obviously we want to
encourage wellness and I understand that under HIPAA
process, the wellness regulations are divided into two
categories.
The first category includes gym memberships, waiving co payments for parental care, et cetera. There is no automatic kind of permissibility. We are talking about the discretionary component of achieving a goal.

My concern is, and I do not necessarily have the answer, but I am very concerned about it. You have got this fixed amount of money that is going in to support the universe of a certain group of people within a health care plan. The fees for those premiums are set according to the ability to pay that universe. If you start doing anywhere from 30 up to 50 percent rebates because somebody achieves a healthy outcome, aren’t you then asking the sicker people to subsidize the healthy people in the long run?

Senator Ensign. I would say you would be correct if you were looking at this as healthy behaviors not saving money.

You saw the chart. It costs $1,400 a year more to insure a smoker than a non smoker. In other words, if you can get somebody to quit smoking, it costs less money so there is, to insure the non smoker, so there is more money in the pot.

Senator Kerry. I understand that.

Senator Ensign. You do not have to penalize the smoker, but can reward the non smoker.
Senator Kerry. I understand, Senator. Again, I think the principle of encouraging healthy behavior is good. I am just trying to avoid negative and unintended consequences.

I think that some companies that I have met, I think we had them in the course of some of our testimony. One company chose to pay people $50 for each pound that they lost. In effect, I think they wound up with tens of thousands of pounds lost company-wide. It was very remarkable.

But by doing that, they changed their global arrangement in what they negotiated for a price and were able to save money for the whole universe. When you start picking people off on an individual basis of reducing their premium individually, you do not adjust for what else may be happening within that universe and then other people are picking up the overall costs.

Senator Ensign. Well, except that if you are saving, let us just say that you had 100 people and 25 people decided to get healthier and it lowered the amount of money that you had to spend for those 100 people. Not all 100 should benefit in that. Only the 25 that made the difference should benefit in that. That is fairness.

I mean, if the 25 are the ones who are changing their behavior and that is the reason you have to spend
less, they should be the ones rewarded, not the people
who did not change their behavior. We should reward the
ones who do change and that is what this amendment goes
after.

That is why Senator Harkin I think - right wing
conservative saw the wisdom.

Senator Kerry. Let me give you an example. In
many instances you can have people who change their
behavior and for that particular outcome of changing
behavior they get the benefit of a reduction in their
premium and then they get a different kind of sickness
and they are paying a lesser premium but they are getting
the care. Now who pays for that? People are not
necessarily only going to sick because they are obese or
they smoke or whatever. They have many other issues.

Senator Ensign. We do not penalize for having a
disease or genetic problem. We reward people for good
behavior.

Senator Kerry. Why not encourage the companies to
reward them or the --

Senator Ensign. That is what we are doing. We are
encouraging companies to provide rewards for healthy
behaviors. Under this amendment, both the company
benefits and the employee benefits. You see, the company
is going to save money because they share in this. They
share in the benefit.

If you can get somebody to quit smoking and it costs $1,400 a year less to insure a non smoker versus a smoker, then, and you are only discounting a percentage of the premium, that is why Safeway has been able to save money on what they spend and their employees have been incentivized.

By the way, these are all voluntary programs. So nobody forced a single employee, a single Safeway employee to participate in any of these programs, but yet a lot of their employees are signing up.

Senator Carper. Mr. Chairman?

Senator Kerry. I am just told that under the Safeway plan those who score the lowest pay 51 percent more for health insurance premiums than those who score perfectly.

Senator Ensign. They start here, and so yes. If somebody gets discounted, okay, but if you are just starting here and you are providing the incentives, the incentives through the health care premium, yes, they paid the same as what they were paying if they did not engage in healthy behaviors. But the people who did engage in healthy behaviors got a lower premium.

Senator Kerry. What do you say to those who suggest that a large disparity in premiums becomes a
proxy for medical underwriting and encourages a 50 percent differential in a premium. You encourage people who do not participate in the wellness program to actually opt out of the employer based insurance.

The discount then becomes a vehicle for risk selection. You wind up removing employees who have problems participating from the employee’s pool.

There is a cost shifting that occurs here. I am just inquiring truly. I do not know. But these are issues that have been raised.

Senator Ensign. Let me turn this question over to Senator Carper. I believe that Senator Carper wants to answer this question.

Senator Carper. First of all, CBO has done an analysis to see what kind of diversion there is to the kind of concerns that you are raising that actually occurred at Safeway or the other companies that are doing this. We have asked them to consider whether we can anticipate through our amendment the kind of concerns that you have raised. They have said that is not a concern. We have not analyzed it or considered it. So that is not a concern.

Speaker. That is CBO?

Senator Carper. I just want to go back. We have done any number of things in this legislature, smart
things to bend the cost curve. We have, among other things that we have done, we have said let us create these purchasing pools to enable people to do what we do through the FEHBP program.

We have said let us move away from fee for service and let us try to emulate the Mayo’s and the Cleveland Clinics as they deliver health care in a smarter way. We said that we are -- information technology and make sure more people have the electronic health records, all kinds of smart things that we have done.

But if you look at the legislation that we have done and I am proud of what we have done so far. If you look at it, we have not done a whole heck of a lot with respect to saying to individuals that we have some responsibility here too to do a better job of taking care of ourselves.

We all have car insurance. This summer our boys came home. We had an extra car at our house and they went back to school a month ago and we sold one of the cars. I got a statement from my insurance company and it said here is your interest bill because you sold one of your cars. I actually took the time to do something I do not think I have ever really done before and I looked through my insurance statement at all the discounts that we earned.
We received discounts for safe drivers, we received discounts for smart student discounts, we received discounts for not running traffic lights and not getting into accidents. We received discounts for all kinds of things that incentivize us to do those things.

Meanwhile, we do not get discounts through FEHBP if we stop smoking. We do not get discounts through FEHBP if we lose weight, control our overweight or obesity. We do not get discounts through FEHBP for controlling our cholesterol or reducing hypertension. But we know that if we actually control those things, we would dramatically reduce our cost, what we are paying for ourselves for our coverage and what the taxpayers and employers are paying.

I would like for us to be able to get those kinds of discounts for federal employees and retirees and our dependents. Frankly the kind of stuff that they are getting at Safeway, that they are doing at Pitney Bowes, that they are doing at Delta, that they are doing at Johnson and Johnson to reduce their health care costs and get better outcomes.

John said it. He went through the kind of discounts they offer at Safeway. They offer, a person can get a discount on their premium of about $300 a year by stopping smoking. We know empirically that the reduction
in costs that are incurred by stopping smoking is
something like $1,400 a year, yet they can only offer a
discount for $300 a year.

One of the reasons why we want to go up above the 20
percent to 30 percent is so that the discount, the
premium discount is more reflective of the reduction in
cost that has occurred because of the change in behavior.

I am not interested at putting anybody at a
disadvantage. If folks are unable to voluntarily
participate in these programs, fine, they do not have to.
It is something they do voluntarily. If they cannot
participate at Safeway, for example, they say go to the
doctor, have the doctor present the reason why you cannot
participate, that works. I think we ought to provide
that kind of safeguard and we do in this case as well.

This is a good amendment. This is a very good
amendment. I am excited to offer it with Senator Ensign.

You know we haven’t had a whole lot of bipartisan
amendments that have been offered in the last day or two
or three. This is a bipartisan amendment and it is one
that is designed to bend the cost curve, it is going to
bend the cost curve in a way that I think is responsible,
but some ownness on the individual. Rewards incentivize
good behavior.

To the extent that people do the right thing for
themselves, they lower their cost, they lower their health insurance costs really for the other people, too in the program. Think about it. If somebody gets rewarded $300 in their premium, a $300 discount, they have reduced, by stopping smoking they have reduced the cost for the plan by $1,400.

They say a rising tide lifts all boats. In this case, everybody in that plan benefits from that person having stopped smoking.

Senator Grassley. Mr. Chairman?
The Chairman. Senator Grassley?
Senator Grassley. I’m surely glad that an amendment like this one is put forth because there is nothing to help America save more on health care than better prevention and wellness.

While the mark and the modification of the mark make some modest improvements in prevention and wellness, there is more that can and should be done to promote healthy behavior. In order to promote healthy lifestyles, a number of employers have initiated healthy behavior wellness programs. So I am happy to tell you about John Deere as an example, one of the largest employers in Iowa has a program called Healthy Directions that promotes prevention by offering wellness programs, tobacco cessation and weight management.
No cost health coaching is available. John Deere employees are encouraged to participate in these risk assessments to identify and manage their health risks and can lower their premiums through participation. The good efforts of John Deere are not unique. According to one of my Iowa constituents supporting the Ensign/Carper amendment, thousands of employers in Iowa and across the country offer work site wellness programs for their employees.

The programs offered include awareness, education and behavior change. Additional efforts include providing health risk assessment, biometric screenings, education on managing stress, weight and physical activity, as well as smoking cessation and medical self care and disease management. Iowa employers use a variety of methods to educate and motivate employees to change behavior including workshops, newsletters, health fairs, group classes, individual health coaching, online tools and work site based incentive challenges.

Iowa employers also do a great job of encouraging employees to participate and make these changes in health style. Those incentives have a variety of incentives that bring people to that.

Tomorrow, 12 Iowa companies will be recognized in excellence in the work site health promotion following
the annual conference on work site wellness, an event
that over 200 companies will attend. We should be very
proud of companies who do this and so I am for Iowa
companies. Unfortunately the Iowa innovators are
frustrated by certain federal laws and regulations that
make it difficult to implement really effective programs.

We should make it easier for employers and insurers
in the individual market to do the right thing. That is
what the Ensign/Carper amendment accomplishes. This is
common sense bipartisan and it will result in a healthier
population and more productive workforce. So I hope it
will pass unanimously.

The Chairman. Any further discussion?

Senator Enzi. Mr. Chairman?

The Chairman. Senator Enzi?

Senator Enzi. Thank you, Mr. Chairman. I still I
am sitting in an invisible zone. I too want to thank
Senators Ensign and Carper for working on this amendment.
It does reflect a lot of common sense at promoting
healthy behaviors which I know will lower costs. I know
incentives work. I want to thank Safeway and Mr. Burg
for the time that he spent speaking to both the Democrats
and the Republicans about the way that he was able to
control health care costs through this incentive process.

I think it is good that they brought it to us.
We did work on this in the Health, Education, Labor and Pensions Committee again in a bipartisan way. I was pleased that Senators Harkin and Dodd and Greg and Alexander got together with me and we made only a handful of amendments and it had both Republican and Democrat support.

I can tell you in the Health, Education, Labor and Pensions Committee that was not the rule, that was definitely the exception. This is one of the few. It passed unanimously. Of course there was a lot of work that went into it, but it did pass unanimously. Unfortunately sometimes unanimous does not mean anything.

Between the time the bill was voted out of the Help Committee which was July 15th and the time that it was reported out which was September 17th, the language again laterally changed.

My colleagues were never consulted and the democratic majority staff removed that. Never notified us of it. We had to discover that on our own. I think that is an outrage anytime that a member or a democrat thinks they have negotiated a deal on a health care bill and looks carefully at what happened here, they are going to be upset. I do not think that is the way the Senate is supposed to work, so I hope that it gets into this bill so that it will be considered when it is going into
a merged bill since it was adopted unanimously there. I would hope it would be unanimously adopted here.

An excellent amendment. It does not penalize anybody. It helps at least level costs, probably cut them significantly and winds up with a healthier bunch of people. Healthier, happier, more productive bunch is what Safeway has found with it. So I would hope that we could put in this amendment that assures that there can be 30 percent flexibility and then the Secretary going to up to 50 percent. It would be nice when that person saves $1,400 for the company and they get $700 worth of benefit, not $300 worth of benefit. Thank you.

Senator Ensign. If nobody else would like to speak, then I would like to make just a couple of closing comments.

The Chairman. I might way a word or two actually.


