

1 EXECUTIVE COMMITTEE MEETING TO CONSIDER
2 HEALTH CARE REFORM
3 THURSDAY, OCTOBER 1, 2009
4 U.S. Senate,
5 Committee on Finance,
6 Washington, DC.

7 The hearing was convened, pursuant to notice, at
8 10:45 a.m., in room 216, Hart Senate Office Building,
9 Hon. Max Baucus (chairman of the committee) presiding.

10 Present: Senators Rockefeller, Conrad, Bingaman,
11 Kerry, Lincoln, Wyden, Schumer, Stabenow, Cantwell,
12 Nelson, Menendez, Carper, Grassley, Hatch, Snowe, Kyl,
13 Bunning, Crapo, Roberts, Ensign, Enzi, and Cornyn.

14 Also present: Democratic Staff: Bill Dauster,
15 Deputy Staff Director and General Counsel; Cathy Koch,
16 Chief Tax Counsel; Elizabeth Fowler, Senior Counsel to
17 the Chairman and Chief Health Counsel; Kelcy Poulson, Tax
18 Research Assistant; Bridget Mallon, Detailee; and Andrew
19 Hu, Health Research Assistant. Republican Staff: Kolan
20 Davis, Staff Director and Chief Counsel; Mark Hayes,
21 Republican Health Policy Director and Chief Health
22 Counsel; James Lyons, Tax Counsel; Chris Condeluci, Tax
23 Benefits Counsel; Theresa Pattara, Tax Counsel; Rodney
24 Whitlock, Health Policy Advisor; and Andrew McKechnie,
25 Health Policy Advisor.

1 Also present: Josh Levasseur, Deputy Chief Clerk
2 and Historian; Athena Schritz, Archivist; Mary Baker,
3 Detailee; Thomas Barthold, Chief of Staff of the Joint
4 Committee on Taxation; Thomas Reeder, Senior Benefits
5 Counselor; Yvette Fontenot, Professional Staff; David
6 Schwartz, Professional Staff; Tony Clapsis, Professional
7 Staff; and Shawn Bishop, Professional Staff.

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1 OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM
2 MONTANA, CHAIRMAN, COMMITTEE ON FINANCE

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4 The Chairman. The Committee will come to order.
5 Good morning, everybody. This is our seventh day of
6 consideration of America's Healthy Future Act. It has
7 been 15 years since we have held a markup this long.

8 Yesterday, the Committee considered 23 amendments.
9 We have thus considered a total of 107 amendments thus
10 far. I am beginning to have some hopes of finishing up.

11 The staff advises me that we have a couple dozen
12 amendments and some raining cats and dog, and if we can
13 be as productive today as we have been in the last
14 several days, I have high hopes of finishing today--maybe
15 late today, but at least finish today. And my
16 expectation is, my assumption is, I think, most members
17 would like to, if we could, finish up today, which might
18 mean we go late tonight, quite late, but at least let us
19 try to finish up if we can today. Otherwise, it will
20 slip over to tomorrow, and certainly we will be finished
21 by tomorrow.

22 Okay. The first amendment. Senator Grassley?

23 Senator Grassley. Could I make a request?

24 The Chairman. Sure.

25 Senator Grassley. Because we do not have enough

1 members yet here to start amending, anyway, do we?

2 The Chairman. No.

3 Senator Grassley. Okay. So then this would be
4 sort of a unanimous consent request, but I want to take a
5 couple minutes here just to explain why I am asking this.

6 This is something that we have not spent much either
7 here or in the Group of Six on, and that is, how the
8 majority of this bill will be administered and the cost
9 to administer it. And it is my judgment that when CBO
10 makes an estimate of cost of what a program is going to
11 cost, this information has to come from the executive
12 branch of Government. So this is kind of geared towards
13 getting this information.

14 When the President did his Sunday morning talk show-
15 -and it was five or six different times, and I think it
16 was either last weekend or the weekend before--he stated
17 he did not intend to grow the Government. On the other
18 hand, there is probably going to be some additional
19 Federal employees have to be hired, particularly with the
20 IRS.

21 Now, I could be wrong on that, but it would be my
22 judgment that they would have to, to enforce these
23 provisions.

24 The costs to implement the bill are not included in
25 CBO or Joint Tax estimates. Since these costs should be

1 considered as part of the overall cost of this bill, I
2 believe receiving this information is just as important
3 as getting Joint Tax-CBO scores before voting on a bill.

4 I have a lengthy statement that I am not going to
5 read, so that is why I ask unanimous consent to put it in
6 the record.

7 The Chairman. Without objection.

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

10 Senator Grassley. And then I would just--these
11 would be very general questions of either staff or Joint
12 Tax or CBO, if anybody is involved with CBO.

13 Has anybody at the table received from the
14 administration estimates of the cost to implement this
15 bill, particularly from HHS or the IRS? And if not, do
16 you know when we could expect to receive such estimates?

17 Mr. Barthold. Senator Grassley, we work all the
18 time with the Internal Revenue Service on matters of
19 administration and how administrable different aspects of
20 many proposals might be, and we take that into account in
21 our estimates in terms of compliance and just general
22 taxpayer behavior.

23 But we do not receive from the administration
24 explicit estimates of the amount of manpower that they
25 may or may not allocate to any one new proposal.

1 As I know you are fully aware, the administration's
2 current budget and the budget from last year did
3 authorize an increase in the Internal Revenue Service
4 budget, and from congressional scorekeeping perspectives,
5 the Joint Committee and the Congressional Budget Office
6 assume that, given their budget, the Internal Revenue
7 Service will allocate it in such a way as to try and get
8 the best outcome for the Government as possible.

9 Senator Grassley. Okay. Thank you, Mr. Chairman.

10 If you responded to my UC, then I am done.

11 The Chairman. Yes, I have.

12 Senator Grassley. Okay.

13 The Chairman. Okay. We are still waiting for a
14 quorum. One, two, three, four, five, six, seven, eight.
15 We need one more.

16 [Pause.]

17 The Chairman. Okay. Senator Crapo, do you have an
18 amendment? Thank you. Senator Stabenow is here so we
19 have a quorum.

20 Senator Crapo. Are you ready, Mr. Chairman.

21 The Chairman. Yes, Senator, proceed.

22 Senator Crapo. Mr. Chairman, I am having passed
23 out Crapo amendment F1 as modified.

24 The Chairman. All right.

25 Senator Crapo. This amendment is intended to bring

1 the bill in line with one of President Obama's pledges to
2 the American people. I think that virtually everybody in
3 America has probably heard President Obama describe the
4 parameters of the health care proposal that he seeks to
5 have Congress adopt, and one of the core points that he
6 has continuously made is that he will not impose a new
7 tax on those in this country making--individuals making
8 less than \$200,000 a year or families making less than
9 \$250,000 a year.

10 For example, in August of last year, in Orlando,
11 Florida, the President said, "And if you're a family
12 making less than \$250,000 a year, my plan won't raise
13 your taxes one penny--not your income taxes, not your
14 payroll taxes, not your capital gains taxes, not any of
15 your taxes."

16 Similarly, in September of last year, in New Mexico,
17 the President said, "You will not see any of your taxes
18 increase one single dime. And if you make less than
19 \$250,000--if you make less than \$250,000 a year, you will
20 not see any of your taxes increase one single dime."

21 And just one other quote that the President made
22 among many that he has commented on this. Again, last
23 year in September, in New Hampshire, the President said,
24 "No family making less than \$250,000 will see their taxes
25 increase. And I can make a firm pledge: under my plan,

1 no family making less than \$250,000 will see their taxes
2 increase." And again, he said, "not your income taxes,
3 not your payroll taxes, not your capital gains taxes, not
4 any of your taxes."

5 Well, as we have already discussed previously, this
6 legislation, the conceptual paper in front of us does
7 propose tax increases that people who earn well less than
8 \$250,000 will be paying. And the purpose of this
9 amendment--the amendment is very simple. It simply
10 provides that no tax, no fee, or penalty imposed by this
11 legislation shall be applied to any individual earning
12 less than \$200,000 per year or any couple earning less
13 than \$250,000 per year.

14 Let me identify just briefly what taxes I have
15 identified in the bill that I think this amendment would
16 apply to.

17 In one of the amendments I brought earlier, Mr.
18 Chairman, you will recall that I made a very strong
19 argument that the pay-or-play provisions in the bill, the
20 proposals that employers who do not provide health
21 insurance to their employees have to pay a penalty, would
22 be directly passed on to their employees, who would then
23 pay higher taxes--or higher fees because of those taxes.

24 I am not counting that as a direct tax. I actually
25 believe that should count, and I believe that those kinds

1 of direct pass-through costs that we are passing through
2 to employees of small businesses, or of any businesses
3 who do not provide support to their--health insurance to
4 their employees should be counted.

5 But just looking at the direct tax increases in the
6 bill, first, the individual mandate to have health
7 insurance under this bill would impose an excise tax of
8 \$750 per person up to a maximum of \$1,500 per family for
9 anyone between 100 percent and 300 percent of the poverty
10 level. For those above 300 percent of the poverty level,
11 the tax would be \$950 for individuals and up to \$1,900
12 per family.

13 An analysis of this done by the Joint Tax Committee
14 and CBO has shown some rather remarkable statistics. The
15 JCT and CBO numbers show that of the estimated \$2.8
16 billion that this tax will collect in 2016, 71 percent
17 would come from people earning less than 500 percent of
18 poverty. That is \$120,000, not \$250,000. Seventy-one
19 percent of this tax will fall on people making less than
20 \$120,000. In fact, \$600 million of it will fall on those
21 making between \$24,000 and \$48,000 a year.

22 Another \$600 million of it will fall on those making
23 between \$48,000 and \$72,000 per year. Another \$500
24 million of it will fall on those making between \$72,000
25 and \$96,000 per year. And another \$300 million will fall

1 on those making between \$96,000 and \$120,000 a year. For
2 71 percent of that tax that will be imposed falling on
3 those making less than \$120,000 per year.

4 We do not have statistics between \$120,000 and
5 \$250,000, but of the remaining \$800 million collected, we
6 can assume, I think safely, that a significant amount of
7 that would be paid by people making less than \$250,000
8 per year.

9 Another direct tax increase in the bill is the
10 provision in the bill that increases the penalty from 10
11 percent to 20 percent for anyone who uses a portion of
12 their health savings account for purposes other than
13 qualified medical expenses. In these difficult times,
14 many middle-income families may unfortunately need to dip
15 into their health savings accounts to address unexpected
16 financial difficulties. Doubling the penalty for doing
17 so for these families is an unnecessary and an unwise tax
18 increase on those families.

19 And then, finally, in the Chairman's modification,
20 the floor on deductions for medical expenses is raised to
21 10 percent from its current level of 7.5 percent. The
22 current law tax provision allows several million
23 Americans with very high health care costs to deduct from
24 their income, and thereby lowering their income taxes,
25 some of the cost for their medical goods and services

1 that are not covered by insurance. And I know that--I do
2 not think that there is any way that this cannot be
3 acknowledged as a direct tax increase on those who now
4 will lose that additional portion of their deduction for
5 these medical costs.

6 Again, according to the Joint Tax Committee, which
7 provided a distributional analysis of this provision, the
8 bulk of this \$21 billion tax increase will fall on those
9 who President Obama promised to protect. In 2017 alone,
10 in one year alone, this provision will raise \$13.8
11 million on tax units, meaning single filers and families--
12 -excuse me. It will raise taxes on 13.8 million tax
13 unit--that is singles and families--by \$3.73 billion. Of
14 those 13.8 million taxpayers--or tax units, because some
15 are families, only 86,000 of them will have an income
16 above \$200,000. And what that means is that this
17 particular tax increase in the bill, \$3.73 billion in one
18 year--and who knows how many if we accumulated it over 10
19 years. Of this particular tax increase, 99.6 percent of
20 it hits affected taxpayers who have incomes less than
21 \$200,000.

22 These are just three of the more prominent tax
23 increases in the measure that would place an undue burden
24 on our middle class and violate President Obama's
25 commitment that this health bill will not increase taxes

1 of any kind--his words were "of any kind"--will not
2 increase taxes of any kind on those earning, as singles,
3 less than \$200,000 or, families, less than \$250,000.

4 I urge my colleagues to support this amendment.
5 Again, it is very simple. It will remove all taxes,
6 fees, and penalties from the bill that apply to families
7 earning less than \$250,000 per year.

8 The Chairman. Any discussion?

9 Well, first, we do not have a quorum. Let me ask
10 some questions. Let me ask some questions here. I am
11 trying to understand what the amendment provides.

12 As you say, it provides that no tax, fee, or penalty
13 imposed by this legislation shall be applied to any
14 individual earning less than \$200,000 or a couple earning
15 less than \$250,000. Does that include the excise tax on
16 insurance companies? Because you have been saying and
17 others have been saying that is passed on. Does that
18 include that as well?

19 Senator Crapo. I believe we should include it, but
20 my amendment does not.

21 The Chairman. So that excise fee would not result
22 in an increased tax on individuals?

23 Senator Crapo. Well, again, I personally believe
24 it would, but it is a pass-through tax, and my amendment
25 is dealing with specifically direct taxes that are

1 imposed by the bill.