The Chairman. Thank you. This kind of reminds me of a paraphrase -- which is nothing is as good as it seems and nothing is as bad as it seems. This has a lot of service appeal. We all talk about wellness. That is sort of the issue of the year and health care reform is wellness prevention. Clearly that is true.

I think to be honest, some of the thinking around this is not as rigorous as it probably should be. For
example, one thing that comes to my mind off the top is
that the premium discounts almost by definition are going
to raise the premiums for others who do not participate.

Those people that do not participate may not
participate for many reasons. I know that the attempt
here is to say that those who do not want to participate,
if they get a certification from their doctor or
something that they cannot or whatnot that they do not
have to and also they get the same premium discount even
though they cannot. I understand that is what is
provided for in this amendment.

Well, off the top I wonder if the premium discount
could be up to 50 percent and say 23 percent of the
people participate. That is a big discount. Other folks
cannot, they get the discount, too. Or they do not for
whatever reason.

What is left of the policy? It seems like
potentially it is kind of a hollowing out here. After
that, we do in the bill recodify the 20 percent discount
and that is a pretty significant discount to allow that
to be increased to 30 percent, that is pretty hefty.
That is getting close to $1,000 per person.

Then again, if somebody cannot participate, let us
say it is a working mom. Let us say it is a person that
has two jobs. It is not that the person cannot
participate because, not because of medical conditions
but because of circumstances. I do not know if it is
fair to discriminate against those people.

It also applies to the individual market. Frankly
what we are trying to do here is reduce discrimination of
the individual market. That is prevent companies from
denying health insurance based on health status. This is
the inverse of that. This basically says that based on
health status we are going to give you a break or
penalize those people who cannot participate.

I am not saying that they cannot just because of
medical condition. They cannot based on circumstance.
Fifty percent sounds pretty hefty to me. And after that
there is no, I mean, a lot of health care experts say
yes, this is what we should do, yes chronic care accounts
for, chronic disease accounts for maybe 70, 80 percent of
our health care dollars that is true I guess. The
experts say it so many times so it must be true. That is
smoking, it is obesity, it is cardiac issues and similar.
That is true.

But when I ask people like at the Walmart, somebody
is pretty excited about what is going on at Walmart. I
say, what works? Why does it work in your store? They
claim it works. The answer I got was it was partly
financial incentives. But everything else is cultural.
Just the cultural ethic of that store.

So if companies do work to get that cultural ethic, that is great. But if I am in the individual market and I go to my insurance policy and the policy starts to reward based on health care status in a sense, it just seems to me that that is a little strange.

So I just think there is a lot here. I will start where I left which is certainly we should encourage wellness. There is no doubt about it. I know that everybody talks about Safeway. My gosh, Steve Bird I think is going for President of the United States. He has seen every Senator many, many times. And Pitney Bowes, too. Everybody loves Pitney Bowes. We all love Pitney Bowes, Safety and so forth. But that is those stores.

A lot of Safeway savings, and I do not know if they have been fully documented either. Steve Bird is a good salesman. He is a very good salesman and I am sure that is probably why Safeway does so well.

I frankly -- on this because it has such appeal. We certainly want to encourage wellness. We want to send a signal to encourage wellness and prevention. But there are a lot of issues that I do not think this amendment has fully addressed.

Senator Ensign. May I close?
The Chairman. Sure.

Senator Ensign. Thank you. First, we have to ask ourselves a question. Why would the CEO of a company like Safeway spend so much time on this important issue? How would they benefit? Why would they benefit from doing this kind of a program and wanting us to enact something like this for the rest of the country that would encourage larger rewards?

I asked that question to Steve Burd. His answer was that it surprised him that his company was able to save so much money and change so many people’s behavior based on these financial rewards and knowing that they did this to save their company because health care costs were going to destroy their company. So he wanted to share his company’s story with the rest of the country. He is doing this basically as an American. By the way, I hope Steve Burd does not mind me sharing this story, but his wife is a Type I diabetic. She has never been to the hospital because she really takes care of herself and manages her diabetes.

We are not penalizing somebody like that. Most of Steve Burd’s relatives died in their 40s due to heart disease. That is a genetic problem due to heart disease. That is a genetic problem that he has. Steve Burd takes personal responsibility for his own health by making sure
that he eats right, exercises, and takes care of himself.

We have all seen Steve, he is in great health.

So Steve wants to change the culture as far as health is concerned at Safeway, but he also wants to share his story and encourage other companies and other individuals in the rest of the country because he saw what was happening at Safeway with their health care costs skyrocketing. He has seen the results that they have had.

Let me emphasize a couple of other points. The HELP Committee language, as Senator Enzi described, was bipartisan and unanimous. The HELP Committee language is basically what we are trying to do here. We do not take the HIPAA threshold to 50 percent right away. We take it to 30 percent and then it is at the discretion of the Secretaries to take it to 50 percent if they think it is appropriate.

Lastly, we do not penalize somebody for a health condition. This cannot be emphasized enough. We do not penalize individuals for their health status. We do not penalize somebody for having high cholesterol. We reward them for keeping their cholesterol under control.

By the way, if it is medically unadvisable for them to do any of these things, we protect them in the legal language of the amendment. The language indicates that
if it is unreasonably difficult or medically inadvisable for a person to satisfy the particular health goal because of a medical condition, then that person must be offered a reasonable alternative or a waiver.

So Mr. Chairman, I think we have put the needed protections into the amendment. If we really care about wellness and encouraging and incentivizing healthy behaviors, then we will adopt this amendment in a bipartisan fashion. If we really do mean that we want to do a bipartisan bill, there is no better way to at least adopt a few bipartisan amendments. Thank you, Mr. Chairman.

Senator Carper. Mr. Chairman?

The Chairman. I might say I agree with the concept and I am going to vote for it. I think it has, it needs a little cleaning up frankly and a little of the cleaning up a little later. But I intend to vote for it. Senator Carper?

Senator Carper. First of all, I want to say thank you. Senator Ensign kind of preaches to the choir because probably nobody is more fit here than I suspect you are. You are a guy who runs 50 mile races and that sort of thing. So we understand that you and others in our colleagues know the value of fitness.

When people say to me, we -- encourage Senator
Carper that what you are doing in this bill will actually bend the cost curve? I believe there is a number of things that are in the bill that actually do significantly help to bend the cost curve, to reign in the growth of the health care costs.

There are a couple of things that are not really in the bill that I find encouraging as well. One of those grows out of a conversation that I had at the Cleveland Clinic about three weeks ago when I said to the folks at Cleveland Clinic, I said, you know, when people are graduating from medical school these days and trying to decide what kind of practice to go into, an individual practice or small group practice or maybe practice with the Cleveland Clinic or Gisinger or May Clinic. How do those young docs do it? Where do they want to end up?

I was very encouraged by their response. They said you know, they want to practice in a practice like this. They do not want to have to worry about the insurance forms, they do not want to have to worry about putting up with Medicare and Medicaid, they do not want to have to worry about the malpractice. They want to be in a practice like this.

The other thing that I find encouraging about bending the cost curve is frankly the stuff that is going on is not just at Safeway, it is not just at Pitney
Bowes, it is not just at Johnson and Johnson. It is not just at Delta. There are a bunch of employers, private sector employers who are doing smart things to incentivize their employees to take better care of themselves, to help them live longer and healthier lives but also to help reduce health care costs of those employers.

I am very much encouraged by what I see and I want to encourage more than that. One minute and I am done. Think about the number of times that we have had people say to us, I know I should stop smoking. I have tried to do it before but I always go back. I know I should stick to my diet, I just cannot stick to my diet. I know I should do that but I just keep -- I have a gym membership. I stopped going. I know I should. I know I should walk.

I know I should do all those things, but they do not do it. We want to make sure that they have a good financial incentive, an economic incentive. Not only should you start those things, but you should stick to them. I am convinced that we have the ability here to make sure that that happens.

The Chairman. The clerk will call the role.

The Clerk. Mr. Rockefeller?

The Chairman. No by proxy.
The Clerk. Mr. Conrad?
Senator Conrad. Aye.
The Clerk. Mr. Bingaman?
Senator Bingaman. Aye.
The Clerk. Mr. Kerry?
Senator Kerry. Aye.
The Clerk. Mrs. Lincoln?
Senator Lincoln. Aye.
The Clerk. Mr. Wyden?
The Chairman. Pass.
The Clerk. Mr. Schumer?
The Chairman. No by proxy.
The Clerk. Ms. Stabenow?
Senator Stabenow. Aye.
The Clerk. Ms. Cantwell?
Senator Cantwell. Aye.
The Clerk. Mr. Nelson?
Senator Nelson. No.
The Clerk. Mr. Menendez?
The Chairman. Pass.
The Clerk. Mr. Carper?
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
1 Senator Hatch. Aye.
2 The Clerk. Ms. Snowe?
3 Senator Snowe. Aye.
4 The Clerk. Mr. Kyl?
5 Senator Kyl. Aye.
6 The Clerk. Mr. Bunning?
7 Senator Bunning. Aye.
8 The Clerk. Mr. Crapo?
9 Senator Crapo. Aye.
10 The Clerk. Mr. Roberts?
12 The Clerk. Mr. Ensign?
13 Senator Ensign. Aye.
14 The Clerk. Mr. Enzi?
15 Senator Enzi. Aye.
16 The Clerk. Mr. Cornyn?
17 Senator Cornyn. Aye.
18 The Clerk. Mr. Chairman?
19 The Chairman. Aye.
20 The Clerk. Mr. Conrad?
22 The Chairman. Senator Menendez is no by proxy.
23 The Clerk. Mr. Wyden?
25 The Clerk. Mr. Chairman, the final tally is 18
ayes, four nays and one pass.

The Chairman. The amendment carries.

Senator Kyl. Mr. Chairman? May I just take one moment to thank both Senator Carper and Senator Ensign for their leadership on this. I did not dare speak up for it during the debate. It did not want to jeopardize its passage. But I do compliment you.

Senator Conrad. Mr. Chairman, can I change my vote?

Senator Kyl. It is a testament to a lot of hard work. I know I do not know for sure about Senator Carper, but I know Senator Ensign has been working on this a long, long time and I really appreciate his leadership on this.

The Chairman. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman. I do have an amendment. This is a modified Amendment D6 that would ask, would direct the Secretary of Health and Human Services to convene a working group of experts in emergency care, in-patient crucial care, hospital operations, to focus on issues around emergency room care.

Mr. Chairman, I have raised what seems like a long time ago, I think last week concerns about what is happening in our emergency rooms and the fact that our
emergency room doctors are in fact in many cases our primary care doctors right now. I would like very much to see us address that as it relates to payment incentives for emergency room physicians.

This amendment does not do that, but it does do something else which is very important which is to focus on what we know to be critical issues about patient access and it would set up a working group to recommend guidelines to ensure patient access to emergency rooms.

In fact, the Chairman commissioned a GAO report that was released in June that found that patients in need of immediate care, someone that needed care between one minute and 14 minutes actually waited twice as long as that, up to 28 minutes and 75 percent of the time people had to wait longer than the recommended time for emergency room care.

The report cited a lack of in-patient beds as the largest contributor to overcrowded emergency rooms, inadequate access to primary care was also a contributing factor. So it is important that we look at and develop recommendations, how to address overcrowding, what is called boarding, that threatens to overwhelm our emergency rooms.

We know in the long run that what we are doing here will affect emergency rooms so that fewer people are
using emergency rooms for primary care doctors, but it is
going to be a few years before we see a change in that.
In Massachusetts, they found that in fact just focusing
on insurance alone did not resolve the problems related
to emergency rooms, they needed to focus on what should
be done in terms of various guidelines and procedures.

So this simply sets up a working group. There is no
cost, Mr. Chairman.

The Chairman. I am prepared to accept the
amendment.

Senator Stabenow. Thank you.

The Chairman. Without objection, it is agreed to.

Senator Cornyn. Mr. Chairman?