2 The Chairman. So the same would apply to any other
3 fees in the bill, that is, they would not--you are not
4 addressing those fees?

5 Senator Crapo. I believe the answer to your
6 question is yes. I am not sure specifically which fees
7 you are referring to, but, again, the three examples I
8 gave are the types of direct tax increases on individuals
9 or families that I am seeking to address by this bill.
10 And let me again say I believe that President Obama's
11 promise and his pledge--

12 The Chairman. What were the three areas again? I
13 was distracted. I did not hear them all.

14 Senator Crapo. Certainly, Mr. Chairman. I was
15 talking about the individual--

16 The Chairman. Also because this is as modified, so
17 I have not had a chance to look at it.

18 Senator Crapo. I understand. The three examples I
19 used were the individual mandate to have health insurance
20 that would impose a tax on persons who did not comply
21 with the mandate. Secondly, the increase in the penalty
22 for health savings accounts from 10 percent to 20 percent
23 for those who use a portion of them for purposes of other
24 than qualified medical expenses. And then, finally, the
25 increase in the floor on deductions for medical expenses

1 from 7.5 percent to 10 percent in the income tax code.

2 The Chairman. Have you totaled what those are?

3 Senator Crapo. We have not been able to get a
4 score from CBO yet, and part of the problem is that we
5 are using conceptual language to start with, then the
6 Chairman's modified mark changed some of these
7 provisions. And now as we move through the mark, we have
8 not been able to get total figures on all of them. So we
9 have not been able to get a score.

10 However, from the information that I was using, we
11 expect that the tax on the individual mandate in just the
12 year 2016 would--

13 The Chairman. You are talking about the premiums.

14 Senator Crapo. Excuse me?

15 The Chairman. You are talking about the premiums--
16 I mean, the penalty.

17 Senator Crapo. The penalty. Yes, the penalty.
18 That tax would be \$2.8 billion in just the year 2016, and
19 we expect, as I indicated, that at least 71 percent of
20 that would come from those making less than \$250,000 and
21 probably closer to 80 or 90 percent.

22 Similarly, the increase in the floor on deductions
23 is estimated in just the year 2017 alone to raise \$21
24 billion, and we could extrapolate for that over about 10
25 years to see that this could be a very significant tax

1 increase.

2 But the bottom line, Mr. Chairman--well, let me go
3 back. That \$21 billion would not all fall on those
4 making less than \$250,000; only 99.6 percent of it would.

5 But my point is we are going to have to make some
6 extrapolations. We do not have a score yet, but we
7 expect that there is a pretty sizable amount of tax
8 increases that are included in the mark.

9 The Chairman. Well, let me just remind everybody
10 that this bill, this legislation before us, provides for
11 a \$40 billion net tax cut for Americans--\$40 billion--by
12 the year 2019. A net \$40 billion tax cut for Americans.

13 That is the tax credits, primarily, of an exchange. But
14 it is a \$40 billion net tax cut in one year alone and--by
15 the year 2019. That is 1 percent of Americans--a 1-
16 percent reduction in taxes for all Americans. And it
17 builds up. So it is fewer dollars tax cut in the first
18 year. By the time you get to 2019, this bill results in
19 a \$40 billion net tax cut.

20 I might also point out that it would result in wage
21 increases for those employees who find their wages
22 increased on account of the high excise premium tax.
23 That is CBO. That is a wage increase. So when people
24 talk about, you know, Americans might be harmed a little
25 bit here and there, it is also very important to look at

1 the whole story, and the whole story is that there is a
2 \$40 billion net tax cut provided for in this bill.

3 Senator Crapo. Mr. Chairman?

4 The Chairman. Does the Senator wish to close?

5 Senator Crapo. I would like to respond on that
6 issue. I do not know that President Obama was saying
7 that--that he was talking in a net sense for the country
8 as a whole when he said he would not increase taxes.
9 There are going to be a lot of people whose taxes are
10 increased by this legislation.

11 And I suppose that if you wanted to do an analysis
12 to see how individual families are impacted, that is kind
13 of complicated, but we could do that, if you provide a
14 tax cut and then you provide an increase, what is the net
15 result for them. But most of the tax cuts that you are
16 talking about are refundable outlays, and they are going
17 to be hitting in a different pattern than the tax
18 increases that you were talking about, and there will be
19 a substantial number of Americans who will pay more taxes
20 under this legislation. And because of that, all I have
21 done is provide that if this bill results in an increase
22 in taxes on those making less than \$250,000 per year,
23 then the taxes will not have to be paid by them. That is
24 the promise and the pledge that the President has made to
25 the American people about the tax impact of the

1 legislation that he has said should come before him.

2 The Chairman. Okay. I think we are ready to vote.

3 The clerk will call the roll--

4 Senator Stabenow. Mr. Chairman? I just think it
5 is important to indicate that we have had six different
6 amendments from the Republican side that have voted to
7 raise taxes on the middle class by making this health
8 care plan more affordable--less affordable, six different
9 amendments taking money away from the middle class,
10 reducing the tax credits for the middle class, in order
11 to do other things in this bill, like, you know, funding
12 more insurance company efforts and so on.

13 So I guess I just want to go on record as saying I
14 have no interest in raising taxes, I am not going to
15 support raising taxes on the middle class or on the
16 individuals talked about in this amendment. And so while
17 there may be some technical difficulties in this
18 amendment, I hope we are going to work through this to
19 make sure it is very clear. This is not about hurting
20 the middle class, and from my perspective, we have seen
21 nothing but efforts on the other side to pick priorities
22 over funding tax credits for the middle class--six
23 different votes that we have had, which I have opposed
24 every one of them because I want to make sure that we are
25 doing everything to help the middle class be able to get

1 health care, as well as low-income people.

2 I know this amendment--I mean, I appreciate the
3 discussion here, but at this point I certainly know that
4 none of us are interested in doing what is in this
5 amendment. But, you know, Mr. Chairman, I guess--I wish
6 there was some way to work out this language, I guess.

7 Senator Crapo. Mr. Chairman?

8 The Chairman. The clerk will call the roll.

9 Senator Crapo. Could I respond?

10 The Chairman. Yes, respond. Wrap up and close and
11 we can vote on it. Go ahead.

12 Senator Crapo. Well, first of all, I want to make
13 it clear. Republicans are not proposing to increase
14 taxes, and there has been no proposal that I have seen in
15 this markup to increase taxes.

16 I do understand that in making some of the
17 amendments that have been brought forward, there had to
18 be offsets included so that adjustments within the mark
19 were proposed that would have adjusted some of the tax
20 credits, some of the offsets--I mean, some of the subsidy
21 supports and so forth. And so that is acknowledged.

22 But I first want to make it clear that neither I
23 nor, to my knowledge, any of the Republicans on this
24 Committee have proposed any kind of a tax increase on the
25 American people. The current law that we have is

1 different from the mark that we are debating here.

2 But, secondly, I appreciate Senator Stabenow's
3 comment about want to achieve the spirit of this pledge
4 that the President has made in not increasing taxes on
5 the American people making less than \$250,000 for
6 families or \$200,000 for individuals. And again, I think
7 that you could not say it any clearer. I realize we are
8 working in concept language here, but the concept that is
9 in this amendment that I believe we can clearly write
10 into law once we get the opportunity to try to write this
11 bill, the concept is very clear--that is, the amendment
12 says no tax, fee, or penalty imposed by the legislation
13 shall be applied to any individual earning less than
14 \$200,000 per year or any couple earning less than
15 \$250,000 per year.

16 It is straightforward, and I believe that we ought
17 to be able to accomplish that, which would assure--it is
18 a fail-safe mechanism to assure that the President's
19 pledge about the tax impact of this reform will not fall
20 on the backs of those in these income categories.

21 Senator Stabenow. Would my friend yield for a
22 question?

23 Senator Crapo. Yes.

24 Senator Stabenow. Mr. Chairman? In May of this
25 year, there was an analysis by Families USA that the

1 hidden health tax on annual premiums for family health
2 care coverage last year was \$1,017, and for health
3 coverage provided to single individuals, \$368. So for a
4 family, there is a hidden tax of \$1,000.

5 How would you address that in what you are talking
6 about? Because what we are doing in this legislation is
7 taking away a hidden tax that folks are paying in higher
8 premiums right now to pay for the uninsured.

9 So my concern about the language is: Does this stop
10 us from moving forward on doing health care reform
11 because there is a hidden tax right now on annual
12 premiums? That is my concern, sort of how you implement
13 what you are talking about.

14 Senator Crapo. I very much appreciate the fact
15 that you ask that question because, actually, President
16 Obama himself has made that same argument--or a similar
17 argument that there is this hidden tax. And, by the way,
18 I think--

19 Senator Stabenow. There is.

20 Senator Crapo. It is interesting that you call it
21 a hidden tax. It is a cost, but there is no tax being
22 paid to the Federal Government in that concept that you
23 are talking about there. And I do not believe that when
24 the President said to the American people we will not
25 raise your taxes that he was saying, well, this is a net

1 deal that I am talking about where we are going to
2 provide you some benefits in some legislation and we may
3 raise your taxes for it, but if our definition of the
4 benefit you are getting is higher than the taxes we are
5 charging you, then I have not violated my tax pledge.

6 The Chairman. I would like to vote on this. This
7 is a message amendment. It is not really substantive or
8 solid. It is a message amendment. It--

9 Senator Crapo. Well, I--

10 The Chairman. I have the floor, Senator. Because,
11 in a sense, basically what you are saying is you want to
12 gut the President's program. More than that, you want to
13 gut health reform. If we are serious about having health
14 reform, if we are serious about having the insurance
15 market reformed, if we are serious about making sure that
16 the Americans have health insurance, we have to have
17 shared responsibility. And that shared responsibility is
18 that all Americans are in this, we all have to
19 participate, which means there has to be a shared
20 responsibility for individuals to buy health insurance.

21 Essentially what you are saying, you want to take
22 away the personal responsibility. That is basically what
23 you are saying. And I believe that guts health care
24 reform. This is a killer amendment. This is an
25 amendment which guts and kills health reform. And that

1 is why I say this is a message amendment. It is really
2 not what--the effect is not what are purportedly saying.

3 The effect is to say no more coverage, not have
4 universal coverage. That is the effect of the amendment.

5 So I, therefore, would like to have a vote.

6 Senator Crapo. Mr. Chairman, could I respond?

7 The Chairman. Just very briefly. Senator Hatch
8 very briefly, then Senator Crapo very briefly, then let
9 us vote. Senator Hatch.

10 Senator Hatch. I want to express my support. I do
11 not think it is just a message amendment. I mean, my
12 gosh, perhaps the most solid promise that President Obama
13 made during his campaign was that he "will not raise any
14 tax rate on families making less than \$250,000 per year,"
15 period. That is an exact quote.

16 However, this Chairman's mark is riddled with tax
17 increases on Americans making far less than these
18 amendments. I have enjoyed the Chairman's remarks here.

19 He is right. You cannot do all that they want to do
20 without increasing taxes on everybody, directly or
21 indirectly. He is right on that. But that is not what
22 the President said we were going to do.

23 To start with, it declares war on savings accounts
24 for health care. For example, the mark would limit the
25 amount that employees can set aside of their own money

1 into FSAs. In addition, over-the-counter medicine would
2 no longer be qualified expenses for FSAs and health
3 savings accounts unless you have a doctor's note. That
4 is not so today.

5 Lastly, the proposal includes an increase from 10
6 percent to 20 percent for the penalty for withdrawals
7 that are not used for qualified medical expenses. All
8 together, as I have pointed out before, this means that
9 employees could be facing a 55-percent Federal tax on a
10 bottle of aspirin, and you can extrapolate it onto every
11 non-prescription drug there is.

12 Then we have the outrageous tax increases on seniors
13 and others with catastrophic medical expenses that would
14 occur if we increase the threshold of deducting the
15 medical expenses itemized deduction from 7.5 percent of
16 AGI to 10 percent of adjusted gross income.

17 Perhaps even worse are the indirect tax increases in
18 the Chairman's mark. Probably the most troubling to me
19 is an unprecedented excise tax levied on entire segments
20 of the health care industry, including pharmaceuticals,
21 medical devices, and health insurance. And while these
22 fees would be paid by corporations, there is no doubt in
23 any of our minds that they ultimately will be passed on
24 to consumers in the form of higher prices or on to
25 employees in the form of lower pay or even layoffs.

1 And for those Americans who decided to either not
2 have health insurance or if you need a more expensive
3 plan than is allowed, the Chairman's mark would raise
4 taxes on you even if you do not make anywhere near
5 \$250,000 per year. This is part of the so-called
6 individual mandate which would requires individuals to
7 obtain health care coverage or pay an extra tax.

8 Now, President Obama promised from the beginning
9 that he would not raise taxes on the 98 percent of
10 Americans who make less than \$250,000 a year.
11 Unfortunately, the Chairman's mark would break that
12 promise.

13 Now, the Chairman has been honest with us in
14 basically admitting you cannot have the health care bill
15 without having some of these taxes. But I think we could
16 find other ways of not taxing people who make less than
17 \$250,000 or \$200,000 a year.

18 This amendment would not allow this overtaxation to
19 happen. It would mean we would have to settle down and
20 find ways of living within the promises that have been
21 made. To do what our friends on the other side want to
22 do here is going to involve a lot of direct and indirect
23 taxes on people who can ill afford them in our current
24 economy.

25 I hope that was short enough, Mr. Chairman.

1 The Chairman. Okay. Thank you very much.

2 Senator Crapo?

3 Senator Crapo. Thank you, Mr. Chairman. I
4 appreciate the opportunity to close on this debate.

5 Let me just respond once again--let me start by
6 reading President Obama's pledge. "...if you're a family
7 making less than \$250,000 a year, my plan won't raise
8 your taxes one penny--not your income taxes, not your
9 payroll taxes, not your capital gains taxes, not any of
10 your taxes."

11 The Chairman has indicated he thinks that this is
12 just a message amendment. I could not disagree more.
13 This is very, very substantive and very direct.

14 I could have brought a broad amendment that would
15 have sought to address all of the pass-through taxes and
16 the costs, some of which Senator Hatch has just
17 mentioned, but I made it very clear that I am willing to--
18 -which I believe should be included in the President's
19 pledge, but I am limiting this amendment simply to the
20 direct tax increases that will be paid by people making
21 less than \$250,00 a year.

22 I think it is very interesting, though, that the
23 Chairman argues that this would gut the bill. Again, all
24 this amendment does is say what the President said will
25 be a fail-safe position for the bill. And if we cannot

1 do health care reform without taxing people in the middle
2 class and the lower-income categories, then we have got
3 the wrong plan in front of us. I believe we can do major
4 and very helpful reforms that will increase access, that
5 will reduce costs, and help us to dramatically improve
6 our health care situation and our health care economy in
7 the United States without imposing these taxes.

8 The Chairman. The clerk will call the roll.

9 The Clerk. Mr. Rockefeller?

10 Senator Rockefeller. No.

11 The Clerk. Mr. Conrad?

12 The Chairman. No by proxy.

13 The Clerk. Mr. Bingaman?

14 Senator Bingaman. No.

15 The Clerk. Mr. Kerry?

16 The Chairman. No by proxy.

17 The Clerk. Mrs. Lincoln?

18 The Chairman. Pass.

19 The Clerk. Mr. Wyden?

20 The Chairman. No by proxy.

21 The Clerk. Mr. Schumer?

22 The Chairman. Pass.

23 The Clerk. Ms. Stabenow?

24 Senator Stabenow. No.

25 The Clerk. Ms. Cantwell?

1 Senator Cantwell. No.
2 The Clerk. Mr. Nelson?
3 The Chairman. No by proxy.
4 The Clerk. Mr. Menendez?
5 The Chairman. No by proxy.
6 The Clerk. Mr. Carper?
7 The Chairman. No by proxy.
8 The Clerk. Mr. Grassley?
9 Senator Hatch. Aye by proxy.
10 The Clerk. Mr. Hatch?
11 Senator Hatch. Aye.
12 The Clerk. Ms. Snowe?
13 Senator Snowe. Aye.
14 The Clerk. Mr. Kyl?
15 Senator Hatch. Aye by proxy.
16 The Clerk. Mr. Bunning?
17 Senator Bunning. Aye.
18 The Clerk. Mr. Crapo?
19 Senator Crapo. Aye.
20 The Clerk. Mr. Roberts?
21 Senator Hatch. Aye by proxy.
22 The Clerk. Mr. Ensign?
23 Senator Ensign. Aye.
24 The Clerk. Mr. Enzi?
25 Senator Hatch. Aye by proxy.

1 The Clerk. Mr. Cornyn?

2 Senator Cornyn. Aye.

3 The Clerk. Mr. Chairman?

4 The Chairman. No. Senator Schumer is no by proxy.

5 The Clerk. Mrs. Lincoln?

6 Senator Lincoln. Yes.

7 The Chairman. Senator Wyden? Has Senator Wyden
8 voted?

9 The Clerk. Mr. Wyden?

10 Senator Wyden. No.

11 The Chairman. The clerk will tally the vote.

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

14 The Chairman. The amendment does not pass.

15 Okay. I think, Senator Ensign, you had one.

16 Senator Ensign. Yes, Mr. Chairman. It is similar,
17 except that my amendment is much more narrowly focused.
18 It is Ensign number F2. The amendment is to exempt
19 middle-income families from the provisions in the
20 Chairman's bill that applies the individual tax penalty
21 for failure to have health insurance.

22 My amendment is very simple and straightforward.
23 The provision in the original mark was at page 29 and
24 says, "The consequence for not maintaining insurance
25 would be an excise tax." I will repeat that. "The

1 consequence for not maintaining insurance would be an
2 excise tax." Not a fee. A tax.

3 It goes on to explain how much that tax would be.
4 That statement should have put to rest any claims that
5 this is not a tax increase. And just to be clear, my
6 amendment is focused on this tax, whether you call it a
7 fine or a fee or a penalty or a charge or any other way
8 to describe picking the pocket of hard-working Americans.

9 You have seen a version of this before when I
10 offered my amendment to the budget resolution and the
11 entire Senate voted for it. My amendment today similarly
12 says that families making less than \$250,000 per year and
13 individuals making less than \$200,000 should be exempted
14 or should be carved out of this individual mandate excise
15 tax.

16 Does this sound familiar? Let us review where the
17 President is on this issue. Let me quote from the
18 President. He said, "But let me be perfectly clear. If
19 your family earns less than \$250,000, you will not see
20 your taxes increase a single dime. I repeat, not one
21 single dime."

22 My amendment to the budget resolution, I know my
23 colleague Senator Conrad will recall, stated, "It shall
24 not be in order in the Senate to consider any bill,
25 resolution, amendment between Houses, motion, or

1 conference report that includes a Federal tax increase
2 which would have widespread applicability on middle-
3 income taxpayers." That provision was adopted by a
4 recorded vote of 98-0. And it is a shame that,
5 unfortunately, that provision was dropped in conference.

6 If my budget resolution amendment had remained, then
7 we would not have to consider my Committee health care
8 amendment today. Indeed, we would not have the present
9 bill in front of us at all, and maybe middle-income
10 families would not be as apprehensive about next year's
11 tax bill as they watch congressional debate on this
12 legislation.

13 And despite the lip service that my colleagues make
14 toward following that policy of not raising taxes on
15 middle-income families, we continue to see legislative
16 proposals that do just that. People are saying one thing
17 but doing another.

18 So my argument is simple: Let us do what we said we
19 would do and exempt middle-income families from these new
20 taxes.

21 Mr. Chairman, I have a chart that we will pass out
22 to all the members of the Committee that Joint Tax and
23 CBO did, a chart for 2016, and the chart says--basically
24 let me sum it up. For people making less than \$120,000--
25 we are not even getting up to \$200,000. The people

1 making less than \$120,000 a year, they will bear the
2 brunt of 70 percent of this tax increase. So 70 percent
3 of the tax increase will be on people making less than
4 \$120,000 a year because they combine the last 30 percent
5 and anybody above 120, we do not have the breakout
6 exactly what it is on people making less than \$200,000 a
7 year. The bottom line is, though, 70 percent of the
8 burden is being paid by people who make less than
9 \$120,000 a year.

10 When I first offered my budget resolution amendment,
11 I talked then about the danger of tax increases caused by
12 climate legislation that was being considered, and I
13 noted then how President Obama had said under his plan of
14 cap-and-trade system, electricity rates would necessarily
15 skyrocket. Well, he could very well have said the same
16 thing about how under Democrat health care legislation
17 taxes and costs will necessarily skyrocket. We have seen
18 that in many tax provisions in this bill.

19 There is an interesting common thread here. Under
20 both proposals, Democrats have incorporated enormous
21 taxes on America, including middle-income families. Both
22 involve very definite and immediate high costs in the
23 early years, and both promise savings and benefits
24 sometime in a vague way in the indefinite future. Both
25 proposals involve the creation of entirely new and

1 complex structures that have never been tested and are
2 described in ridiculously long and complex bills. Yet in
3 both cases, Democrats are so confident that people and
4 markets will react exactly as they predict to bring about
5 benefits someday.

6 I, on the other hand, am confident only that
7 American wallets will be getting lighter if this kind of
8 legislation continues, and I am far less confident that
9 Americans will ever see the benefits that they are being
10 promised.

11 So, Mr. Chairman, if we want to keep the President's
12 promise of not raising taxes by one single dime on
13 American families making less than \$250,000 a year, there
14 is no question the excise tax is a tax. The vast
15 majority of it is being leveled on people making less
16 than \$250,000 a year. We should adopt this amendment.

17 The Chairman. All right. This is, again, a
18 message amendment because it just does not have
19 sufficient definition. And I might remind everybody that
20 the effect of this amendment really is that no one
21 earning less than \$200,000 a year should buy health
22 insurance. That is basically what the amendment says.
23 Nobody earning less than \$200,000 a year should buy
24 health insurance. We are trying to have a shared
25 responsibility here where all Americans are

1 participating. And I do believe that those Americans
2 earning under \$200,000 should buy health insurance.

3 And essentially another effect of this amendment,
4 therefore, is to gut, kill universal responsibility
5 requirements. Again, it is the same discussion we had
6 last time. It is virtually the same amendment, so I
7 frankly think we should vote on it right away.

8 Senator Cornyn, very briefly.

9 Senator Cornyn. May I ask Mr. Barthold from Joint
10 Tax, on page 20 of the Chairman's mark, the Chairman's
11 mark would provide a refundable tax credit for eligible
12 individuals and families to purchase there State
13 exchanges, and the tax credit would be available for
14 individuals up to 300 percent of the Federal poverty
15 level.

16 Can you tell me in dollars and cents what 300
17 percent of the--what kind of income for an individual and
18 a family at 300 percent of the poverty level, what does
19 that translate to?

20 Mr. Barthold. Senator, for 2009, the Federal
21 poverty level for a family of four is \$22,050, I think,
22 so basically 300 percent is \$66,000.

23 Senator Cornyn. And can you tell me--I know that
24 in the stimulus bill there was a making-work-pay
25 refundable tax credit. There is an earned income tax

1 credit. Could you tell me, if this bill passes with tax
2 credits up to 300 percent of the Federal poverty level,
3 what other refundable tax credits would an individual or
4 a family of four be entitled to?

5 Mr. Barthold. Well, as you point out, Senator,
6 taxpayers may be eligible for the earned income tax
7 credit. We enacted as part of the American Recovery and
8 Reinvestment Act the making-work-pay credit. Also, the
9 American opportunity credit, the education credit is
10 refundable under the American Recovery and Reinvestment
11 Act.

12 Senator Cornyn. And can you quantify what the
13 value of all those refundable tax credits would be for a
14 family of four up to 300 percent of poverty?

15 Mr. Barthold. Well, not right now at the table. I
16 would have to calculate it. Recognize, of course,
17 Senator, that there are different income thresholds and
18 requirements to claim the different credits. Obviously,
19 the American opportunity credit only relates to families
20 with college expenses. The earned income tax credit by
21 its name generally requires that the family have earned
22 income. The making-work-pay credit, again, is based on
23 earned income. There are different income tests.

24 If you would like, I can ask some of my colleagues
25 to work out some of the values for different income

1 levels, if you would like it for sort of a prototypical
2 family of four at different income levels.

3 Senator Cornyn. I would appreciate that very much.

4 I think it is very important, Mr. Chairman, for people
5 listening to understand that these refundable tax credits
6 that are going to be used to subsidize health insurance
7 basically represent a cash payment by the Federal
8 Government, a subsidy to individuals, and these are
9 individuals who pay no income tax. And so what we have
10 is by taxing people at higher-income levels, it is
11 basically a huge income redistribution.

12 And I would say to my friend from Michigan that the
13 proposals that we are making here to try to help the
14 President keep his pledge not to raise taxes on the
15 American people, we are not taking anything away from the
16 lower-income people that they have now. It is that we
17 are trying to protect all the American people from huge
18 tax increases and this huge income redistribution. And I
19 think it is important for us to get some figures that we
20 can look at so we can quantify that--

21 Senator Stabenow. Would my colleague yield?

22 Senator Cornyn. --and make some sense out of it.
23 So I appreciate Joint Tax doing that, and I would be
24 happy to yield?

25 Senator Stabenow. Would my colleague yield?

1 Since, Mr. Chairman, this is message day, let me just
2 indicate again, we have had six amendments from the
3 Republican side that would reduce tax credits for middle-
4 income people. And I do not consider somebody with two
5 children making \$60,000 a year a wealthy person.

6 We have had to fight back employee benefits being
7 taxed broadly from the Republicans. We have an
8 opportunity to address this by saying to the wealthiest
9 people of the country, to millionaires in this country,
10 that they would pay their fair share in order to make
11 sure that we can provide health care for the middle
12 class. That is certainly not something that Republican
13 colleagues have wanted to do. We have seen nothing but
14 proposals that would give a small tax credit and leave
15 everybody hanging in this country.