The Chairman. Senator Cornyn first sought
recognition.

Senator Cornyn. Mr. Chairman, I would like to call
up Amendment C22.

The Chairman. C22.

Senator Cornyn. Mr. Chairman, there has been a lot
of discussion about personal responsibility on the part
of individuals to see that they are covered and we have
heard of course from Senator Carper and Senator Ensign
about the importance of personal responsibility and
taking care of yourself and hopefully reducing the costly
impact of chronic diseases and the like.
This amendment makes sure that this principle of personal responsibility applies to every American including those who are on Medicaid. I have shamelessly borrowed from West Virginia provisions which have been implemented a few years ago for its Medicaid population.

All it did was ask these beneficiaries to receive public dollars to do things that will keep them healthy. It reads as follows. Number one, I will do my best to stay healthy. Number two, I will show up on time when I have appointments. This is particularly one reason why I have heard from doctors in Texas why they will not take Medicaid patients because Medicaid patients do not show up on time or when their appointments are scheduled. So this seems like a logical one.

I will use the emergency room only for emergencies. This as we know is a huge issue. It is the least efficient, most costly means of delivering care. If we can find ways to encourage Medicaid beneficiaries to seek clinical care and stay out of the emergency room where possible, that seems like a good thing.

Finally the last two says I have a right to decide things about my health care and the health care of my children. Last, I will be treated fairly and with respect.

So I think the promotion of this principle of
personal responsibility hopefully is non-controversial, something we can agree on and I ask my colleagues for their support.

The Chairman. Is there discussion? Senator Rockefeller? Senator Rockefeller has the floor. I just recognized Senator Rockefeller.

Senator Hatch. Okay.

The Chairman. Senator Rockefeller deferred. If you have a question, Senator. Senator Hatch recognized.

Senator Hatch. Yes, I just have a question.

Earlier in the day, I believe it was you who brought up that the CBO just recognized that it had an $11 billion error in its scoring. It was not their fault but it was clearly something that had to be rechecked and they rechecked it and it turned out to be a total of $11 billion.

It seems to me and the reason I raise it is because you are bringing up the amendment and I would just like to ask you a question or two about it.

It seems to me that that is one reason why we really should go back to the burning amendment of not only having the language in the bill ultimately but really make sure we are right on the scoring. That is one reason why I think maybe, you know, it does not seem like we are rushing this, but we are rushing this if we don to
have the scoring on these matters.

Who knows how much other scoring is going to be off. I just wanted to know of you feel that is really a very important issue.

Senator Cornyn. Well, yes, certainly. We have seen a number of mistakes on scoring because of the problems that, as Dr. Elmendorf said that they believe going at maximum safe speed we have seen an erroneous score initially on my SGR amendment to do the doc fix. It was initially scored at $10 billion more than it ultimately ended up being scored. This other one involving the agreement of the American Hospital Association for a certain price to be excluded from provisions of the Med Pack on steroids provision where essentially that entity would not be able to make cuts that it deems necessary because of this deal.

So yes, I am concerned about it and I agree with you that the Bunning amendment could have gone a long way to help us fix it.

Senator Hatch. Well, what I am concerned about it is I think members of the committee need to know whether or not this new analysis will have a negative impact on long-term spending reductions that I suspect it will.

Also there is a $100 million mistake on the stamina amendment that was brought up earlier, too. So I think,
Mr. Chairman, the reason I raise this is because I know there is a desire to get through this and get over it. No one has that desire more than I do.

But I just wonder, we are not pushing this to the point where we are not getting what we ought to get. I guess we have to finish this process before the CBO can literally do the scoring for the whole process. I hope that once we are finished in this mark up, that the committee will allow the CBO enough time to really score this doggone thing before it comes up in committee.

We need to know what we are voting on. We need to know what the costs are. Frankly I am really concerned about it. I have been thinking about this all day. I think CBO has been under tremendous pressure by all of us.

I think they do a great job. I have a lot of confidence in Mr. Elmendorf and he is never afraid to tell us when they think they have not quite got it right.

This morning was almost more than I thought could happen during this process. So I am hoping, Mr. Chairman, that once we get through this conceptual mark up, that we will have time to give the CBO enough time to really look at what we have done and tell us what the final economics of the matter really are going to be.

I do not think we are doing what is right for the
population at large and I do not think that we are doing what is right for ourselves if we do not get that kind of information.

So I wanted to just bring it up while Senator Cornyn was doing his amendment because he raised it this morning. I thought it was a very, very important thing. I said the stamina, the mistake that was made on that was $100 million. It is actually $600. These are not inconsequential things. I am just very, very concerned about it and I wonder if my colleagues are as well.

The Chairman. Senator, we discussed this many times. Let me say as I have said many times and in particularly conversations with the Senator of North Dakota several times that it is my intention that we will get a score on this bill before we finally vote on it.

It may take a few days once we finally wrap up what we agree to here, the majority agree to and then send that to CBO. It might take a few days to get the score for a final vote, but that is my intention to make sure we get a score before we have the final vote. Senator Cornyn?

Senator Kyl. Mr. Chairman, might I ask you a question just on that?

The Chairman. Sure.

Senator Kyl. You are aware of the new stories on
this and I am just wondering. Do you think that there is any additional legislative amending or change in your mark that needs to be done to effectuate the policy that you intended? If not, would the CBO simply, what assumption would the CBO be using with respect to this so-called carve out so that they could take into effect what it is that the authors of the mark intended.

The Chairman. CBO will score the bill as they read it, and they will use their objective, neutral, unbiased, fair, and balanced analysis. They will read the language and use their fair and balanced--

Senator Kyl. And it would be your view that there is not anything necessary--

The Chairman. That is my--

Senator Kyl. --by way of amendment to further clarify--

The Chairman. That is correct. That is right.

Senator Kyl. --anything that has been raised.

The Chairman. Because, otherwise, you go back and we could--somebody could find some ambiguity someplace, and we have to do the bill over again. So I think it is wise to let CBO work with what they have.

Senator Hatch. Will it be done on the conceptual bill, or will it be done on the final draft?

The Chairman. Well, it is going to be conceptual
first, and then we will have to cross that next bridge when we get there. As I recall, Dr. Elmendorf at one point said here—we can get the record to confirm it—that it will take him 2 weeks to score legislative language. And I do not know if we have 2 weeks to wait around.

We will give him time, several days, to score this bill, as we customarily have in the past, although I might say that we are going to give him more time and sufficient time to score the—do his preliminary analysis, and my guess is the scoring based on statutory language might not be that different. But let us be honest here, let us be open about all this. We have to merge the two bills, too, and I think we will be working on the score while we are merging the bills. But we will have a vote after CBO scores the modified mark as amended. As I said, we have 3 days, probably about 3 days. My guess is about 3 days. Then after the 3 days, we will then have a vote on the bill, once we know the scoring.

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe?

Senator Snowe. Mr. Chairman, based on the story this morning, the CQ, about this hospital carve-out, is it clear or not clear? I mean, why was there a question
by CBO with respect to that?

The Chairman. I do not know. You would have to ask CBO that question. I do not know.

Senator Snowe. But was it clear from our standpoint? I mean, it is in the language? I mean, what--has CBO communicated with the Committee on that question? I mean, I think that is what is important here because--

The Chairman. Not to my knowledge. Not to my knowledge.

Senator Snowe. They did not?

The Chairman. Not to my--

Senator Snowe. Is there a carve-out or not, specifically, in the legislation? I mean, I think it is just a good example and illustrative of the problems that we could potentially face. And I remember, you know, this summer between Joint Tax and CBO, we had errors or miscalculations or underestimations of more than $70 billion. So I just think it is important that we learn from this experience in these specific instances.

The Chairman. Let me have Ms. Eisinger address that question.

Ms. Eisinger. On this issue, I think there was ultimately a bit of confusion, which we realized after the mark was released, which is we had talked to CBO
during the day about how to handle this issue, and we were going back and forth on it. Ultimately, we made the decision to include language which essentially does result in a carve-out, which we can talk about that if need be. But I think CBO was left with the impression from our conversations that that maybe was not the case even though the paper that we sent them did clearly indicate it. And so much after the fact we realized that maybe their score did or did not reflect it, and from their perspective they are still looking at it.

The Chairman. Let me say my objective is Senators-

- Senator Snowe. I mean, there has got to be clarity in these policies.

The Chairman. That is my intention. I was going to say, we will work with CBO to achieve that clarity.

Senator Snowe. Then will we have the opportunity as a Committee to respond to some of these issues before the final vote? Because that is the other question.

The Chairman. Yes.

Senator Hatch. Well, Mr. Chairman, I have no doubt you are going to be fair about this, and as far as I am concerned, you have been totally fair on this process, and I personally appreciate it. But this is one-sixth of the American economy. If we do not get it right, then I
cannot tell you the repercussions and problems we are going to have in the future--not we as legislators, although that would be bad enough, but that the country is going to have.

So, you know, I do not see any reason to overly rush this, and I agree you have got to--I guess you have to meld it somehow or other with the HELP bill. I sure hope that is not the bill that we are going to base this on in any real sense, having lived through that markup as well.

But I think it is really important that we give CBO enough time to really be able to tell us what is going on here, and hopefully in a confident manner, so that, you know, we do not have to keep coming back to it and revisiting it again and again.

This is an important issue, and I think had we agreed to the Bunning amendment, we would be a lot farther down the line, and we would have a lot more confidence in what is going on here. And I know you intend to do a good job here, but I do not see how you could expect CBO in one-sixth of the American economy, with all of the language we have that we have had to discuss back and forth, and we are just hardly denting even the conceptual language that you have brought here.

We are giving them almost an impossible job if you say you are just going to give them a few days to be able to
come up with some sort of an answer before we vote in Committee.

Senator Conrad. Mr. Chairman?

Senator Hatch. I am sorry. Go ahead.

The Chairman. No, no. I will wait until you finish, Senator.

Senator Hatch. All right. Well, I--

The Chairman. Are you finished?

Senator Hatch. Not yet.

The Chairman. Well, I will wait until you finish.

Senator Hatch. I will just take another couple of sentences.

Look, I think CBO has a very, very difficult job. I do not think we have been all that helpful to CBO with some of the things that we voted upon here, both positively and negatively. I have a desire to help them to be able to have every ability they can exercise to get this job done right.

The way I have interpreted what you have said is we will finish the conceptual markup; they will then score that in a certain number of days; and then because of the HELP Committee bill, there will be some work to try and resolve the conflicts between the two bills. And then hopefully they will come up with the final legislative language, which CBO says will take them at least 2 weeks
to--it would be 2 weeks to do this conceptual language. It may take them 2 weeks or longer to do the final statutory language.

So I just want to make sure I understand this process, because I am very concerned about it. I think we are--we can hardly say we are rushing this, but I think we can be too concerned about not giving enough time.

The Chairman. Wait until Senator Hatch is finished.

Senator Hatch. I am finished.

The Chairman. Okay. Actually, Senator, that is not what I said. I said that when we finished the bill, we will then give the bill to CBO.

Senator Hatch. Right.

The Chairman. And then CBO--


The Chairman. Conceptual, preliminary--the conceptual bill to CBO.

Senator Hatch. Right.

The Chairman. Which this Committee has done for more years than anybody--

Senator Hatch. I am not griping about that.

The Chairman. And I might add, too, this is the longest markup in 15 years. We will then give the
language to CBO. CBO has told me that they need about 3
days. Then they will give us their preliminary score.
We then vote on the bill.

Now, it may be that the preliminary score is out of
balance, that it is not deficit neutral over 10 years, as
is required by the budget resolution. If that is the
case, then we are going to have to modify it. We will
need a modifying amendment.

To be honest with you, I am not quite certain how
long it will take CBO then to score that. My assumption
is and my hope is that when they tell us we are out of
balance, if we are out of balance--I am doing my best to
make sure we are not in the first place. But if we are
out of balance, my hope is they could tell us not only
that we are, but how and why so that could be remedied
very quickly. They then give us a ruling that we are
deficit neutral.