16 So, Mr. Chairman, I know this is message day, and I
17 understand what this is all about. But just for the
18 record, what we are talking about--and I am looking
19 forward to the floor when we will have opportunities to
20 decide whose side we are on in this debate, whether it is
21 the middle class or the privileged few who have benefited
22 so greatly by past tax policy. But at the moment, I
23 guess we are just going to have a series of message
24 amendments to try to hurt the President and score points.

25 And I--

1 Senator Cornyn. If I could reclaim the floor just
2 briefly to make the point--

3 The Chairman. I am sorry. Senator Stabenow was
4 recognized, and now--

5 Senator Cornyn. She asked if I would yield.

6 The Chairman. I am sorry. Okay.

7 Senator Cornyn. If I could just finish up and make
8 the point--

9 The Chairman. Senator Cornyn has the floor.

10 Senator Cornyn. My friend from Michigan is
11 assuming that these 300 percent tax credits to purchase
12 this insurance under the exchange is already law and that
13 our amendments are taking something away which is already
14 vested in these families up to 300 percent of the poverty
15 level. That is demonstrably false. And I know the
16 Senator would like to make this a populist argument that
17 we are taking from the rich to give to the poor, but I
18 think we need a little more definition on this. We need
19 to know dollars and cents of what the impact will be,
20 what the transfer from small businesses, from people who
21 are paying an excise tax on higher-cost insurance
22 policies, what the wealth transfer will be as a result of
23 the proposals here.

24 That is why I appreciate Joint Tax providing us
25 their best estimate because I think we ought to make our

1 decisions based on those facts rather than based on
2 rhetoric.

3 The Chairman. Senator Ensign, do you want to
4 close--Senator Crapo?

5 Senator Crapo. Mr. Chairman, just very briefly. I
6 just have to speak again because of the argument that is
7 being made that these are just messaging amendments and
8 this is message day or what have you. You know, we spent
9 5 hours yesterday debating the proposal for a public
10 option, and now we are being asked to just debate the
11 question of tax policy in the bill for 20 minutes and
12 being accused of messaging, and I just have to disagree
13 with that.

14 The fact is that the issue of whether we are taxing
15 middle-class America is a real substantive issue. And it
16 is as important in this bill as it is in the other bills
17 that Senator Ensign has raised. You know, to try to just
18 dismiss this issue by saying that it is a message effort
19 is incorrect and, frankly, I think undermines the true
20 need that we have to truly address the question of
21 financing.

22 Today was the day that we were supposed to bring
23 amendments relating to the financing portions of the
24 bill, or we would have had some of these messages or
25 amendments on other days. And is there a message in this

1 debate? Yes, there is. But that does not mean that
2 these are not very serious, substantive issues. The
3 taxes that we are talking about here are real. They are
4 in the bill, and they are going to hit squarely on the
5 middle class.

6 I for one believe that we should be spending a much
7 larger amount of time debating these issues than we are
8 being allocated here, and that we need to get down into
9 the details of these proposals so that the American
10 public understands what is truly in the legislation.

11 The Chairman. Okay. Senator Ensign, why don't you
12 close?

13 Senator Ensign. Thank you. Thank you, Mr.
14 Chairman.

15 Getting rid of the tax, the excise tax on middle-
16 income countries is not just a message. It actually will
17 change policy in the bill. Mr. Chairman, you said that
18 it guts a part of the bill. Well, there are some of us
19 who believe that the individual mandate is the wrong
20 policy. So we are trying to change policy by exempting
21 middle-income countries from a tax increase.

22 And what is the effect of the tax increase if you do
23 not pay it? Well, we heard that the other day. The
24 effect is up to a \$25,000 fine and 1 year in jail.

25 Well, this is the effect. We are changing tax

1 policy here, and the penalties are up to 1 year in jail
2 and a \$25,000 penalty for not paying these taxes.

3 So, Mr. Chairman, this is not just messaging. This
4 is a serious policy consideration that we are trying to
5 get today, and we are trying to get the President to have
6 policies that reflect what the President's promise was,
7 and it was not just on one day that he said it. He said
8 it time after time after time.

9 So we should support this amendment to make sure we
10 are being consistent with the President's policy.

11 The Chairman. The clerk will call the roll.

12 The Clerk. Mr. Rockefeller?

13 Senator Rockefeller. No.

14 The Clerk. Mr. Conrad?

15 Senator Conrad. No.

16 The Clerk. Mr. Bingaman?

17 Senator Bingaman. No.

18 The Clerk. Mr. Kerry?

19 The Chairman. No by proxy.

20 The Clerk. Mrs. Lincoln?

21 The Chairman. Pass.

22 The Clerk. Mr. Wyden?

23 The Chairman. No by proxy.

24 The Clerk. Mr. Schumer?

25 The Chairman. No by proxy.

1 The Clerk. Ms. Stabenow?
2 Senator Stabenow. No.
3 The Clerk. Ms. Cantwell?
4 Senator Cantwell. No.
5 The Clerk. Mr. Nelson?
6 The Chairman. No by proxy.
7 The Clerk. Mr. Menendez?
8 The Chairman. No by proxy.
9 The Clerk. Mr. Carper?
10 The Chairman. No by proxy.
11 The Clerk. Mr. Grassley?
12 Senator Grassley. Aye.
13 The Clerk. Mr. Hatch?
14 Senator Hatch. Aye.
15 The Clerk. Ms. Snowe?
16 Senator Snowe. Aye.
17 The Clerk. Mr. Kyl?
18 Senator Grassley. Aye by proxy.
19 The Clerk. Mr. Bunning?
20 Senator Bunning. Aye.
21 The Clerk. Mr. Crapo?
22 Senator Crapo. Aye.
23 The Clerk. Mr. Roberts?
24 Senator Grassley. That is aye by proxy, as well.
25 The Clerk. Mr. Ensign?

1 Senator Ensign. Aye.

2 The Clerk. Mr. Enzi?

3 Senator Grassley. Enzi, aye by proxy.

4 The Clerk. Mr. Cornyn?

5 Senator Cornyn. Aye.

6 The Clerk. Mr. Chairman?

7 The Chairman. No.

8 The Clerk. Mrs. Lincoln?

9 Senator Lincoln. Aye.

10 The Clerk. Mr. Chairman, the final tally is 11

11 ayes, 12 nays.

12 The Chairman. The amendment does not carry.

13 I understand, Senator Grassley and Senator Snowe,

14 you are ready to bring back--oh, it is Snowe-Lincoln,

15 excuse me. Your amendment?

16 Senator Snowe. The F9 as modified?

17 The Chairman. Sorry.

18 Senator Snowe. Yes, the F9 amendment that we

19 discussed yesterday, I brought it up yesterday. Now it

20 is pending for a vote.

21 The Chairman. On the maintenance--

22 Senator Snowe. No.

23 Senator Grassley. No, the other.

24 The Chairman. Which one is that?

25 Senator Grassley. Ours was the maintenance of

1 effort, and F9 was Snowe-Lincoln.

2 Senator Snowe. Snowe-Lincoln-Bingaman.

3 The Chairman. Oh, the medical indemnity.

4 Senator Snowe. Yes, and the seasonal workers in
5 community health centers.

6 The Chairman. Yes, why don't you bring that back
7 up? The Snowe-Lincoln-Bingaman amendment now is in
8 order.

9 Senator Snowe. Thank you, Mr. Chairman. This is
10 the F9 amendment as modified that included three
11 provisions--one of mine and Senator Bingaman's and
12 Senator Lincoln's.

13 The initial component of this amendment excluded
14 from the excise tax on high-cost health insurance
15 indemnity insurance policies that are paid for by
16 employees with after-tax income, and these are insurance
17 policies that Americans buy to protect themselves from
18 costs that may be incurred due to illness other than
19 health-related expenses, maybe a loss of wages or other
20 expenses, as a result of hospitalization. These
21 indemnity insurance policies pay a set amount based on
22 the severity of the claim.

23 These indemnity insurance policies are very
24 important because for a number of individuals, as we well
25 know, they end up filing for bankruptcy due to medical

1 expenses. In fact, one of the biggest reasons for
2 bankruptcy today is medical debt. In fact, more than 62
3 percent of personal bankruptcies were medical, an
4 increase from just 8 percent of bankruptcies that
5 occurred in 1981. And among those who filed for
6 bankruptcy, 75 percent reported having some type of
7 medical insurance.

8 So this type of insurance is crucial for people in
9 times of illness or accidents and keeping together their
10 financial lives. These policies are not health
11 insurance. Most people equate these policies with
12 disability insurance, which is already excluded from the
13 excise tax on high-cost insurance plans.

14 In addition, Senator Bingaman has two additional
15 components to this legislation--one which includes
16 community health centers. The first of these addresses
17 the fact that those who are Medicare beneficiaries,
18 regardless of the services performed, are capped in the
19 amount that they receive for reimbursement. Last year,
20 for example, a rural health center was paid a maximum of
21 \$100.06, regardless of the amount of services provided.
22 I think this is an arbitrary and unfair system that costs
23 the health centers \$85,000 in lost reimbursement on an
24 annual basis, and we know the role that community health
25 centers play today in our communities and will play even

1 more so in the years ahead, and most especially in rural
2 communities. So more and more Medicare beneficiaries are
3 relying on community health centers for their medical
4 treatment, and this inequity threatens the viability of
5 these centers. So we ought to be able to reimburse them
6 for the services actually performed and/or received.

7 Senator Bingaman also has another amendment that
8 will allow Medicare beneficiaries with HIV and AIDS to
9 obtain vital medications, have those contributions
10 credited towards their Part D out-of-pocket expenditures.

11 Given the fact that the Chairman's mark includes
12 provisions to credit seniors who receive help in
13 purchasing drugs in the doughnut hole coverage gap, we
14 should not treat those obtaining assistance obtaining HIV
15 medications any differently.

16 Finally, there is an amendment that would allow--
17 Senator Lincoln's provision in this legislation that
18 would allow seasonal employees and employers to offer
19 health insurance to those employees and not be
20 disqualified because in the summer months, they have a
21 dozen of employees, and our States rely on tourism as a
22 crucial part of our economy. In fact, it is predominant
23 in our State. And so we should allow those employers who
24 have seasonal employees to be able to be eligible for
25 health insurance and not to be disqualified because they

1 are seasonal employees because they hire, you know, more
2 employees during the summer than they, of course,
3 throughout the entire year.

4 So, Mr. Chairman, I would hope that the Committee
5 would adopt this legislation.

6 The Chairman. Is there further discussion?

7 [No response].

8 The Chairman. This has been worked over and vetted
9 quite thoroughly and I think we are prepared to vote on
10 it. I think a voice vote would be proper here.

11 All those in favor of the amendment, say aye.

12 [A Chorus of Ayes].

13 The Chairman. Those opposed, no.

14 [No response].

15 The Chairman. The ayes have it. The amendment is
16 agreed to.

17 Thank you, Senators.

18 Senator Hatch. Mr. Chairman?

19 The Chairman. Senator Hatch, you are recognized
20 for an amendment.

21 Senator Hatch. Well, thank you, Mr. Chairman. I
22 want to call up my amendment, Hatch F-6, which has been
23 modified and provided to you and the Ranking Member.

24 This would provide a process for the courts promptly
25 to consider any constitutional challenge to this

1 legislation. I chose the same language that we put into
2 the bipartisan Campaign Reform Act. Like that
3 legislation, this is a very important bill that raises
4 very real constitutional questions. The Chairman opposed
5 my earlier amendment because he said it was
6 unconstitutional. I hope he and others on that side will
7 be at least that sensitive to the very real
8 constitutional concerns raised by the Chairman's mark.

9 I would just mention two provisions of the
10 Chairman's mark that raised at least three obvious
11 constitutional questions. First, while the Constitution
12 allows Congress to impose excise taxes, it requires those
13 taxes to be uniform throughout the United States. The
14 Chairman's mark would impose an excise tax on high-
15 premium insurance plans that provide transition relief
16 for insurers in 17 unnamed States.

17 If this excise tax is the solution to the problem of
18 high-premium plans, then to be uniform the tax must have
19 equal force and effect wherever the problem occurs. I
20 think the notion that a tax that differs by State is
21 actually uniform throughout the United States raised an
22 obvious constitutional question.

23 The provision requiring individuals to buy health
24 insurance, or the individual mandate, raises at least two
25 more constitutional questions. The only conceivable

1 constitutional basis for Congress requiring that
2 Americans purchase a particular good or service is the
3 power to regulate interstate commerce.

4 Even as the Supreme Court has expanded the commerce
5 power, there has been one constant: Congress was always
6 regulating activities. Let me repeat that: Congress was
7 always regulating activities in which people chose to
8 engage. They might be non-commercial activities or
9 intrastate activities, but they were activities.

10 But the Chairman's mark would do something entirely
11 different. Rather than regulate what people have chosen
12 to do, it would require them to do something they have
13 not chosen to do at all. When I raised this issue last
14 week, the Chairman's staff implied that the Congressional
15 Research Service had concluded in a report that this
16 individual mandate is constitutional.

17 I did not pursue the point then because I had not
18 read the report. I have now read it, and with respect,
19 it says nothing of the kind. In fact, the CRS report did
20 not review the specific provisions in the Chairman's mark
21 at all. The CRS report, however, is definite about one
22 thing. Let me quote from the report: "This is a novel
23 issue, whether Congress can use its commerce clause
24 authority to require a person to buy a good or a service,
25 and whether this type of required participation can be

1 considered economic activity."

2 Now, I urge my colleagues to read this report. The
3 Chairman's mark would have Congress boldly go where we
4 have never gone before, at least as far as I can see, in
5 the history of our country. If we have the power simply
6 to order Americans to buy certain products, why did we
7 need a Cash for Clunkers program or the upcoming program
8 providing rebates for purchasing energy-efficient
9 appliances? We can simply require Americans to buy
10 certain cars, dishwashers, or refrigerators.

11 Now, I want to answer one inevitable question up
12 front. This is fundamentally different than the
13 requirement that drivers have to buy car insurance. That
14 requirement comes not from the Federal Government, but
15 from the States, which may do many things that Congress
16 may not do.

17 But even the States require only those who drive to
18 buy car insurance. People who do not drive do not have
19 to purchase or buy car insurance. But under the
20 Chairman's mark, individuals must buy health insurance
21 whether or not they ever visit a doctor, get a
22 prescription, or have an operation.

23 The second constitutional problem with the
24 individual mandate arises because the penalty for failing
25 to purchase health insurance is, in fact, not the excise

1 tax that the Chairman's mark calls it. An excise tax is
2 a tax on the manufacturer and sales of goods or services.

3 The gasoline tax would be a good example. The tax
4 imposed upon people who failed to purchase health
5 insurance, however, is the exact opposite. It occurs not
6 when there has been the sale of something, but when there
7 has been no sale of anything at all.

8 This actually works more like a fine, but the
9 Chairman's mark said it is an excise tax to be assessed
10 through the Tax Code and collected by the IRS. If this
11 is a tax at all, it is certainly not an excise tax.
12 Instead, it is a direct tax. And while the Constitution
13 requires that excise taxes must be uniform throughout the
14 United States, it requires that direct taxes must be
15 apportioned among the States by population.

16 Now, just as the excise tax on high-premium plans is
17 not uniform, this direct tax on individuals who do not
18 purchase health insurance is not apportioned. In an
19 analysis just published in the well-respected *B&A Daily*
20 *Tax Report*, they looked at this question. I would ask,
21 Mr. Chairman, consent that this be placed in the record
22 at this point.

23 The Chairman. Without objection.

24 [The information appears at the end of the
25 transcript.]

1 Senator Hatch. Now, here is its conclusion:
2 "Accordingly, unless Congress wishes to develop a
3 mechanism to apportion the tax in a constitutionally
4 acceptable way, a different funding mechanism would be
5 developed or a constitutional challenge could be
6 successfully brought."

7 Now, these are just three of the obvious
8 constitutional problems with the Chairman's mark. These
9 problems are real and, as the CRS report concluded, they
10 are "novel" and "unprecedented". This simply highlights
11 the need to provide a streamlined process so that the
12 courts promptly can settle any constitutional challenge
13 to this legislation.

14 The American people need to know that we are not
15 allowing politics to trump the Constitution. They need
16 to know that we on this committee take the Constitution
17 seriously. Now, my amendment would provide for a process
18 that would help provide such assurance, and I believe
19 that it is the least we can do to make sure that we have
20 a procedural route to be able to determine, as quickly as
21 possible if this legislation should pass--heaven forbid--
22 and determine whether or not the legislation is
23 constitutional or not.

24 I think it is a reasonable approach to this problem.
25 I would hope that my colleagues on the other side would

1 see that this is a reasonable approach and that, since it
2 does involve at least these three constitutional
3 questions, we really, in due conscience, ought to do
4 everything we can to make sure that we have a mechanism
5 in place in this bill to be able to get to the bottom of
6 that as quickly as possible and determine whether or not
7 there are unconstitutionality aspects of this bill.

8 The Chairman. Thank you, Senator, very much, for
9 your amendment. These provisions in the bill clearly are
10 constitutional. I think that is fairly clear. But as I
11 read your amendment, your amendment would allow an
12 expedited judicial review for the transition relief for
13 the excise tax and high-cost insurance plans, and that
14 personal responsibility requirement. That is, an
15 expedited judicial review.

16 Accordingly, this committee does not have
17 jurisdiction over this issue. This is clearly within the
18 jurisdiction of the Judiciary Committee because it
19 provides for expedited judicial review. Because we do
20 not have jurisdiction, it is not germane and I rule this
21 amendment out of order.

22 Senator Hatch. Well, I move that we waive the
23 germaneness rule.

24 The Chairman. The Clerk will call the roll on the
25 motion to overrule the Chair.

1 The Clerk. Mr. Rockefeller?
2 Senator Rockefeller. No.
3 The Clerk. Mr. Conrad?
4 Senator Conrad. No.
5 The Clerk. Mr. Bingaman?
6 Senator Bingaman. No.
7 The Clerk. Mrs. Lincoln?
8 Senator Lincoln. No.
9 The Clerk. Mr. Wyden?
10 Senator Wyden. No.
11 The Clerk. Mr. Schumer?
12 Senator Schumer. No.
13 The Clerk. Ms. Stabenow?
14 Senator Stabenow. No.
15 The Clerk. Ms. Cantwell?
16 Senator Cantwell. No.
17 The Clerk. Mr. Grassley?
18 Senator Grassley. Aye.
19 The Clerk. Mr. Hatch?
20 Senator Hatch. Aye.
21 The Clerk. Ms. Snowe?
22 Senator Snowe. Aye.
23 The Clerk. Mr. Bunning?
24 Senator Bunning. Aye.
25 The Clerk. Mr. Crapo?

1 Senator Crapo. Aye.

2 The Clerk. Mr. Ensign?

3 Senator Ensign. Aye.

4 The Clerk. Mr. Cornyn?

5 Senator Cornyn. Aye.

6 The Clerk. Mr. Chairman?

7 The Chairman. No.

8 The Clerk. Mr. Chairman, the final tally is 7
9 ayes, 9 nays.

10 Senator Hatch. Mr. Chairman?

11 The Chairman. Two-thirds of those present not
12 having voted in the affirmative, the ruling of the Chair
13 is sustained.

14 Senator Hatch. Mr. Chairman?

15 The Chairman. Senator Bunning, I think you are
16 next.

17 Senator Hatch. Well, if I could just make a
18 request, please.

19 The Chairman. Senator Hatch would like to be
20 recognized.

21 Senator Hatch. I would hope that we would at least
22 have a CRS review of some of the issues that I have
23 raised before final vote on this bill in committee. I
24 think these are really important issues.

25 The Chairman. We will make that request to CRS.

1 Senator Hatch. That would be great. Thank you.

2 The Chairman. Senator Bunning?

3 Senator Bunning. Thank you, Mr. Chairman.

4 I would like to call up Amendment F-2, not F-3. F-
5 2, as modified. Everybody got a copy?

6 Let me explain the amendment. It sunsets in 2019
7 the tax increases in this mark will have an effect of
8 either increasing costs on consumers or that result in
9 employers invading the privacy of their workers. Let us
10 take the last issue first. The so-called "free rider"
11 provision, which is a thinly-disguised employer mandate,
12 will cause employers to pry into the private lives of
13 their workers in a way they never have before.

14 Never before have employers had to know whether
15 their workers have health insurance outside of the
16 workplace. Never before have employers had to inquire
17 about the total income and number of people in the
18 worker's household. And never before have employers had
19 to maintain confidential tax information about their
20 workers that is unrelated to the work they perform. This
21 tax increase is not only an invasion of the workers'
22 privacy, it will also cause employers to discriminate
23 against low-wage workers. Is this really the result we
24 want?

25 Now, let us take a look at the laundry list of tax

1 increases that increase costs for consumers. Buried on
2 page 167 of the Chairman's mark, there is a tax on health
3 plans to fund patient-centered outcome reach. Next,
4 there is a tax on the uninsured. Americans will now have
5 to pay a hefty penalty for the privilege of being
6 uninsured, backed up by the threat of jail time if they
7 refuse to pay the tax.

8 According to CBO, in 2016, 20 percent of the revenue
9 from this tax will come from uninsured Americans with
10 incomes below or between 100 and 200 percent of poverty,
11 and 58 percent of the revenue will come from uninsured
12 Americans below 400 percent of poverty. These are the
13 very people that several members of this committee claim
14 to have affordability concerns about, yet this group will
15 be hardest hit by the tax on the uninsured.

16 Next, we have a tax on high-cost plans. The Joint
17 Tax Committee has told us that this will hit consumers in
18 several ways. It could result in reduced benefits or
19 restricted networks of providers. The other likely
20 results are cost increases for consumers in the form of
21 higher premiums or higher co-pays and deductibles.

22 How is this making health care more affordable? How
23 does this tax increase allow people to keep the health
24 care coverage they like when it forces plans to change by
25 restricting benefits or increasing cost? Now that the

1 high-cost plans will increase out-of-pocket costs for
2 consumers, the Chairman's mark pours salt on the wounds
3 by drastically restricting something that makes out-of-
4 pocket health care costs more affordable: flexible
5 spending accounts.

6 The cap on FSAs in the mark, combined with the fact
7 that employers who offer FSAs will be subject to the
8 high-cost plan tax, virtually assures that FSAs will
9 become extinct. Workers will no longer be able to use
10 FSAs to make out-of-pocket health care costs more
11 affordable.

12 But it does not stop there. People who use FSAs,
13 health reimbursement accounts, or health savings accounts
14 will no longer be able to use them to help with their
15 over-the-counter medicines. Under the Chairman's mark,
16 if you believe you have swine flu you must now track down
17 your doctor and get a prescription before you can buy the
18 over-the-counter anti-viral medications needed to treat
19 your swine flu.

20 Tax increases on over-the-counter medicines will
21 actually drive up health spending by causing more
22 unnecessary visits to physicians. It certainly does not
23 allow people who like the coverage they have to keep it.
24 There is also a tax increase on employers who offer
25 prescription drug coverage to their retirees.

1 We used to be concerned about employers dropping
2 retired health coverage, but apparently this is no longer
3 a concern. The Joint Committee on Taxation tells us that
4 the annual tax on insurers will be passed along to
5 consumers in the form of higher premiums.

6 The beauty of this tax is that it will force your
7 health plans into a high-cost plan tax even quicker,
8 which will allow the government to confiscate even more
9 money from taxpayers. Let me be clear: I do not support
10 any of these tax hikes that increase costs for consumers.
11 I wish they were not in the bill. But my amendment will
12 allow these tax increases on American consumers to last
13 until December 31, 2019. After that time the tax
14 increases that result in increased health care costs to
15 consumers will expire.

16 This will leave a future Congress with three options
17 in order to prevent an increase in the deficit. First,
18 perhaps all these magical savings that President Obama
19 has claimed will result from health reform will
20 materialize by then so there will no longer be a need for
21 tax increases to finance health reform. In fact, this
22 past weekend, President Clinton said that tax increases
23 will only be necessary in the short run for health
24 reform. Or if the savings do not materialize, Congress
25 will have to have 10 years, 2010 to 2019, to find

1 spending cuts rather than tax increases to finance the
2 mandates in this bill.

3 There is a third option for our future Congress. By
4 2019, perhaps Americans will not mind paying a higher
5 health care cost because of these tax increases. Maybe
6 the American people will love the health reform they have
7 gotten from all this shared responsibility. If this is
8 the case, then I am certain that a future Congress will
9 have no trouble simply reinstating all these cost-
10 increasing tax hikes.

11 I think we can all agree that health reform should
12 reduce costs, not increase them. That is why it makes no
13 sense to have policies that drive up costs for consumers
14 continue forever under this bill. I urge my colleagues
15 to stand up for the taxpayers and health care consumers
16 and support this amendment.

17 The Chairman. All right. Is there any further
18 discussion?

19 [No response].

20 The Chairman. I think we should vote on this right
21 away, too. Basically, I think it is irresponsible to
22 cut off, frankly, the revenue for health care reform
23 after 10 years while spending continues. That would
24 certainly have an effect on the cost curve in the second
25 10 years and it would skyrocket as a consequence of this

1 amendment, which would not help us with the CBO score.

2 So, consequently, I think we should just summarily
3 vote on this amendment and go on to the next amendment.

4 Senator Bunning. Mr. Chairman, just in response.

5 The Chairman. Senator Bunning?

6 Senator Bunning. I have given three other options
7 that future Congresses could address if you think I am
8 trying to cut it off after 10 years.

9 The Chairman. Well, right now this bill is before
10 us right now. You want to cut off, after 10 years, all
11 the funding, yet all the spending continues. I think
12 that is not responsible.