Then we have to merge the bills afterwards, after we
vote. I want to vote on this bill first before there is
any merger, if you will. But in talking to the Leader,
he would like to move this bill after we get a score.
And I talked to him about that just a few hours ago; that
is, he fully expects us to vote after we get the score
from CBO--not before, but after.

Senator Hatch. Sure.
The Chairman. He, therefore, expects us to vote on this bill sometime next week. Then he begins the process of merging the bills together with the HELP Committee, and to be honest with you, I do not quite know what he has in mind. I do know that he has been talking to CBO, and has for some time, to work on a HELP score and also to try to work with the two committees to get a score on the bill before it is brought up on the floor of the Senate.

It is my view that we need to have a ruling by the CBO before we vote on the Finance Committee bill. It is also my view that we need a CBO ruling before we go to the floor on the merged bill.

That is all I can say at this point. To be candid, I think--you may not like this, but I just do not think we can wait around 2 weeks for a score on legislative language, because if there is a problem later on, we can always amend it, fix it, and one thing or another. But I do not expect with the legislative language the score will be that different than the preliminary score.

I want to also say on a more narrow issue, Senator, that we will work with CBO on the so-called MedPAC provision to get the scoring savings that we hope to get with that provision. If it turns out that CBO says, sorry, we do not get the scores that we want, then we may
have to come back with an amendment to try to get the
score that we want to get—that is, the savings that we
want to get in that amendment. But we are somewhat in
the hands of CBO at this point, and we are going to just
do our very best, totally open, totally transparent in
dealing with CBO.

Senator Bunning. Mr. Chairman?

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. Mr. Chairman, I have served on
this Committee a lot of years and on the Budget Committee
for my entire time in the Senate, and I know there is a
concern. I have talked to some colleagues on both sides
of the aisle about what happens if there is a discrepancy
between the bill as written in plain English, which is
the way this Committee considers legislation, and the
legislative language, which is to follow. And I was in
conversations with CBO, as was the Chairman, in which
they said—and I think they said here they would need 2
or 3 days once we are done here to provide us a score.
That would be before they take the legislative language
and prepare another score.

And the concern that I have picked up from a number
of colleagues is: What if there is a discrepancy between
the bill as written in plain English so all of us can
understand it and our constituents can understand it when it is on the website, and the legislative language? And my experience has been—and I would ask the Chairman if it is not his intention—that if there is a discrepancy between the score on the bill written in plain English, which is what we would vote on, and the score provided by CBO, and a subsequent score based on the legislative language, that if there is a discrepancy, my experience has always been on this Committee that the Chairman addresses that in a manager's amendment to recapture the intention of the Committee when they pass the bill.

Is that the Chairman's experience and intention?

The Chairman. Absolutely. And, in fact, it is almost amazing to me how well that has worked and in good faith. It has always been there. Every Chairman that I have served under has done that. Republican or Democrat, it makes no difference, because we have operated basically on a bipartisan basis in our Committee, and in good faith and just trust each other. That is exactly right, Senator. Exactly right. It has always worked seamlessly. There has never been—and if there is a little discrepancy, we talk to Senators and work it out. I have never seen anything come close to being characterized as heavy-handed or as deceitful or a sleight of hand. Nothing ever. It is always transparent
and good faith, and that is what I would intend to do.

Senator Hatch. And, Mr. Chairman, if I could just answer that--

The Chairman. I want to call on somebody else first--

Senator Hatch. I just want to praise you.

The Chairman. Sorry?

Senator Hatch. Could I praise you for a minute? I just want to say something nice about you. I do not think anybody would doubt that you will act in total good faith.

The Chairman. I am waiting for the "but."

Senator Hatch. No, there is not a "but" here.

But-

[Laughter.]

Senator Hatch. I have no doubt about your good faith, but the fact of the matter is that there will be a subsequent bill where you work with the HELP Committee.

The Chairman. Yes.

Senator Hatch. Which is an entirely different matter. They do not do it this way. They do it only on, as I recall, when I was Chairman, a full-scored, legislative language way. And so you can see why I am concerned about the process here, how we handled this. I do not think anybody doubts that you would handle this in

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a very good-faith manner, and certainly I do not. But I wanted to raise these procedural issues because they are tough issues, and will we be given, will the general public and everybody be given at least 3 days on the Internet to read it and look at it and see if there are any mistakes that we can come up with?

The Chairman. Well, as I said, when the CBO gives a score, then we have an opportunity to vote. And we will not vote--

Senator Bunning. Mr. Chairman?

The Chairman. My intention is we do not vote on the bill until we have that CBO score.

Senator Hatch. And we have some time to look at it, too.

The Chairman. Senator Bunning.

Senator Bunning. Thank you. I just want to bring to the Chairman's attention that the HELP bill, the H-E-L-P bill--and I went down and talked with the Ranking Member--passed the Committee on July 15th with three titles not in legislative language and no score.

The bill was sent to the floor of the U.S. Senate on September 17th with legislative language and still no full score. So they never got a final score prior to voting on the bill.

I just want to make sure that this Committee does
not try to do that, and then after its final passage the
merger of the two bills—we cannot have one conceptual
and one in legislative language to get a final score on a
merged bill. So what is the Chairman's intention at that
time?

The Chairman. Well, first of all, we can only
control what we can control. There are certain matters
we cannot control. What can we control a little better?
Well, we can control to some degree—and hopefully
entirely—our Committee. It is difficult to control
other committees. And we will do our very best, as I
have said, to get the score—we will get a score from
CBO. We are not going to vote on the final bill until we
get that score from CBO.

Then the next step, as you said, is to merge this
bill with the HELP Committee bill. That is more up to
the Leader. I do not know what the Leader's plans are.
I do not know what his intentions are. I do suspect that
he wants to move without too much delay, and I think he
would like to get this bill on the floor after a couple
three weeks.

Senator Bunning. Could you give us some assurance
that we are at least going to see a final merged bill
before we vote on it?

The Chairman. I cannot give total assurance, but
that would be my strong intention and that would be my
wish.

Senator Bunning. With a score?
The Chairman. Yes.

Senator Bunning. Thank you very much.

Senator Snowe. Mr. Chairman?
The Chairman. Senator Snowe.

Senator Snowe. A quick question. Will we have
sufficient time to review the mark after it has been
scored?
The Chairman. You will certainly have time to
review the mark while CBO is reviewing the mark, because
it will take them several days--

Senator Snowe. No, but when we get the score, to
review it from that standpoint?
The Chairman. We are going to have to cross that
bridge when we get there.

Senator Snowe. I mean, I hope we do not get it at
9 o'clock and we are voting at 10:00.
The Chairman. No, no, no.

Senator Snowe. Okay, or midnight and the next
morning at 9:00.
The Chairman. That would not be--

Senator Snowe. That is the point.
The Chairman. That would not be in good faith.
Senator Snowe.  Okay. Thank you.

The Chairman.  You bet.

Senator Crapo.  Mr. Chairman?

The Chairman.  Senator Crapo.

Senator Crapo.  I think you have answered the question I was going to ask, but I want to be clear on my understanding. I was going to ask in the process that you described whether we would have bill language at the time the HELP bill and the Finance bill are merged. And I understood you to answer that question by saying that you would expect that that should be the way we should do it, but that you could not control it.

The Chairman.  That is right. I cannot control the HELP Committee. I cannot control what the Leader wants to do.

Senator Grassley.  It seems to me, though, to be Chairman of the Finance Committee, if we work for a year and probably 3 weeks in this Committee to vote a bill out, that we ought to be able to see the product that we have produced. If you are telling me that we might not see statutory legal language as a product, then I think what are we wasting our time here for.

So we ought to have two products, one from the HELP Committee, one from this Committee, and then at that point somebody in the Senate above us decides how it is
going to be done?

Senator Conrad. Mr. Chairman?

Senator Crapo. Mr. Chairman, I had--

The Chairman. Senator Conrad?

Senator Crapo. Mr. Chairman, I had not completed my remarks.

The Chairman. I recognize Senator Conrad. Senator Conrad is recognized.

Senator Conrad. I would defer to Senator Crapo if you have not completed your thought.

Senator Crapo. Well, thank you, Mr. Chairman. I had not concluded my thought.

My point was that from the answer that you gave, it sounded to me like there was the possibility that we could yet again after this Committee had concluded its work be facing a circumstance when, after the two bills were merged, that we have been merging a conceptual bill with a statutory language bill, and we would still not have an opportunity for the public and for the Members of the Senate at that point to be able to observe and vet legislative language.

And I just wanted to say, just to make a point, that the circumstance that came up today with regard to the CBO's score on the MedPAC language is an example of the concern, namely this: Apparently the conceptual language
led CBO to believe that the hospital deal was not
included, but the hospital deal was supposed to be
included. And when CBO figured that out from the
conceptual language, they indicated that they had a $10
billion mistake.

My only point is to say that that is an example of
what many of us are concerned about happening, and that
is one of the reasons why we would like to get some kind
of certainty with regard to when there will be statutory
language for the Senate to consider.

The Chairman. Okay. Let us--are you finished?
Let us go t the amendment. Before we go to the
amendment, let me just say this: I intend to operate
totally in good faith, all the way around. And to be
honest with you, I do not know if we can wait 2 weeks for
the legislative language. And, frankly, it might take
longer given the experience with CBO.

But we will operate in total good faith--that is, we
will get the CBO score after we complete our business
here. We will look at the score, and in good faith there
will be time to look at the score. We will operate in
good faith, and protecting this Committee's prerogatives
and rights, and when we get to the floor and merge with
the HELP Committee bill, and do all I can to make sure
that it is a score on the merged bill, and just in good
faith so that people have an opportunity to see what is
in the product and what is not in the product.

We are a democracy. We are an imperfect
institution. We try our best. We work hard. The real
glue here, the real way to make this work is good faith.

If we all operate in good faith, both sides--both sides--
-if we operate in good faith, then we are going to
accomplish our objective here, and we will be doing our
business, and Senators can vote any way the Senators wish
to vote at different stages along the way.

All I am saying is I will do my very best to operate
in good faith and to give Senators an opportunity to
review the score--the bill and review scores.

Let us get back to business here.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. Mr. Chairman, isn't it the case
that when there is a merged bill that comes to the floor,
by definition that will have to be in legislative
language?

The Chairman. That is correct.

Senator Conrad. So what we have is what we have
always had. It is a little--maybe it is because other
members have not been in chairmanships or not gone
through the hoops here, but the path here is one well
traveled. This is not something new. The pattern is very clear. You have the bill that is reported here that is in plain English. That is scored by CBO. The Chairman has said very clearly we will not vote until there is a score. Then the plain English is translated into legislative language. That will be several weeks before CBO has a score on that.

By definition, the bill that goes to the floor that is a merged bill between the two committees of jurisdiction has to be in legislative language. Has to be. And so that will be the bill for all to see, for all to read, for all to evaluate. And that will be scores. That will be scored.

The Chairman. Okay.

Senator Roberts. Mr. Chairman, could I just have a short question?

The Chairman. Senator Roberts.

Senator Roberts. My concern--it is like "Cool Hand Luke." We have a failure to communicate. My concern is, obviously, in reconciling the scoring and we have the legislative language and all that has been talked about by my colleagues. But what I do not get--and I guess I just did not get it until I read the press articles about this. Here we have the assertion that the American Hospital Association made a deal--if that is the way to
put it—or at least agreed to $150 billion worth of cuts. And then made an additional deal or a carve-out with somebody and said, But we are not going to take any additional cuts—I do not know whether that is the first year after this or next year. I do not know how this figure was reached, i.e., $11 billion separate that would be recommended by the Medicare Commission that Senator Rockefeller spoke so strongly for that would be immune to this kind of a deal. And it would mean that the Medicare Commission has already succumbed to the hospital lobby saying, Look, we gave $150 billion up front, we are not going to give any more to the tune of $11 billion, and that that is really responsible for the carve-out deficiency. And if that is the case, it speaks to what Senator Rockefeller was trying to do. And it speaks to the fact that deals can still be made because, obviously, if it is the AHA or if it is big PhRMA, or if it is anybody else, they can come here and lobby, and still, despite Senator Rockefeller's efforts with the Medicare Commission, bypass that.