13 The Clerk will call the roll.

14 The Clerk. Mr. Rockefeller?

15 Senator Rockefeller. No.

16 The Clerk. Mr. Conrad?

17 Senator Conrad. No.

18 The Clerk. Mr. Bingaman?

19 The Chairman. No by proxy.

20 The Clerk. Mr. Kerry?

21 The Chairman. No by proxy.

22 The Clerk. Mrs. Lincoln?

23 The Chairman. Pass.

24 The Clerk. Mr. Wyden?

25 Senator Wyden. No.

1 The Clerk. Mr. Schumer?
2 The Chairman. Pass.
3 The Clerk. Ms. Stabenow?
4 Senator Stabenow. No.
5 The Clerk. Ms. Cantwell?
6 Senator Cantwell. No.
7 The Clerk. Mr. Nelson?
8 Senator Nelson. No.
9 The Clerk. Mr. Menendez?
10 The Chairman. No by proxy.
11 The Clerk. Mr. Carper?
12 Senator Carper. No.
13 The Clerk. Mr. Grassley?
14 Senator Grassley. Aye.
15 The Clerk. Mr. Hatch?
16 Senator Hatch. Aye.
17 The Clerk. Ms. Snowe?
18 Senator Snowe. No.
19 The Clerk. Mr. Kyl?
20 Senator Grassley. Aye by proxy.
21 The Clerk. Mr. Bunning?
22 Senator Bunning. Aye.
23 The Clerk. Mr. Crapo?
24 Senator Crapo. Aye.
25 The Clerk. Mr. Roberts?

1 Senator Grassley. Aye by proxy.
2 The Clerk. Mr. Ensign?
3 Senator Ensign. Aye.
4 The Clerk. Mr. Enzi?
5 Senator Grassley. Aye by proxy.
6 The Clerk. Mr. Cornyn?
7 Senator Cornyn. Aye.
8 The Clerk. Mr. Chairman?
9 The Chairman. No.
10 Senator Schumer votes no by proxy.
11 The Clerk. Mrs. Lincoln?
12 Senator Lincoln. No.
13 The Clerk. Mr. Bingaman?
14 Senator Bingaman. No.
15 The Clerk. Mr. Chairman, the final tally is 9
16 ayes, 14 nays.
17 The Chairman. The amendment is not agreed to.
18 Senator Bunning, do you have another amendment?
19 Senator Bunning. Yes.
20 The Chairman. You are recognized.
21 Senator Bunning. I would like to call up amendment
22 F-3, as modified.
23 The Chairman. F-3, modified.
24 Senator Bunning. Slider 3.
25 The Chairman. All right. Slider. All right. But

1 I do not want a slider, I want a fast ball.

2 Senator Bunning. Well, sorry. Too late.

3 [Laughter].

4 The Chairman. All right.

5 Senator Bunning. First, I want to explain why I
6 had to change this amendment so drastically. The reason
7 is that our side of the aisle was not notified about a
8 \$22 billion tax increase in the modified Chairman's mark
9 until four days after the amendment filing deadline had
10 passed. I will note, however, that this amendment still
11 deals with the same universe of taxpayers: people with
12 catastrophic health care costs who take the itemized
13 deduction for medical expenses.

14 By definition, only taxpayers with catastrophic
15 medical expenses can take this deduction because they
16 have to spend more than 7.5 percent of their adjusted
17 gross income on health care before they can have their
18 first few cents of tax relief. But, unbelievably, the
19 Chairman's mark modifies and raises the 7.5 threshold to
20 10 percent, making health care less affordable for people
21 with catastrophic health care costs.

22 In other words, let me say, a family with only
23 \$20,000 in income spends \$2,000 out-of-pocket for health
24 care. Today, that family gets no tax relief on the first
25 \$1,500 in costs and can only deduct the remaining \$500

1 from their taxes.

2 Under the Chairman's mark, this family would lose
3 the entire \$500 deduction. Maybe the loss of \$500 would
4 not matter much to people in this room, but I am willing
5 to bet it means a lot to families with \$20,000 worth of
6 income.

7 Let us take a closer look at the people affected by
8 this \$22 billion tax increase. The Joint Committee on
9 Taxation tells us that 50 percent of the revenue from
10 this tax increase will come from households with people
11 that are over age 65. Some members of this committee may
12 be patting themselves on the back for protecting seniors
13 from this tax increase under the Nelson amendment, but
14 you really did not protect them. You only gave them a
15 four-year reprieve. After 2016, seniors with
16 catastrophic expenses will face a tax increase under this
17 Chairman's mark.

18 But it does not just affect seniors. Others who
19 take this deduction may be people who have to spend an
20 enormous amount of money coping with a disability. Many
21 others have a disabling condition, such as cancer,
22 diabetes, Parkinson's, chronic heart failure, multiple
23 sclerosis, Alzheimer's, or COPD. Others may be parents
24 of a child with cancer or other heart-breaking
25 conditions. Very few of these people are wealthy.

1 According to the Joint Committee on Taxation, 99.6
2 percent of taxpayers affected by this tax increase in
3 2017 will have incomes of less than \$200,000, as has been
4 stated many times before.

5 This tax increase violates three of President
6 Obama's promises to the American people: it does not
7 allow people who like the health care coverage they have
8 to keep it; it raises taxes almost exclusively on people
9 who earn less than \$200,000; and it makes health care
10 less affordable, not more affordable.

11 Some of my colleagues have dismissed these concerns
12 because the insurance exchange will have catastrophic
13 protection. That is true for regular health expenses but
14 it is not true for long-term care expenses. If a person
15 in an exchange becomes so disabled that they must live in
16 a nursing home, this tax deduction may be the only
17 protection they have from catastrophic long-term care
18 expenses.

19 Even under the Chairman's mark, millions of
20 Americans will not have catastrophic protection. It was
21 already pointed out that seniors do not have catastrophic
22 protection in Medicare Part A or Part B. After 2016,
23 these seniors will be hit with a tax increase. And
24 nothing in this mark requires the millions of people in
25 employer-sponsored ERISA plans to have out-of-pocket

1 limits.

2 In addition, even under the Chairman's mark, 17
3 million Americans will still be uninsured. For the
4 uninsured, this medical expense deduction is the only
5 catastrophic protection they have. Let me say that
6 again: for millions of Americans, this tax deduction will
7 be the only catastrophic protection they have.

8 If the Chairman's mark truly succeeds in eliminating
9 catastrophic health care costs for Americans, then the
10 score on his tax increase would be zero and the score on
11 the amendment I am offering now would be zero because no
12 one would take this deduction. The Joint Committee on
13 Taxation has told us that the hundreds of billions of
14 dollars in tax increases in the Chairman's mark will
15 drive up out-of-pocket health care costs for consumers,
16 yet this bill weakens a critical safety net for those
17 costs. It defies logic.

18 I wish we could protect every American from this
19 devastating tax increase, but surely both sides of the
20 aisle can agree that we should protect the most
21 vulnerable Americans from losing this critical safety
22 net. My amendment exempts seniors, people with a
23 disability, people with debilitating chronic conditions,
24 and people with a terminal illness from the tax increases
25 on catastrophic health care costs. The amendment is

1 offset by a corresponding reduction in insurance
2 subsidies under the exchange, starting with the highest-
3 income people.

4 In short, my amendment protects the most vulnerable
5 constituents with catastrophic health care costs by
6 slightly reducing the subsidy for wealthier Americans who
7 already have catastrophic protection through the
8 exchange. It seems like a pretty simple choice. If we
9 truly are concerned about affordability for people who
10 earn less than \$90,000 a year, then we should not cut a
11 hole in their catastrophic safety net.

12 A basic concept of health insurance is that the
13 healthy pay for the sick. By increasing taxes on
14 catastrophic medical expenses, the Chairman's mark forces
15 the sick to pay for the healthy. That is simply wrong.
16 I urge my colleagues, help me to help you keep President
17 Obama's promise to the American people. Help the most
18 defenseless citizens keep the catastrophic coverage they
19 have. Do not force the sick to pay for the healthy.
20 Please do the right thing and support this amendment.

21 The Chairman. Well, Senator, I appreciate your
22 amendment. As you well know, we adopted an amendment by
23 the Senator from Florida, Senator Nelson, which exempts
24 seniors already.

25 Senator Bunning. Through 2016.

1 The Chairman. Well, I also committed to Senator
2 Snowe and to others that we will have that senior
3 protection continue permanently, not just to 2016. It
4 will be changed or amended to permanently protect
5 seniors.

6 You raise sympathetic arguments for sympathetic
7 populations, no doubt about it, those on disability and
8 those with debilitating, chronic conditions. Certainly
9 they deserve special protections. I would like to work
10 with you to try to find a way to protect those
11 populations, but paid for in some other way. Because
12 what you do in your amendment, is you pay for it by, in
13 effect, taxing middle income Americans, that is, those
14 Americans whose incomes -- it starts, under your
15 amendment, at 400 percent of poverty, and then it goes
16 down to 300 percent of poverty.

17 I do not know what the total score is, but I think
18 the amount required under your amendment will certainly
19 affect those with families earning \$66,000 and families
20 earning \$45,000. I mean, basically you are taking it out
21 of the pockets of middle income Americans to pay for a
22 very sympathetic population. I am sympathetic with the
23 goals of your amendment, but I am not sympathetic --

24 Senator Bunning. I am willing to work. But I want
25 you to remember that those people are already covered for

1 catastrophic health care costs.

2 The Chairman. I am sorry, who is?

3 Senator Bunning. The people that you are talking
4 about. They have catastrophic coverage through the
5 exchange, through insurance, or something. They are
6 covered.

7 The Chairman. Yes. But you want to lower the
8 amount of tax credits they would otherwise receive, and I
9 do not think it is wise to lower the tax credits on
10 middle income Americans. These are tax cuts that go to
11 Americans.

12 Senator Bunning. I am willing to work any way we
13 can to make sure this works.

14 The Chairman. Well, I am, too. So that is why I
15 suggest you withdraw the amendment so we can find a way.
16 But we just cannot pay for it this way. Now, if you have
17 got another way to pay for it, I am more than open.

18 Senator Bunning. I think we should vote it.

19 The Chairman. Sorry?

20 Senator Bunning. I think we should vote on it as
21 it is, and I would be more than happy to work with you.

22 The Chairman. If you wish. All right.

23 Senator Stabenow. Mr. Chairman?

24 The Chairman. I am constrained to oppose this
25 amendment because it is not right to take money out of

1 middle income Americans to pay for a sympathetic
2 population. There are other ways to raise revenue to
3 help accommodate this population.

4 Senator Stabenow?

5 Senator Stabenow. Mr. Chairman, first of all, I
6 want to thank you for indicating you want to work with
7 Senator Bunning on this. There are certainly ways we
8 need to work together on what Senator Bunning is talking
9 about. But I do want to raise that this is now the
10 seventh time that we have seen amendments come forward
11 that would cut tax credits for middle income families.
12 With all the talk a while ago on amendments, we are now
13 right back at it again.

14 Maybe Michigan is different, but somebody making
15 \$66,000 for a family of four is not wealthy in our State.
16 We are talking about folks that are just trying to make
17 the mortgage payment and stay afloat. So, unfortunately
18 I cannot support this amendment because we are going
19 right back after the middle class.

20 The Chairman. The Clerk will call the roll.

21 The Clerk. Mr. Rockefeller?

22 The Chairman. No by proxy.

23 The Clerk. Mr. Conrad?

24 The Chairman. No by proxy.

25 The Clerk. Mr. Bingaman?

1 Senator Bingaman. No.
2 The Clerk. Mr. Kerry?
3 The Chairman. No by proxy.
4 The Clerk. Mrs. Lincoln?
5 Senator Lincoln. No.
6 The Clerk. Mr. Wyden?
7 The Chairman. No by proxy.
8 The Clerk. Mr. Schumer?
9 The Chairman. No by proxy.
10 The Clerk. Ms. Stabenow?
11 Senator Stabenow. No.
12 The Clerk. Ms. Cantwell?
13 Senator Cantwell. No.
14 The Clerk. Mr. Nelson?
15 Senator Nelson. No.
16 The Clerk. Mr. Menendez?
17 The Chairman. No by proxy.
18 The Clerk. Mr. Carper?
19 Senator Carper. No.
20 The Clerk. Mr. Grassley?
21 Senator Grassley. Aye.
22 The Clerk. Mr. Hatch?
23 Senator Hatch. Aye.
24 The Clerk. Ms. Snowe?
25 Senator Snowe. No.

1 The Clerk. Mr. Kyl?
2 Senator Grassley. Aye by proxy.
3 The Clerk. Mr. Bunning?
4 Senator Bunning. Aye.
5 The Clerk. Mr. Crapo?
6 Senator Grassley. Aye by proxy.
7 The Clerk. Mr. Roberts?
8 Senator Grassley. Aye by proxy.
9 The Clerk. Mr. Ensign?
10 Senator Ensign. Aye.
11 The Clerk. Mr. Enzi?
12 Senator Grassley. Aye by proxy.
13 The Clerk. Mr. Cornyn?
14 Senator Cornyn. Aye.
15 The Clerk. Mr. Chairman?
16 The Chairman. No.
17 Senator Crapo. May I record my vote?
18 The Chairman. Yes.
19 The Clerk. Mr. Crapo?
20 Senator Crapo. Aye.
21 The Chairman. The Clerk will tally the vote.
22 The Clerk. Mr. Chairman, the final tally is 9
23 ayes, 14 nays.
24 The Chairman. The amendment does not pass.
25 Senator Cornyn, I believe you have an amendment.