And I would like to know if that, in fact, is correct and who is responsible for the carve-out for $11 billion.

The Chairman. Okay. Let us go to the amendment.

Is there further debate on the Cornyn amendment?
Senator Rockefeller. Yes.

The Chairman. Senator Cornyn.

Senator Rockefeller. I have been patiently been waiting since holding--

Senator Cornyn. I think Senator Rockefeller--

The Chairman. Senator Rockefeller.

Senator Rockefeller. Yes, that is me. --holding West Virginia up as an example. I think that is unfortunate. Our Governor is a Democrat. I happen to disagree with him on his approach to a State that both he and I know very, very well. We are not a rich State. We have a lot of people that do not have automobiles, do not have doctors, do not have insurance, do not know where they can get health care. If they want to go to the emergency room, they have no idea where the emergency room is or, in fact, how they could get there, having no transportation.

So the concept of the personal responsibility agreement to me has always--and, you know, our Governor, whom I respect and like and agree with on most things. But he applied for the first Medicaid waiver. I never did like that program. I never did like that program because it allows Governors to cut Medicaid and in my case, particularly, to cut the Children's Health Insurance Program, which is exactly what happened in West
Virginia when he took this "personal responsibility, you have got to sign the pledge" rule.

I think it is condescending. I think it is Government doing what I think I have been hearing all of you folks say that you do not think Government should be doing: telling people what they have to do in order to get health care services.

I happen to agree with the concept of personal responsibility. It is just a whole lot easier for people that have had education, have had experience, and have means, et cetera, to exercise that. But the whole concept of doing this, Senator Cornyn--I admire you greatly--would require all Medicaid beneficiaries to sign a member agreement. That is not a country club. That is a personal responsibility club, similar to the one used by the West Virginia Medicaid program, and that one was a disaster. It was a disaster.

I was the Governor there for 8 years. It was a disaster. And it would have worked with part, but it would not have worked with most of the Medicaid community, because as you have in East Texas, we have all over West Virginia--people who are not capable of knowing how to make decisions, even though preventive care, wellness is such a high order of business, and we all know that.
But I have to recognize that these are human beings, and I have to recognize the people factor. Yes, it would work for some. But, no, it would not work for a lot. And it would backfire, and, in fact, it has backfired under the Medicaid waiver where they had to do that, that the Senator from Texas refers to. Medicaid has been cut, and the number of children under the Children's Health Insurance Program has dropped greatly.

So I would oppose the amendment.

The Chairman. Okay, let us close the amendment.

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman.

Senator Bingaman. Mr. Chairman, let me agree with Senator Rockefeller in opposing the amendment. It seems to me we have heard speech after speech here for the last 6 or 8 days about how we were not being fair to Medicaid recipients and that we were allowing Medicaid to be a second-class health care system and that physicians would not take Medicaid patients and that we ought to increase reimbursement in Medicaid and on and on.

To me, this amendment drives home the point that we think Medicaid is a second-class medical system. And it is demeaning to the people who have to be presented with this so-called personal responsibility agreement. It is demeaning to require them to sign it. And I think it is
ironic that the last statement in it is, "I will be treated fairly and with respect." In my view, giving somebody this kind of agreement and saying you have got to sign this if you want to participate in Medicaid is not treating that person with respect. We would never think of doing that with veterans. We would never think of doing that with Medicare beneficiaries. We would never think of doing that with FEHBP participants. And there is no reason why we ought to be thinking about doing it with Medicaid.

The Chairman. Further discussion? Senator Cornyn.

Senator Cornyn. Mr. Chairman, if I could close.

Mr. Chairman, my friend, the Senator from West Virginia, seemed to suggest that Medicaid benefits would be contingent on signing the pledge. That is not what my amendment proposes, so under no circumstances would it affect somebody's right to receive Medicaid if they otherwise qualify.

Let me just read the words again because I have yet to understand what it is about this that people disagree with.

Number one, "I will do my best to stay healthy." I think that was what the Carper-Ensign amendment was about that was embraced by broad margins.

Number two, "I will show up on time for my
appointments." As I indicated, doctors in Texas have
told me one reason they do not take Medicaid is because
many Medicaid patients, because they do not pay anything,
they have no skin in the game, they do not show up for
appointments on time. So encouraging them to show up for
appointments on time so they can get the treatment that
they need seemed to be common sense.

And, third, we have talked about overutilization of
emergency rooms, and it says, "I will use the emergency
room only for emergencies." Bending the cost curve by
getting people treatment in a clinic or in a clinical
setting rather than the emergency room seemed to me to be
a salutary objective.

The last two, "I have a right to decide things about
my health care and health care of my children," and, "I
will be treated fairly and with respects," I just do not
see how that could possibly be demeaning. It is an
affirmation of the fact that have a right to decide about
their health care and we treat them fairly and with
respect.

I think if there is anything that has happened here
that sort of ensures the second-class status of Medicaid
beneficiaries, it has been the votes we have had which
have given them no choice, with limited access to doctors
because of low reimbursement rates, and the kind of
arguments we have been trying to make on this side, but
which have apparently fallen on deaf ears.

The Chairman. The clerk will call the roll.

The Chairman.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

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?

The Chairman. No by proxy.

The Chairman. No by proxy.
The Clerk. Mr. Carper?
The Clerk. Mr. Grassley?
Senator Hatch. Aye by proxy.
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. No.
The Clerk. Mr. Crapo?
Senator Crapo. No.
The Clerk. Mr. Roberts?
Senator Hatch. 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 will tally the vote.
The Clerk. Mr. Chairman, the final tally is 9
ayes, 14 nays.

The Chairman. The amendment is not agreed to.

Senator Cornyn, do you have another amendment?

Senator Cornyn. Mr. Chairman, I would like to call up amendment C30, hopefully with better prospects than my last amendment.

Mr. Chairman, as we have been discussing, the Medicaid program is not working today for taxpayers or beneficiaries of that program. And I believe, as the President said during his inaugural address, that we ought to ask the question not so much whether Government is too small or too big, but whether it works, and where it does not, to fix it.

The American people agree with that, according to an Insider Advantage poll from July that found that by a margin of 61-27, Americans believe the issues of fraud and waste in Medicaid and Medicare should be addressed prior to creating new Government-run programs. So let us look at the fraud in the Medicaid program.

In 2008, Medicaid's total costs were $332 billion. According to Health and Human Services, fraud, waste, and abuse in the Medicaid program equals 10.5 percent--10.5 percent--of Medicaid expenditures, or $32.7 billion. Medicaid has three times the fraud, waste, and abuse of Medicare. That is also three times the Federal agency
improper payment rate of 3.9 percent. So Federal agencies, on average, pay improperly at the rate of 3.9 percent, yet Medicaid pays wrongly in 10.5 percent of the cases.

The Government Accountability Office has determined that the Medicaid program is plagued with fraud and in 2009 labeled Medicaid a high-risk program.

A series published in the New York Times a few years ago revealed that New York's improper payment rate may be as high as 40 percent—40 percent. Those are dollars that should go to pay benefits to Medicaid beneficiaries, but 40 percent of them are lost to fraud, waste, and abuse.

In July 2009, the New York Times reported on six people charged with stealing more than $47 million in Medicaid in the last 10 years.

Also in July 2009, the New York Times reported that Federal officials had arrested 20 people who said they worked for a company that defrauded California Medicaid $4.6 million by sending untrained, unlicensed individuals to care for disabled children and adults. Although some of those arrested worked as nurses abroad, officials said none trained in the United States, and many had no health care experience at all.

And, unfortunately, even in the great State of
Texas, in Houston in August 2009, the Houston office of the FBI found that a doctor and his wife were accused of conspiracy to defraud Medicare and Medicaid and private health care providers of more than $31 million by falsely claiming to have administered facet joint injections and blocks to patients and routinely prescribing excessive amounts of hydrocodone.

The Associated Press recently reported that the New York Attorney General recovered $263 million from Medicaid fraud in 2008 alone. That is 263,000 in New York in the year 2008 alone. And these are just a few examples.

The most recent examples can be found in a GAO report called "Fraud and Abuse Related to Controlled Substances Identified in Selected States." This was delivered today. And it documents, for example, one Ohio physician who was convicted in 2006 for filing $60 million--$60 million--in fraudulent Medicaid, Medicare, and other insurance claims, and two patients who regularly saw him died under his care--one from a multi-drug overdose in the physician's office and one from an overdose of OxyContin taken on the same day that the prescription was written.

If we do not restore accountability now, Medicaid spending will grow by 7.9 percent per year, and by 2017,
it will explode to $673 billion. But GAO has repeatedly warned that entitlement spending will threaten America's international competitiveness and the Federal Government's long-term capacity to respond to national emergencies.

My amendment would simply say that before Congress expands the Medicaid program, we need to stop the hemorrhaging of taxpayer dollars to fraud, waste, and abuse—something we heard from President Obama during the joint session of Congress. The Federal agency average is 3.9 percent for improper payments, and my amendment would require that the Medicaid program achieve at least that level of integrity—I wish it were lower, but achieve at least that level of integrity before we expand it by billions of dollars. This is not unreasonable compared to the private sector's success in preventing fraud.

Let us look at the credit card industry, for example. The credit card industry is a model of fraud containment compared to Medicaid or any Federal agency. According to the Center for Health Transformation, the credit card industry processes more than $2 trillion in payments every year from 700 million credit cards being used at millions of vendors to buy countless products. Fraud in that industry is one-tenth of 1 percent— one-tenth of 1 percent—while fraud in Medicare and Medicaid
is about 100 times that.

Since the Medicaid expansions in the mark do not go into effect until 2014, 5 years from now, I think it is a reasonable requirement and consistent with the President's promise to hold accountable those who manage the public dollars. And, furthermore, it is a quest that Secretary Sebelius has already begun, working with Attorney General Holder. In May, Secretary Sebelius announced a new administration initiative to fight fraud. She said, "Today we are turning up the heat on perpetrators who steal from taxpayers and threaten the future of Medicare and Medicaid. Most providers are doing the right thing and providing care with integrity. But we cannot and we will not allow billions of dollars to be stolen from Medicare and Medicaid through waste, fraud, and serious abuse of the system."

Given Secretary Sebelius' intentions to be zealous about fighting fraud in the Medicaid program, I would hope that she would have no problem getting the Medicaid fraud in check by 2014.

So I hope my colleagues will support me in supporting this amendment. I know waste, fraud, and abuse are discussed by every administration and perhaps by every Member of Congress, but this gives us an opportunity to put some teeth in the requirement to at
least bring it down to the improper payment rate of Federal agencies generally of 3.9 percent and down from the 10.5 percent currently experienced.

The Chairman. Further discussion?

Senator Crapo. Could I ask Senator Cornyn a question, please?

The Chairman. Senator Crapo.

Senator Crapo. Senator Cornyn, could you just review for me the numbers you gave? What was the total level of waste, fraud, and abuse in the Medicaid system?

Senator Cornyn. It is 10.5 percent of every Medicaid dollar spent.

Senator Crapo. And do you have any numbers on that for--

Senator Cornyn. That is $32.7 billion.

Senator Crapo. Over 10 years? Or do you know?

Senator Cornyn. Per year. Per year.

Senator Crapo. So if you reduced it by about two-thirds, you would be reducing $20 billion--

Senator Cornyn. That would be $20 billion that we could either save for the taxpayers or deliver in terms of enhanced care, maybe reimbursement rates for Medicaid patients so they could--or for doctors who see Medicaid patients so they could actually get in to see a doctor.

Senator Crapo. And then just a last question.
What was the source? Was CBO the source of those numbers?

Senator Cornyn. That was Health and Human Services.

Senator Crapo. All right. Thank you.

The Chairman. Mr. Schwartz, could you just comment on the effect of this amendment?

Mr. Schwartz. Sure, I would be happy to, Mr. Chairman. So the measurement of error rates in Medicaid is relatively new. CMS within HHS has been doing it on the Medicare side much longer, on the fee-for-service Medicare side much longer. And so, Senator Cornyn, I have the same number you do, the 10.5 for fiscal year 2007 in Medicaid. It is actually roughly the same number for Medicare Advantage. I think it was 10.6 percent on the Medicare Advantage side because they also just implemented PERM. But the effect of the amendment would say that you have to bring down that 10.5 to, I think it is, 3.9 percent now, so it would--before the mandatory levels in the Chairman's mark for a Medicaid expansion can take effect. So the net effect is that people below 133 percent of poverty have to wait to get their health care until that magic number of 3.9 is reached.

The Chairman. Any further discussion of the amendment?
Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman.

Senator Bingaman. I think the point is fairly obvious that there is no justification for penalizing the Medicaid beneficiaries for the error problem or the failure to meet the 3.9--which I think is a fairly arbitrary number--the 3.9 percent PERM rate. We are talking about real people here who we are trying to give access to health care to, and that is a major thrust of this legislation, is to make it possible for a lot of people who do not have access to health care today to get access to health care. And I think it would be a major mistake for us to say that they will be held hostage to some kind of change in the bureaucratic PERM error rate or the implementation of the PERM error rate by folks in Washington, D.C., when they have no--the beneficiaries who we are hoping to assist to get the health care have no way of affecting that.

The Chairman. 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?

Senator Bingaman. No.
The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

The Chairman. Pass.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

The Chairman. No by proxy.

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. 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.   Mr. Conrad?
Senator Conrad.   No.
The Clerk.   Mr. Wyden?
Senator Wyden.   No.
The Chairman.   Senator Schumer is not here.
Senator Schumer is no by proxy. The clerk will tally.
The Clerk.   Mr. Chairman, the final tally is 10 ayes, 13 nays.
The Chairman.   The amendment fails.
Senator Enzi, I understand you have an amendment.
Senator Enzi. Yes, Mr. Chairman, I do. And I appreciate your calling on me. I guess for all the hours that you have put in on this bill, I know that there probably is not anybody that has put in more time on it than you have, unless it might be Senator Bingaman and I, who are on the HELP Committee.

The Chairman. I was going to say, I think you two Senators have put in more time.

Senator Enzi. We had to work a different Committee before we could join in that.

The Chairman. Right, exactly. Absolutely.

Senator Enzi. I appreciate what you have put together. Now, I did miss the hospital carve-out, and then in the manager's amendment, I noticed that there is a provision that caps the FSAs at $2,500, and it has got my name on it. I have always insisted on the old one, not the new one. And I did have an amendment in at $3,000, so if you could just drop my name from that, that would be okay.

The Chairman. You got it.

Senator Enzi. But what this amendment does is go to some of the germaneness debates that we have had. I have no problem at all with what I am striking. I appreciate Senator Bingaman's effort in working on this, but the Public Health Service Act is totally within the
jurisdiction of the HELP Committee, and in several instances, we have ruled non-germane because they were in the jurisdiction of other committees. And from a fairness standpoint, it seems to me like we have either got to look at those ones that we ruled non-germane before or we have got to rule this one non-germane. Even though it appears in the mark and I think it is an important amendment, but it does not come under our jurisdiction here. That is totally under the jurisdiction of the HELP Committee, and as the Ranking Member, I feel compelled to kind of preserve the jurisdiction of that Committee if we are preserving Committee jurisdictions.

So I think a vote for this amendment would be a vote for consistency and fairness. I do not know if we are doing that. I do not object to the substance of the provision. We have repeatedly seen during the markup that we have ruled things non-germane and kept them from being in here. So I just think that it ought to be applied fairly, and I hope the Chairman will support this amendment to ensure that the same jurisdictional rule gets applied equally to both sides.

Just as an example of some of the ones that were ruled non-germane was the Kyl C25, which limited non-economic damages, and Ensign C5--that one was Judiciary.
Then the Ensign C5 as modified, which was health savings accounts, and we ruled that that was Banking jurisdiction.

So I hope you would support the amendment, or my preference would be to revisit some of those.

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman.

Senator Bingaman. Mr. Chairman, I would strongly oppose the amendment that Senator Enzi is offering. The Chairman's modification consists of two parts with regard to these teaching health centers. The first part is start-up grants within the Public Health Service Act, and that is in the HELP Committee's jurisdiction. And the other part, which is in the Finance Committee's jurisdiction, is the new graduate medical education payment.

These two pieces were filed jointly to create a comprehensive package. The HELP portion was approved by the HELP Committee to be included in the modifications in the Chairman's mark, and that was checked before it was included.

Teaching health centers represent a new paradigm in health care training that is critically important to my State of New Mexico, to Senator Enzi's State of Wyoming, to other rural States represented on this Committee, as
well as to urban underserved areas.

Instead of primary care residents having to spend most of their time training at a hospital and then doing a rotation to a community health center, this program will allow just the reverse happen; that is, primary care residents will locate at a teaching health center and then rotate to a teaching hospital.

Workforce experts tell us that this paradigm shift is critical in getting primary care physicians to become invested in rural and other underserved communities and to remain there after their training is complete. The portion of the proposal that Senator Enzi's amendment would strike would remove the start-up funding that teaching health centers need to meet the standards required by the Accreditation Council for Graduate Medical Education. And they need that -- those standards are in the curriculum development and recruitment and training of residents and faculty development, in equipment and in health information technology. And once primary care residency programs are established in community health centers, the second half of the proposal provides a new graduate medical education funding source, will provide ongoing support to the program.

The proposal would add as many as a thousand physicians to the primary care workforce in 5 years. It
is strongly supported by the American College of Physicians, the American Academy of Family Physicians, Service Employees International Union, Society of General Internal Medicine, National AHEC Organization, and others. So I urge my colleagues to oppose the Enzi amendment.

Senator Enzi. Mr. Chairman?

The Chairman. Senator Enzi.

Senator Enzi. Again, I do not have any problem with the content. I now have a new problem because it was said that this was approved by the Committee. It had to be unilaterally approved by the Democrats on the Committee because this was never brought to me. So, you know, it was not a Committee decision because normally they would confer with me and see if that was okay, too. So I have a little problem with that, just like I do with them taking out the Safeway amendment after we had unanimously voted that through.

So those are things that I will have to clear up with the HELP Committee itself, but I, again, am just making the point that we said that we were not going to consider these other things because they were in other jurisdictions. These are some big money savers we could have put in this one, and we are refusing to do them because we say the Judiciary Committee and the Banking
Committee have jurisdiction in two important areas—the Judiciary one being the one where there is the most concern and the most opportunity for savings, and we are just not going to do anything with that. And neither will the Judiciary Committee. And I will not even go into the accusations for the reasons why that is happening.

But I think that those are things that we need to do if we are going to report out a bill that really reforms health care, and we are going to ignore them.

The Chairman. Well, frankly, I think it is a very good program. We have the approval of the HELP Committee, and based on that, I suggest we adopt it—no, we oppose the amendment. The clerk will call the roll.

Senator Enzi. So a vote for this, then, is a vote against the germaneness issue.

The Chairman. Well, Senator, as you well know, many times, in Committee and on the floor, when there is a question about jurisdiction of a committee, we check with the Chairman of the other Committee, and the Chairman says fine, and so we proceed. And that is what happened here.

Senator Enzi. Okay. So the—

The Chairman. I mean, that is standing procedure.

Senator Enzi. Thanks for conferring with me. I
was, you know, for countless hours--

The Chairman. I did not know that you--

Senator Enzi. It must have been an oversight on my part. Sorry.

The Chairman. I did not know that you were not conferred with. All I know is what I know, and we had the approval of the HELP Committee. That is all I know.

Senator Enzi. I will withdraw my amendment.

The Chairman. The amendment is withdrawn.

Senator Grassley. I think I am up next.

The Chairman. Senator Grassley, that is correct.

Senator Grassley. Okay. This would be amendment C11, and I thank Senator Snowe for working with me on this amendment. It is a modified combination of my original amendment and Senator Snowe's amendment C5. The mark has a mandatory expansion of the Medicaid program to 133 percent of Federal poverty. The mark recognizes that mandating the new coverage will not be easy on the States, so under the mark States will receive approximately a 90-percent Federal match for these newly eligible populations starting in 2014.

The mark also requires States to maintain existing income eligibility levels for all Medicaid populations upon enactment. This maintenance-of-effort provision would expire in 2014.
The goal is to preserve coverage in Medicaid until States are ready to expand. Right now, States are operating under a maintenance of effort that was enacted in the stimulus bill. The States have to maintain their existing populations as a condition of the billions and billions of dollars they received in additional assistance that they received in the stimulus bill. That assistance expires at the end of 2010.

So as of January 1, 2011, States have to maintain their Medicaid populations regardless of their economic situation for yet an additional 3 years. If this were to become law, it would mean that Congress has effectively raised the mandatory minimum coverage levels for 5 years, while only providing States additional resources for 2 years. On top of that, the mark increases State spending by $33 billion.

We went through this exercise during the stimulus debate. States simply do not have the resources to absorb additional spending that this bill demands. Somebody is going to have to pay for the bill.

States will have to either cut spending or raise taxes, so you can bring up all sorts of scenarios. Who will pay the $30 billion? Will it be the local school systems? Will it come from roads and bridges? Will it come from local law enforcement? Or maybe it will just
be passed on to the taxpayers?

    Well, my amendment recognizes this fiscal challenge facing these States. My amendment would strike the maintenance of effort for adult populations above 133 percent of poverty. States are required to maintain coverage today through the end of next year, and so they get additional assistance for doing so.

    States will be mandated to cover a significant new population in 2014, and they will get additional assistance for so doing. But for 3 years—2011 through 2014—States will be required to maintain coverage without any additional assistance. That is a burden on States that they should not have to bear. If a State needs to make changes to its Medicaid program, the States should be allowed to, unless the Federal Government is willing to offer additional assistance. We should think twice before writing checks to States that they cannot cash.

    So that is my amendment. I hope you will vote for it.

    The Chairman. Is there further discussion?

    Senator Snowe.

    Senator Snowe. Thank you, Mr. Chairman. I want to thank Senator Grassley for offering this amendment. I am pleased to join him in this effort, and I do think it is
critical. I think we have an obligation to be cognizant of the States' fiscal problems during these very difficult economic times, and especially in the years ahead, because it is clear from all of the information, the reports that we have received, that that will not abate.

Even with the assistance that was provided as part of the stimulus package that Senator Grassley referred to in support of Medicaid programs, States will continue to be struggling with the increased cost. And when States are no longer receiving increased FMAP after December 2010, the tremendous fiscal pressure will still be acute. In fact, according to the National Council of State Legislatures, nearly two-thirds of the States they surveyed already project a budget gap in 2011.

The Chairman's mark provides significant relief for States with low Medicaid eligibility that need to ramp up their programs. Beyond that, it also provides extra assistance for high-need States such as Nevada, Michigan, Oregon, and Rhode Island that have high unemployment and low Medicaid enrollment compared to the national average.

The reason why we are pursuing these policies is abundantly clear. We want to expand coverage in a way that is affordable to States. Yet under the maintenance-of-effort provisions in the mark, we are making the
extraordinary assumption that States with high Medicaid eligibility levels are somehow immune to the budget difficulties being experienced nationwide and that they are in a financial position to continue to provide a high level of coverage without the need for additional support.

And consider for the moment that in the stimulus package where we are providing additional support to the States to maintain their current level of eligibility, it would be unprecedented to require the States to continue their expanded population eligibility without providing additional Federal support.