1 You cannot get away.

2 [Laughter].

3 Senator Cornyn. Thank you, Mr. Chairman.

4 Mr. Chairman, I would like to call up my Amendment
5 F-5.

6 The Chairman. All right. F-5.

7 Senator Cornyn. F-5. This amendment is
8 straightforward. It simply says, before implementing the
9 bill, the Treasury Secretary must certify that no
10 provision of the mark will impose any additional costs on
11 small businesses.

12 We know small businesses are the job-creating engine
13 in our country, and certainly that is true in my State
14 and in all of our States. During a recession, at a time
15 when people are losing their jobs, when we need to retain
16 jobs and help create new jobs, it does not make any sense
17 to increase costs on America's job creators.

18 Most economists, including the nonpartisan
19 Congressional Budget Office, expect that unemployment
20 will soon be in double digits. We know it is a lagging
21 indicator of economic activity, so it is likely to be
22 high for some time.

23 It would seem to me to make a lot of sense that,
24 before implementing the mark, to have Treasury step back
25 and take a look at the bill and certify that it will not

1 increase costs for small businesses. I am afraid, as
2 currently proposed, that the mark, because it includes
3 things like higher taxes and pay-or-play mandates and the
4 like, that small businesses will indeed see their costs
5 go up. We know from CBO that the new taxes contained in
6 the mark will be passed down to health care consumers and
7 will be reflected in not lower insurance premiums, but
8 higher insurance premiums.

9 I think Senator Ensign has some further
10 clarification of the previous statements by CBO that the
11 insurance companies are not going to eat the high excise
12 taxes that would be imposed on them, but they would
13 actually be passed down in higher prices to
14 policyholders.

15 While Joint Tax and CBO are busy developing cost
16 estimates and scores, what also concerns small businesses
17 are the hidden costs, the mountain of red tape that will
18 accompany this huge new infrastructure. This may not
19 sound like so much to the committee, but keep in mind,
20 small businesses already struggle with high taxes and
21 paperwork and reporting requirements. They spend endless
22 hours of their money trying to do all the things they
23 need to do to comply with current law.

24 The cost of paperwork has risen \$7,646 per employee
25 per year, according to the Small Business

1 Administration's Office of Advocacy. I am concerned that
2 the mark would only serve to increase the costs and
3 complexity for America's small businesses.

4 So I would ask for a moment that the committee
5 members put themselves in the shoes of the typical small
6 business owner in our States who may be following the
7 committee's work, and I suspect they are seeing a
8 prospect of mandates, higher taxes, and more red tape, so
9 I would ask for colleagues on the committee to support
10 the amendment.

11 I would point out, Mr. Chairman, that yesterday the
12 Chair accepted the Bunning amendment, which provided a
13 similar protection for increasing taxes on veterans. My
14 hope is the Chair would also consider accepting this
15 amendment along those same lines.

16 The Chairman. I was wondering, either Mr. Reeder
17 or Mr. Barthold, someone, how many firms in America have
18 more than 50 employees, but fewer than 500 employees?

19 Mr. Barthold. Mr. Chairman, I have to go look up
20 that statistic. I do not know off the top of my head.

21 The Chairman. All right. You do not know. All
22 right.

23 Mr. Barthold. I will get back to you, perhaps in
24 the early afternoon.

25 The Chairman. You mean, with the infinite

1 knowledge at Joint Tax, we do not have that at our
2 fingertips right now?

3 Mr. Barthold. I have to use the library
4 sometimes.

5 [Laughter].

6 The Chairman. All right. Maybe, Mr. Reeder, you
7 have a comment on that.

8 Mr. Reeder. We can get it faster than he can.

9 [Laughter].

10 The Chairman. All right. Well, I am sure it is a
11 big number, a lot of firms that have fewer than 500
12 employees. A lot of firms are between the 50 and 500
13 employee number.

14 The effect of this amendment is, there will be no
15 bill. This effectively says "no bill". That is what
16 this amendment is all about. Why? Well, basically it
17 says that for those firms that have fewer than 500
18 employees or more than 50 employees, do not have to
19 provide health insurance, do not have to pay the free
20 rider penalty. They just do not have to be part of
21 America, not part of America's shared responsibility.

22 If there is no free rider penalty for employers and
23 if they are not providing health insurance, then I think
24 this basically just kills the bill because it says, prior
25 to implementation. That means nothing else is going to

1 occur. That means that no health insurance inform,
2 market reforms. That means no rating rule changes.
3 Nothing else in this bill could go into effect because of
4 a certification by Treasury that there is no free rider
5 penalty, for example, on those firms who do not provide
6 health insurance. So I just do not think it is right to
7 kill the bill. It is not my goal, anyway, to kill it.
8 So I think this is a very easy vote: we should vote "no".

9 Senator Cornyn. May I respond, briefly?

10 The Chairman. Absolutely.

11 Senator Cornyn. Then I would be glad to have a
12 vote.

13 Mr. Chairman, we have a bipartisan consensus that
14 health care reform is necessary, although obviously there
15 are differences among us as to how best to accomplish
16 that, whether it ought to be some comprehensive bill
17 approach or whether it ought to be more targeted to deal
18 with things like insurance reform, preexisting condition
19 exclusions, lack of competition, lack of transparency,
20 realigning incentives for providers and individuals.
21 Those are the kinds of things that we could agree on.

22 So while the Chairman says this amendment could kill
23 the bill as presently written, I do not believe it would
24 irreparably damage or fatally damage the cause of health
25 care reform because I do think there is a core consensus

1 of where we could go. But I would respectfully suggest
2 that what the Chairman has suggested is that there will
3 be additional costs on small businesses, but that the
4 Chairman believes that those are necessary in order to
5 accomplish the purposes of the bill.

6 My point is that, during a recession, there is an
7 awful lot of concern across the country that we are not
8 focusing on job number one, which is the economy, and it
9 is job preservation and job creation. We are actually
10 imposing new taxes, new requirements, new mandates on the
11 very engine of job creation. Ultimately, we will end up
12 making things worse, not better.

13 Senator Stabenow. Mr. Chairman?

14 The Chairman. Senator Stabenow?

15 Senator Stabenow. Thank you, Mr. Chairman. Mr.
16 Chairman, I want to thank you for what is in the bill for
17 small business. Small business really is the engine. We
18 all say that. But more and more people are losing their
19 jobs, becoming entrepreneurs, setting up their own small
20 business and finding themselves with no ability to get
21 health insurance. So, I appreciate the fact that this
22 bill will help businesses from day one, starting right
23 away. Businesses with less than 25 employees will
24 receive a tax credit to help them provide health
25 insurance for their workers, day one.

1 Once we have the insurance exchange, small
2 businesses will be able to purchase health insurance for
3 their employees at much more affordable rates, which is
4 so critical to small businesses in Michigan, and all
5 across the country. The exchange will give small
6 businesses the same power that big companies have when
7 purchasing insurance to get them a better rate. Finally,
8 once the exchange is in place, the bill would provide the
9 same small businesses a permanent tax credit to help them
10 purchase insurance for their employees.

11 So, Mr. Chairman, I want to thank you for making
12 small businesses a priority in this bill.

13 The Chairman. All right.

14 Do you want to close again, Senator Cornyn? Go
15 ahead.

16 Senator Cornyn. I am sorry. I am happy to yield
17 back and have a roll call vote.

18 The Chairman. All right. The Clerk will call the
19 roll.

20 The Clerk. Mr. Rockefeller?

21 The Chairman. No by proxy.

22 The Clerk. Mr. Conrad?

23 The Chairman. No by proxy.

24 The Clerk. Mr. Bingaman?

25 The Chairman. No by proxy.

1 The Clerk. Mr. Kerry?
2 The Chairman. No by proxy.
3 The Clerk. Mrs. Lincoln?
4 Senator Lincoln. No.
5 The Clerk. Mr. Wyden?
6 Senator Wyden. No.
7 The Clerk. Mr. Schumer?
8 The Chairman. No by proxy.
9 The Clerk. Ms. Stabenow?
10 Senator Stabenow. No.
11 The Clerk. Ms. Cantwell?
12 Senator Cantwell. No.
13 The Clerk. Mr. Nelson?
14 The Chairman. No by proxy.
15 The Clerk. Mr. Menendez?
16 The Chairman. No by proxy.
17 The Clerk. Mr. Carper?
18 Senator Carper. No.
19 The Clerk. Mr. Grassley?
20 Senator Grassley. Aye.
21 The Clerk. Mr. Hatch?
22 Senator Hatch. Aye.
23 The Clerk. Ms. Snowe?
24 Senator Snowe. Aye.
25 The Clerk. Mr. Kyl?

1 Senator Hatch. Aye by proxy.
2 The Clerk. Mr. Bunning?
3 Senator Hatch. Aye by proxy.
4 The Clerk. Mr. Crapo?
5 Senator Crapo. Aye.
6 The Clerk. Mr. Roberts?
7 Senator Hatch. Aye by proxy.
8 The Clerk. Mr. Ensign?
9 Senator Ensign. Aye.
10 The Clerk. Mr. Enzi?
11 Senator Hatch. Aye by proxy.
12 The Clerk. Mr. Cornyn?
13 Senator Cornyn. Aye.
14 The Clerk. Mr. Chairman?
15 The Chairman. No.
16 The Clerk. Mr. Chairman, the final tally is 10
17 ayes, 13 nays.
18 The Chairman. The amendment does not pass.
19 I am told--I do not know the source. My ace, crack
20 staff just got me the figure--that small firms with fewer
21 than 500 employees represent 99.7 percent of the 25.8
22 million businesses. So, it is 99 percent. That is firms
23 with 500 or fewer employees. Now, we have carved out
24 small business with 50 or fewer employees, so that figure
25 is maybe not totally accurate. But anyway, under 500,

1 about 99 percent firms have 500 or fewer employees.

2 Senator Ensign?

3 Senator Ensign. Thank you, Mr. Chairman. I call
4 up Amendment Number F-6.

5 Mr. Chairman, this, once again, is a very simple
6 amendment. We talked about this during the walk-through.
7 This amendment is to change the index of high-cost
8 insurance tax in the Chairman's mark. The amendment
9 would change the index of the high-cost insurance plans
10 from regular CPI to CPI medical. This is to prevent
11 erosion of coverage for Americans within this health
12 plan.

13 Every year now we are trying to fix the AMT. We
14 know that because it was not indexed for inflation and so
15 it captures more and more people. Well, the excise tax
16 that is in this bill, now a 40 percent excise tax, is not
17 indexed to inflation. By the way, according to the Joint
18 Committee on Taxation, in the year 2019--Mr. Barthold, I
19 know you will recognize this chart right here--for people
20 who make less than \$200,000 a year, 87 percent of that
21 excise tax will be borne on people who make less than
22 \$200,000 a year. Yes, we will pass a copy of this chart
23 around. It is by the Joint Committee on Taxation.

24 Now, they also sent me a letter today, and let me
25 quote from the letter. It says, "An insurer offering a

1 family health plan that exceeds the excise tax threshold
2 and is subject to the excise tax faces an increase in the
3 cost of offering that health coverage. Generally, we
4 expect the insurer to pass along the cost of the excise
5 tax to consumers by increasing the price of health
6 coverage."

7 I make that point because in the six years from 2013
8 to 2019 that the Joint Committee on Taxation estimated
9 the number of returns that this will affect, in that
10 period of time it triples. Is that approximately
11 correct, Mr. Barthold?

12 Mr. Barthold. Yes. It grows from approximately 11
13 percent to 30 percent.

14 Senator Ensign. So it approximately triples. We
15 are ending up the same thing because we are not adjusting
16 this for medical inflation, we are adjusting it for the
17 regular inflation. We know medical inflation is much
18 higher, so we are going to catch a lot more of these
19 plans, is the bottom line. If we do not fix it for
20 medical inflation, we are going to catch a lot more and
21 we are going to make more and more of the plans Cadillac
22 plans in the future.

23 I mean, if we had gone back 20 years and had this
24 amendment in effect, almost all plans in America today
25 would be captured. Well, eventually all plans in America

1 will be captured as Cadillac plans simply because -- I
2 mean, we are not seeing a dramatic drop in the medical
3 CPI under this bill, according to the estimates from the
4 Joint Committee on Taxation and CBO.

5 So I think that this amendment is very important.
6 All of the plans that you hear about from your union
7 members and the like that have a lot of the generous
8 plans in the country, we know those plans are going to be
9 hit in the future.

10 As I said before, 87 percent of the people who are
11 going to be affected by this tax -- and I say "the
12 people", because even though it is a tax on the business,
13 as Joint Committee on Taxation said, they are going to
14 pass that tax directly on to the employees. So I think
15 this is an important amendment to make sure that we are
16 protecting those who make less than \$200,000 a year, so
17 we do not capture more and more of those into the future.