When considering Medicaid eligibility for working parents, the lowest State covers 17 percent of poverty, while the highest States covers 275 percent of poverty, which is an enormous range. Twelve States, including my own State of Maine, have expanded Medicaid coverage to parents at 133 percent of poverty or higher. In fact, it is as high as 206 percent.

Many of these States have led the Nation in health insurance coverage. For example, less than 10 percent of Maine's population is uninsured. But that hardly means that Maine is a wealthy State or that the economic downturn has somehow skipped over us. In fact, it is quite the contrary. Maine's income per capita is $38,000
in fiscal year 2008, 34th in the country. We have a projected State budget gap of $765 million for fiscal years 2011 and 2012. So to require States like Maine to maintain a higher level of coverage than would be required of them in 2014 without providing additional assistance is inequitable and unfair.

I might also say, Mr. Chairman, based on the recent reports, States cumulatively will be facing more than $200 billion in deficits over the next 2 years because of the budgetary problems and because of the economic downturn. So it is obviously something that has to be addressed with respect to this particular issue. We are imposing a fiscal burden on States that have made a decision to expand their populations above 133 percent, and most likely our States will continue that. I am not suggesting that somehow they are going to drop their coverage to 133 percent. But given the projected deficits over the next few years--and, in fact, as I indicated the other day, there is a report recently issued that indicated that States in 2014 will not achieve their revenue levels of 2007, pre-recession levels. That suggests to me that they are going to be facing a long-term budgetary problem, and that is going to require them from year to year to make adjustments. And I think that we have an obligation to ensure that
flexibility for States as they continue to struggle to balance their budgets.

It is obviously, I think, a laudable goal to expand populations. Some States, many States, have not chosen to even go above 100 percent. So I do not think that we should require States who have gone above 133 percent, made some very difficult choices over time in making those investments and expanding the eligibility under Medicaid, to then suggest that during the difficult fiscal years ahead that somehow they have to maintain a much higher level than most States across the country.

In fact, the Kaiser Foundation issued a report today, Mr. Chairman, that I think illustrates the dimensions of the fiscal woes experienced by States across this country. Total Medicaid spending growth averaged 7.9 percent across all States in fiscal year 2009—the highest rate of growth in 6 years and higher than the original projections of 5.8 percent growth. Enrollment growth averaged 5.4 percent in 2009, significantly higher than the 3.6 percent enrollment growth projected at the beginning of fiscal year 2009.

The growth rate in 2010 for total Medicaid spending is expected to be higher than 6.3 percent, and legislatures are appropriating further reductions in State general funds that average 5.6 percent. These
declines in State spending are the first in the program's history.

So I think it is illustrative of the magnitude of the problem that States are experiencing today and for the years ahead. Even with the stimulus relief, nearly every State implemented at least one new Medicaid policy to control spending in fiscal years 2009 and 2010, with more States implementing provider cuts and benefit restrictions than in the previous few years. Some States reported program reductions in multiple areas and also reported that mid-year budget reductions were possible.

While most States mentioned the stimulus helped to avoid or mitigate provider rate cuts, many more States cut or froze rates in 2009 than planned, 33 States versus 22; and even more States are cutting freezing rates for fiscal year 2010, which means about 39 States.

Several States are considering additional provider rate cuts that have not yet been implemented. But, again, I think that that serves as an indication of how severe the problems are at the State level. States are struggling.

So I would hope that we would consider the inequity of requiring this maintenance of effort for those States who have chosen to make the investments in health here over the last few years, expanded their populations and
the eligibility standards beyond 133 percent, because they may have to make some difficult choices.

So the amendment that Senator Grassley and I have introduced would allow States to go back to the level of 133 percent. And mind you, most States are not there, even at 133 percent, let alone 206 percent, or one State is at 275 percent of poverty level.

Those are significant investments, very important choices that have been made by taxpayers in those respective States, and I think we should applaud them. But I think we also should understand that these States are going to be facing some very tough budgetary choices in the years ahead that will not abate and will not recede, even over time, even as the economy improves.

I think we also know that if the States are required to make some tough choices in Medicaid, they will cut their provider rates, which conflicts with the ultimate goal. We already know that many providers are not taking Medicaid patients. We also know that reimbursement rates for providers are certainly subpar. In fact, Medicaid reimbursement rates are 28 percent lower than Medicare rates nationwide.

So there is a significant disparity, you know, among Medicaid providers with respect to the choices of taking
Medicaid patients, but also because of the reimbursement rate.

So, Mr. Chairman, I would hope that we would support this amendment and not punish those States who have made some tough choices in the past and using their taxpayer dollars to expand Medicaid, but may find that they have to make a choice in the 2 years ahead. So I would hope that we would support this amendment.

The Chairman. Senator Rockefeller?

Senator Rockefeller. Thank you, Mr. Chairman.

I do not quite understand it, but maybe I do. There is a proclivity, it seems to me, on this Committee to really have at it when it comes to poor people, people on Medicaid. There is kind of—a number of amendments have been introduced tonight. There is sort of, I would say, a condescending feeling, these people—you know, God creates all people equal, I thought. But then if you grow up poor, somehow you are not equal.

And then these people who I grew up with, so to speak, in West Virginia, who are very close friends to me, who happen to be on Medicaid, become victims of manipulation by maintenance of effort. Is it going to be in or is it going to be out? Was this a terrible thing that we put money into the stimulus package to help these people? People. Human beings. Families.
I do not understand it. I do not understand it, and it bothers me deeply, and it bothers me deeply about this Committee.

If I understand this amendment correctly, it is going to mean States can drop the poor and the near-poor for at least the next several years, there being no exchange that starts until 2014. And, you know, then we talk about was it 150 percent or what are we up. I mean, in West Virginia we have gone up to 300 percent poverty, then down to 200, then up to 250, then down lower than that. It keeps changing.

And who are the pawns? Who are always the pawns in all this? They are the people who are in the circumstance of birth where they do not have choices, they do not have the knowledge, they do not have lawyers to help them make decisions about getting health care. And somehow the concept that, you know, my daughter, who is doing okay financially in life, has three children and she does not have any problems because she can pay for that thing, and so she is good. But if you are poor, you are a poor mother or you are poor kids, why does that make you less worthy of having health care? Isn't that of all things maybe what Government might help with? And, indeed, that is what maintenance of effort is about, and the Chairman was correct to put it in his mark. They
want to take it out.

What will happen, I guarantee you, is that a whole lot of poor and near-poor people are going to be dropped of being able to get health care over at least the next 2 years, maybe beyond. Maybe that is the purpose. I do not know. I have enormous respect for the Senator from Maine, and so I hesitate to question what she would propose. But I just have to simply because I know my own State and I know my own people, and they are hurting and, if this amendment passes, they are about to get another setback from this Committee and from the Government that is meant to represent them.

I do not like it. It makes me angry. And I really want this amendment to lose.

Senator Snowe. Mr. Chairman?

Senator Rockefeller. I doubt that it will, but that would be sad.

Senator Snowe. Mr. Chairman?

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. Mr. Chairman, might I inquire of the staff a few questions with respect to this amendment?

The Chairman. Sure. Absolutely.

Senator Conrad. Is my understanding correct, Mr. Schwartz, that the Recovery Act included a provision that
requires States to maintain coverage levels in exchange
for additional FMAP assistance?

Mr. Schwartz. That is correct, Senator.

Senator Conrad. And is it correct that the
assistance part of that, the additional FMAP, ends on
December 31, 2010?

Mr. Schwartz. That is correct, Senator.

Senator Conrad. So the maintenance of effort that
is in current law is predicated on additional FMAP
assistance, that additional FMAP assistance ends on
December 31, 2010. And the Chairman's mark, as I
understand it--and I would ask, Mr. Schwartz--requires
that States maintain existing eligibility levels upon
enactment of this bill, and this maintenance-of-effort
provision would expire but not until January 1, 2013?

Mr. Schwartz. That is partially correct, Senator.

The Chairman's mark actually has a stop date of January
1, 2013, for the maintenance of effort for part of the
population, and for the remainder of the population, it
extends it to January 1, 2014.

Senator Conrad. Ah, that is one of the things I
wanted to ask about, because it does appear to me that
there is a differential treatment. Could you explain the
differential treatment? It is for those at 133 percent
of the Federal poverty level. Is that correct?
Mr. Schwartz. That is correct, Senator. So the Chairman's mark contains a provision that we have referred to as the "Medicaid bridge" in which individuals between 100 percent of poverty and 133 percent of poverty, adult individuals, non-pregnant, non-elderly adult individuals, are given the choice between traditional Medicaid coverage or coverage through the exchange.

So that group is subject to a maintenance of effort until the exchange is up and running, and in the original Chairman's mark it says January 1, 2013. The start date for the exchange has, I guess, now been pushed back, so we would true that up. But the basic concept is there is a requirement on--there is a requirement on States to maintain their current eligibility levels, procedures, and practices so that people do not become uninsured before there is an alternate source of coverage.

Senator Conrad. I understand that, but, you know, it seems to me Senator Grassley and Senator Snowe have a point here; that is, the maintenance-of-effort requirement was put in place in exchange for additional FMAP funding from the Federal Government. That funding ends, but we are extending the requirement. And as much as I have sympathy for the argument advanced by Senator Rockefeller, you know, some of these States--this does
not affect my State, so this is not a parochial issue with me. But it affects other States, and it is a little hard for me to understand how we are telling States they have got to maintain level of effort based on additional assistance they are being provided, and then we stop the assistance, but the requirement continues.

As I have listened to this, it strikes me that Senator Grassley and Senator Snowe have a point. If this were a time of strong economic performance and the States were doing well in running surpluses, that would be one thing. But that is not the circumstance we confront, and I do not know, it just strikes me as a bit of a bait-and-switch deal to tell the States you have got a maintenance-of-effort requirement based on additional assistance you are giving, then we end the assistance, but we tell them, oh, but the requirement remains.

You know, that strikes me as not quite fair.

Senator Crapo. Mr. Chairman?

The Chairman. Senator Crapo.

Senator Crapo. Thank you, Mr. Chairman. I just want to follow up on Senator Conrad's and Senator Snowe's remarks and just reiterate something that Senator Snowe already stated. That is, just today the Kaiser Commission on Medicaid released a report, and I will quote from the report. The report says, "The survey
finds that Medicaid spending across the States is expected to grow by an average of at least 6.3 percent in fiscal year 2010. Officials in three-fourths of the States are concerned that appropriations will not be enough, leading to more budget shortfalls and more pressures to trim services and spending."

The point, just to follow up, is that to require the States to maintain populations without providing additional resources ignores the budget realities that we are facing in the States and literally extends the mandate of the Federal Government without extending the support the Federal Government provided when the mandate was originally created.

The Chairman. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman. I am very sympathetic to the concerns about what is happening in the States. I think it would be difficult to find a State that is in more financial crisis than we are given our unemployment rate being over 15 percent. So I am very appreciative and understanding of what is attempted here.

But my concern is that this takes us in the opposite direction of where we are trying to go in terms of coverage. And the States that are fudging a maintenance of effort of State money would be asked to continue their
State money, and it is a question of trading off coverage for people, low-income people, versus what I know to be extremely difficult budget situations. Our State legislature right now, today, probably as we speak, are trying to negotiate this year's budget, which is very difficult.

But, Mr. Chairman, I know that Senator Cantwell has another option that I believe--I am assuming will be coming up tomorrow--that really addresses people between 133 percent and 200 percent and supporting the States, giving them resources. And I am wondering if there might be a way for us to hold off and work on this and see if we might compare notes. And Senator Cantwell certainly can speak for herself, but I know she has been working diligently on an amendment for States that would affect the same population of people in a way that would involve providing assistance directly to States but not losing the coverage that we are all trying to achieve here, because we are talking about low-income folks, low-income working folks that are having the toughest time trying to make it while our States are having a tough time. We are getting tens of thousands of new people who never had to ask for help before in their lives, ever, who are having to come and ask for help with their health care for their family.
And so I am concerned--I know we all share that, but I am very concerned about what this would do as it relates to loss of coverage.

The Chairman. Okay. Senator Snowe?

Senator Snowe. I appreciate the comments of all my colleagues. I think it is just a question of whether or not we are prepared to give the States who have chosen to make these investments over the years in expanding Medicaid populations—not to put them out on a limb, but to give them the flexibility to tailor their programs in the event that circumstances require it.

As I said earlier, the Rockefeller Institute said that State tax collections will take about 5 years to recover from, you know, this current recession and to return to the pre-recession levels of 2007.

Now, these are extraordinary times, unprecedented, as we all understand. So our State, you know, has gone above 133 percent, and I am not suggesting that somehow my State is going to drop the coverage or go back to 133 percent. But the circumstances might dictate that, and I just think that we have an obligation not to impose and be adamant about them maintaining that level of expansion in the event that the economic situation warrants otherwise.

I think it is only a matter of fairness. If you
think about working parents in the State of Maine, you know, under our standards, it is 206 percent of Federal poverty level, while the national average is 68 percent of Federal poverty level. We are talking about a dozen States perhaps that have gone above 133 percent, to their credit. They made those tough choices, and as I said, Maine is not a wealthy State. In fact, far from it. But it chose to make those tough decisions in the best of times. But we know that ahead it is not going to be the best of times, and maybe for quite a while. It is going to be a constant budgetary struggle, and I think in all fairness, since the maintenance of effort on the part of the Federal Government will, you know, be suspended in 2010, that we should at least give them the option in the event that they decide that they have to move in that direction.

I would hope that the Committee would give that consideration because, otherwise, I think it is going to make it extraordinarily difficult in the years ahead. We are not encouraging the States to drop their coverage. Far from it. We have had a tradition in our State of prioritizing when it comes to expanding health care coverage under Medicaid. But if our budget outlook worsens--and as I said, it is already $726 million over 2 years of deficits--then we really do not know what the
future holds.

So I would hope that the Committee would give this fair consideration.

Senator Cantwell. Mr. Chairman?

The Chairman. Senator Cantwell. Then we are going to make a suggestion here.

Senator Cantwell. Mine is a question, actually, for Mr. Schwartz on the timing of this, because I know my colleagues are talking about giving States flexibility in the tough times that they are in. But these States have added people to the rolls, new people, obviously, given this money during this time period. And if the exchange is not up and running for a couple of years, then there would be people who could be impacted without coverage at all. Is that correct?

Mr. Schwartz. That is correct, Senator. It is not necessarily true that it is people new to the program. For instance, in Senator Snowe's case, Maine has been at 206 percent for parents for some time, and so they are not allowed to go below. But they do not have to go above. They do not have to add, you know, someone at 207 or 208. They just have to maintain where they are

Senator Cantwell. Do we have any idea how many people in America might be impacted?

Mr. Schwartz. Unfortunately, I do not think I have
a number of individuals. When we found out this amendment would come up this evening--and I think these are actually numbers Senator Snowe has already shared in her statement--it is about 12 States that cover parents above 133 percent in Medicaid. And for childless adults, it is a little bit harder because their waivers vary so tremendously, and so some of the services that these childless adults actually get do not really resemble Medicaid in some extreme instances. But it is somewhere around 14 States that offer some coverage to childless adults. That could vary. It could be a hospital-only benefit package. It could be something more substantial. It could even be things like premium assistance programs that are run through Medicaid.

Senator Cantwell. And at some point, say that the exchange was created, then people would be shifting from this population of Medicaid to the exchange and getting a subsidy, which would be more expensive than the care that States would be providing under the current program.

Mr. Schwartz. That is absolutely correct.

Senator Cantwell. And so in some ways, we would just be encouraging more expensive care than solving the problem, which is how to cover a population when there are State economic budget challenges.

Mr. Schwartz. I think that is correct. I think
you are making it very easy for individuals to make the
decision. If they are not in a program, they are going
to go to the program that exists for them.

Senator Cantwell. So, Mr. Chairman, I think this
certainly--I would like to know, with a State with an
over 9-plus-change unemployment rate, I would be curious
to know what States have actually done--and we have many
States that are either if not at 9, close to double-digit
unemployment rates, and so it would be interesting to now
what population we are really talking about being left
out in the time period up until the exchange, and then
what that impact might be on the exchange.

Mr. Schwartz. Senator Cantwell, I would be happy
to try to get the number of people in those States.

Senator Cantwell. Thank you.

Senator Snowe. I just want to make one point--
The Chairman. Senator Snowe, I would like to set
this aside and let it marinate overnight.

Senator Snowe. The second amendment of mine that
you are allowing to marinate.

[Laughter.]

Senator Snowe. I do not know if there is some
problem here.

The Chairman. No, no. It might be a good idea to
let it rest.
Senator Snowe. Okay. A really good idea?

[Laughter.]

The Chairman. A really, really good idea.

Senator Snowe. Okay.

The Chairman. Okay. Thank you.

Senator Wyden, I think you wanted to seek recognition with respect to a vote.

Senator Lincoln. How about voting on that other Snowe-Lincoln-Bingaman amendment? Are we ready for that yet?

The Chairman. Tomorrow morning. Okay. I understand Senator Wyden wanted to be recorded in the affirmative on the Ensign-Carper amendment, and it would not change the result, so I ask unanimous consent that that occur.

We have one more amendment, and it is my understanding--Senator Kyl will not be here tomorrow. He asked that we take it up tonight. He also assures us it will take no more than 2 minutes.

Senator Kyl. That is right, Mr. Chairman. I will not be here for a little bit in the morning during the Judiciary markup, but I will be here after the Judiciary markup.

Mr. Chairman, this is amendment D2 regarding the physician feedback program. We had laid it aside trying
to find an offset. In a short period of time, Senator Conrad's staff and my staff were unable to find an acceptable offset. So I want to go ahead and have the vote, but I want to thank Senator Conrad. I want to continue to work with him so that we can get this resolved before we go to the floor. And if we adopt the amendment, I am perfectly agreeable, obviously, to having a different offset before the bill gets to the floor.

   Remember, this is the problem we had to solve because we were just taking the top 10 percent of physicians in terms of spending irrespective of who they were or why they spent the money and fining them—or reducing their reimbursements by 5 percent arbitrarily each year. So because it was thought to be too arbitrary and not an effective way to reduce costs, we wanted to eliminate that particular program.

   And as I said, if we can adopt the amendment, I am sure we can find the appropriate offset before we go to the floor.

   Thank you, Mr. Chairman.

The Chairman. Is there further--Senator Conrad?

Senator Conrad. Mr. Chairman, first I want to thank Senator Kyl for offering the amendment. I disagree with the offset, and so I would be constrained to resist passing the amendment at this point. But I do think
Senator Kyl has raised an important point, and I think it would be—we would all be well advised to have the physician feedback program, but not to apply a penalty, because I do not think we know enough to be certain that there would not be unintended consequences here.

So I would resist the amendment, but I would also commit to working with Senator Kyl before we get to the floor and see if we cannot find another offset to deal with this issue.

The Chairman. If there is no further discussion, we will vote on the amendment.

Senator Kyl. Mr. Chairman, I do thank Senator Conrad. I would just note all we do is strike the penalty. The program continues, but the penalty is eliminated. Thank you.

The Chairman. And the offset is to take it out of the core. Is that correct?

Senator Kyl. That is right. It is a $1 billion cost, and that would be taken out of the core funding.

The Chairman. I urge the Committee not to support the amendment. I suppose you want a recorded vote.

Okay. 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?
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?
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 Grassley. Aye by proxy.
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. Mr. Roberts is aye by proxy.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
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.
Senator Schumer. Mr. Chairman?
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Chairman. The clerk will tally.
The Clerk. Mr. Chairman, the final tally is 10 ayes, 13 nays.
The Chairman. The amendment is not agreed to.
Senator Wyden. Mr. Chairman?

The Chairman. Senator Wyden.

Senator Wyden. Mr. Chairman, in pursuit of Committee business, I had to be out of the room during the Carper-Ensign amendment, the consideration of it. If I could be recorded as yes, that would--

The Chairman. You get to vote twice because you have already done that.

Senator Wyden. Very good. Thank you.

[Laughter.]

The Chairman. You are welcome.

I will ask consent that a statement of mine be printed in the record at this point.

[The statement appears at the end of the transcript.]

The Chairman. I thank the Committee for their work this evening. I hope to be as productive tomorrow, and the Committee will recess until 10:30 tomorrow morning.

[Whereupon, at 10:07 p.m., the Committee recessed, to reconvene on Thursday, October 1, 2009, at 10:30 a.m.]
I would like to address any concerns related to a modified Wyden amendment that was included in the Modification of the Chairman’s Mark.

The accepted amendment as modified allows that a State may be granted a waiver if the state applies to the Secretary to provide health care coverage that is at least as comprehensive as required under the Chairman’s Mark.

States may seek a waiver through a process similar to Medicaid and CHIP. If the State submits a waiver to the Secretary, the Secretary must respond no later than 180 days and if the Secretary refuses to grant a waiver, the Secretary must notify the State and Congress about why the waiver was not granted.
I want to clarify that this authority only relates to laws under the authority of the Secretary of HHS and does not apply to laws like the Civil Rights Act, ERISA, and American’s with Disabilities Act or any other federal law or regulation which is not under the jurisdiction of the Secretary of HHS. Waivers are not intended to thwart or affect the intent of the reforms included in America’s Healthy Future Act.
Thank you, Mr. Chairman. I just want to speak for a moment in support of the Kerry amendment, which is also cosponsored by Senators Rockefeller, Cantwell, Stabenow, and Menendez.

The original proposal on the high-premium excise tax contained in the Chairman’s Mark, before last week’s modification, would have impacted 19 percent of those with single coverage and 14 percent of those with family coverage in 2014, rising to 41 percent and 37 percent respectively in 2019. For those of us that come from high-costs states with large urban centers, these numbers would have been very difficult for us to swallow.

The changes that the Chairman has made in his modification do improve things, and I recognize how hard he and his staff have worked to try to reduce the number of Americans that would be affected by the excise tax over time. The modification does two things that soften the impact. First, the bill before us now indexes the annual thresholds before the tax kicks in to CPI-plus-1 every year, which sounds like a small change but it makes a big difference when compounded over many years. Second, the Chairman has increased the thresholds by $750 for single taxpayers and $2,000 for families for those near retirement, or those who work in high-risk professions.

These changes will help – if you take these two changes, and add in the transition for high-cost states, the impact on New York will be significantly less than in the original bill. This is an important step forward. But we must go farther to limit the impact of this provision so that it doesn’t ensnare middle-income, hard-working families – particularly those in high cost states.

If we can increase the thresholds to $9,800 and $25,000, which the Kerry amendment would do, here’s what it will mean: The number of taxpayers affected by the excise tax in the first year will be reduced by nearly two-thirds, and the number of taxpayers affected in 2019 will be reduced by about half. That will make a huge difference. It sets the effective premium before the tax kicks in at FEHP plus 60 percent, or 60 percent above the average premium in the federal employees’ health benefits plan. In 2006, less than 7 percent of New Yorkers with family coverage had premiums above FEHP-plus-60.
I think most of us on this side would be willing to live with a $25,000 exemption because it still bends the cost curve for the highest-cost plans, without casting the net too broadly where it hits the middle class.

The Chairman knows that there are a number of us who want to continue to work with him on this proposal after the bill clears the Finance Committee. I imagine that those on the other side – who supported and pushed the initial idea to tax employee benefits directly and wanted that proposal to raise as much revenue as possible – will not want to increase the threshold. But we are hopeful that the final bill considered in the Senate will have a threshold closer to $9,800 for singles and $25,000 for families, or FEHP-plus-60.

Thank you, Mr. Chairman.