18 Thank you, Mr. Chairman.

19 Senator Cornyn. Mr. Chairman?

20 The Chairman. Senator Cornyn is recognized.

21 Senator Cornyn. I support Senator Ensign's
22 amendment. I wonder if I might ask Mr. Barthold a few
23 questions. I think you are the appropriate person. If
24 you are not, let me know. Maybe it is CBO.

25 Is it true that the insurance provider fee or tax

1 carves out those who self-insure, the excise tax?

2 Mr. Barthold. The separate fee -- this is not the
3 same tax that Senator Ensign was just addressing, but the
4 answer to your question is yes. The fee on insurers does
5 not apply to self-insurers. That is the separate fee as
6 opposed to the high-premium excise tax.

7 Senator Cornyn. You mentioned the fee. Is that
8 the 35 percent excise tax?

9 Mr. Barthold. No.

10 Senator Cornyn. That is different? All right.

11 Mr. Barthold. That is a different fee. That is
12 the allocated \$67 billion-per-year fee (\$60 billion in
13 aggregate) on the insurance industry for the sale of
14 plans. That is a separate provision of the Chairman's
15 mark.

16 Senator Cornyn. Is it true that self-insured
17 companies are carved out?

18 Mr. Barthold. Not from the high-premium excise
19 tax.

20 Senator Cornyn. But from the fee?

21 Mr. Barthold. From that separate fee.

22 Senator Cornyn. The \$60 billion fee?

23 Mr. Barthold. Yes. That is correct, Senator.

24 Senator Cornyn. So who in the business community
25 self-insures? Is it typically larger employers?

1 Mr. Barthold. Self-insurance is very prevalent
2 among firms with 1,000 or more employees, large
3 employees. There is also self-insurance at smaller
4 levels, but businesses tend to go to, in the purchase
5 market, below 1,000, much more so even below 500
6 employees.

7 Senator Cornyn. And this is just so I can make
8 sure I understand what you are saying. These are people
9 who self-insure under the terms of ERISA?

10 Mr. Barthold. That is correct, sir.

11 Senator Cornyn. That is the Employee Retirement
12 Income Security Act, or something like that?

13 Mr. Barthold. Yes. That is what the acronym ERISA
14 is from.

15 Senator Cornyn. So it is usually large companies
16 that self-insure, generally speaking?

17 Mr. Barthold. Yes, sir.

18 Senator Cornyn. So this \$60 billion fee will hit
19 small businesses in the main rather than large businesses
20 that self-insure because the smaller businesses that
21 typically do not self-insure would be subject to that \$60
22 billion fee. Is that correct?

23 Mr. Barthold. Well, let me give a slightly longer
24 answer than just yes/no. As Dr. Elmendorf explained
25 earlier, we do think that basic economics is that that

1 fee will be reflected in higher-premium costs, whether
2 100 percent or less is less clear. So that would affect
3 prices in the purchased market, and that will also affect
4 decisions to self-insure versus go with purchased
5 insurance.

6 Senator Cornyn. So whether it is a \$60 billion fee
7 for the insurance industry or an excise tax on individual
8 policies, so-called Cadillac plans, you would expect that
9 to be passed down in terms of higher price for the
10 policies, correct?

11 Mr. Barthold. That is the economic analysis that
12 we use to analyze the revenue consequences of the
13 Chairman's mark. That is correct.

14 Senator Cornyn. But for self-insured companies,
15 typically larger companies that do not have an insurance
16 policy per se but who self-insure, they would not be
17 subject to that higher price, or would they?

18 Mr. Barthold. Just the fee. Remember, the basic
19 structure of the Chairman's mark is an excise tax that is
20 imposed on the insurer in the case of purchased insurance
21 or the administerer of health care benefits -- in the
22 case of someone who self-insures, they often contract out
23 with an insurance company or an administrator to run
24 their health plans. So the 40 percent excise tax on
25 high-cost health plans in the Chairman's modified mark

1 applies across all employer-provided health benefits.

2 Senator Cornyn. Is the \$60 billion fee paid for by
3 insurance companies under this proposal similar to, I
4 think, the \$80 billion that pharma has kicked in, and the
5 \$155 billion that the American Hospital Association has
6 kicked in?

7 Mr. Barthold. Not exactly. I cannot speak to
8 American Hospital Association.

9 Senator Cornyn. In other words, is it a negotiated
10 figure?

11 Mr. Barthold. But in the Chairman's mark, there
12 are three industry-wide fees which, economically, we
13 think are really similar to excise taxes. They have
14 slightly different structures in each one. The fee on
15 branded pharmaceuticals is restricted to government sales
16 of branded pharmaceutical and is based off a calculation
17 of pharmaceuticals sold in Federal Government programs.

18 In the case of the fee on the medical device
19 manufacturers or importer industry, it is not all FDA-
20 certified medical devices, but it is a subset of those.
21 It is all Class 3 and a subject of Class 2 devices. Then
22 lastly, the insurance fee about which we were speaking
23 earlier applies to purchased group insurance.

24 Senator Cornyn. So just to sum up, and tell me if
25 I am right or wrong, the \$60 billion fee that will be

1 imposed against insurance companies that will ultimately
2 be passed down in terms of higher costs to the insured,
3 higher premiums, that will hit smaller businesses that
4 are not self-insured because self-insured businesses are
5 carved out from paying that fee. Is that an accurate
6 statement?

7 Mr. Barthold. Well, with some qualification,
8 Senator. Again, as you had noted originally --

9 Senator Cornyn. Would you say yes, but?

10 Mr. Barthold. Well, it is not a monolithic choice,
11 that all large businesses self-insure and all small
12 businesses purchase. There is a mix. But it is much
13 more prevalent if you have less than 500 employees and
14 you purchase insurance. If you have greater than 1,000
15 employees, you are much more likely to self-insure.

16 Senator Cornyn. So let me try it one last time and
17 try to say it right. I want you to correct me if I am
18 wrong, that regardless of whether large or small, the \$60
19 billion fee that will be paid by the insurance industry
20 that ultimately will be passed down and cause higher
21 premiums in people who are currently insured, the self-
22 insured companies that are subject to ERISA are carved
23 out and will not have to pay that fee. Is that correct?

24 Mr. Barthold. That is correct, Senator.

25 Senator Cornyn. Thank you.

1 Senator Wyden. Mr. Chairman?

2 Senator Lincoln. Mr. Chairman?

3 The Chairman. Senator Wyden?

4 Senator Wyden. Mr. Chairman, just a question for
5 Mr. Barthold. Some of the plans that members of this
6 committee have been most enthused about, like Group
7 Health, for example, and Kaiser, and others, are very
8 concerned about the prospect if we are talking about two
9 areas here. We are talking about the annual fee and then
10 we are talking about the excise tax. They are concerned
11 about the prospect of creating an unlevel playing field
12 as it relates to the annual fee, in particular, between
13 fully insured and self-insured plans.

14 So we have had many, many sessions that have looked
15 at Group Health, Kaiser, these kinds of programs as the
16 future of health care. I am concerned about whether you
17 all think there is an issue here with respect to whether
18 this is going to further tilt the playing field against
19 real competition, and if so, what are the implications?
20 Can you tell us how you all analyzed that?

21 Mr. Barthold. Well, as I mentioned a little bit in
22 my answer to Senator Cornyn, to the extent that we think
23 that the fee is reflected in higher premium costs, it
24 makes the purchase on behalf of employees of purchased
25 group insurance somewhat more expensive. If a business

1 is deciding, what is the best way for me to provide a
2 health benefit to my employees as part of their
3 compensation, they will weigh, what is the cost of
4 purchasing from a third-party provider as opposed to,
5 well, perhaps I could self-insure. That means I bear
6 certain risks that I may or may not want to bear, and
7 certain administrative costs.

8 So I guess the simple answer to your question is, by
9 making modestly more expensive the purchased insurance,
10 there is a slight, now, relative advantage to self-
11 insuring. But again, there is the price of the policy,
12 and that is weighed against risk, administrative costs,
13 whether you want to hire on additional staff, run things
14 in-house, or if you contract out to a third-party,
15 administer those costs.

16 Senator Wyden. That is a thoughtful answer. I
17 think, Mr. Chairman, I would just hope that we could
18 continue to work on this. I am not going to offer an
19 amendment at this time, but it seems to me one of the
20 things that we have been most interested in is not
21 further disadvantaging some of the plans of the future,
22 the Group Healths, Kaisers, those kinds of models.

23 I am concerned as we have gotten into this,
24 particularly as it relates to the annual fee, not
25 necessarily the excise tax, where we may end

1 up--and Mr. Barthold said it was only a slight
2 disadvantage--I want to run those numbers down and then
3 perhaps talk to you more about it in the future.

4 The Chairman. Sure.

5 I would like to ask Mr. Barthold, what is the cost
6 of this amendment? That is, changing the index?

7 Mr. Barthold. Senator Ensign's amendment would
8 change the index, which in the Chairman's modified mark,
9 is the Consumer Price Index plus 1 percent per year --

10 The Chairman. Correct. Right.

11 Mr. Barthold. [Continuing]. To the Consumer Price
12 Index for medical expenses.

13 The Chairman. Correct.

14 Mr. Barthold. Relative to the mark, that loses
15 about \$19.5 billion over the budget period.

16 The Chairman. I am sorry. How many?

17 Mr. Barthold. \$19.5.

18 The Chairman. 19?

19 Mr. Barthold. Yes. 19.5.

20 The Chairman. All right. Billion?

21 Mr. Barthold. Billion. Billion.

22 The Chairman. Yes. Right.

23 What effect will that have on the second 10 years?

24 Mr. Barthold. Well, to go back to the point that
25 the members had discussed earlier, by having more --

1 The Chairman. With respect to the cost curve.

2 Mr. Barthold. The point that Senator Ensign
3 raised, that more plans potentially become subject to the
4 tax through time under the Chairman's modified mark.
5 That would still be true under Senator Ensign's
6 amendment, but obviously since he is indexing at a rate
7 that is effectively greater than CPI plus one, that
8 effect would be slower, fewer plans.

9 Now, I do not have with me an estimate of the number
10 or the percentage of those plans, so to the extent that
11 the members view that as an important component of
12 creating cost consciousness, and I have not had a chance
13 to discuss with colleagues at the Congressional Budget
14 Office what they think this would do in terms of cost
15 effects, but the basic intuition would be that you have
16 put the additional cost consciousness pressure on fewer
17 individuals.

18 The Chairman. All right. So you are saying
19 approximately \$19 billion?

20 Mr. Barthold. \$19 billion relative to your
21 modified mark, sir.

22 The Chairman. All right. Therefore, there would
23 be about a \$19 billion reduction in spending in the bill.

24 I do not know. What is the offset here? What is the
25 offset? So in effect, this would be taking and asking

1 lower income and middle income people to pay for this,
2 effectively. That is what this does.

3 I might ask too, Mr. Barthold, maybe Mr. Reeder, any
4 one of the two of you, it just seems to me -- first of
5 all, it is your analysis that this would produce
6 ultimately higher wages is a little interesting, because
7 it seems to me that this does not go into effect until
8 2013. A lot of people are going to adjust and they are
9 not going to want to pay that fee. Their companies are
10 not going to want to have insurance policies that cost
11 that much. It just seems to me that, after a while,
12 there would not be any tax because companies will just
13 find a way to avoid it. They will find some other way.

14 Mr. Barthold. Mr. Chairman, that is a fundamental
15 part of our analysis of your provision in the mark. As
16 the committee has discussed, compensation to employees
17 takes many forms. There is cash compensation. Some of
18 the compensation can be in the form of health benefits,
19 others can be in the form of retirement benefits.

20 By potentially making certain types of health
21 benefits more expensive, it changes the calculus both for
22 what the employer might offer the employee and what
23 employees would demand of employers. So, a basic part of
24 our analysis is that people, employees and employers,
25 will say we are changing the mix to more cash

1 compensation, and more cash compensation brings with it
2 revenue into the analysis because that means you are
3 taking an inclusion that is subject to income tax and
4 payroll tax. Currently, employer-provided health
5 benefits are excludable from both of those tax bases.
6 So, I guess that is a long answer to a simple "yes" to
7 your statement.

8 The Chairman. Right. Right.

9 Well, I must say to my colleagues, I oppose this
10 amendment because we have to do all we can to bend the
11 cost curve. This amendment will have the effect of
12 lessening that cost curve. Second, it is paid for by
13 low-income and middle-income Americans. I think that is
14 not a good thing to do. Unless Senator Ensign wants to
15 close, the Clerk will call the roll.

16 Senator Cornyn. I do.

17 The Chairman. Senator Ensign.

18 Senator Lincoln. May I ask a question?

19 The Chairman. Senator Lincoln?

20 Senator Lincoln. May I also ask Mr. Barthold, down
21 in the description at the bottom below this chart it
22 says, "The proposal is estimated as a stand-alone
23 proposal." Does that mean that you are making an
24 assumption that no one will move to a more reasonable
25 priced plan to get below the excise tax?

1 Mr. Barthold. Not at all, Senator Lincoln. What
2 that meant was as a reminder to readers of the chart,
3 that this is one proposal, part of a big package, that is
4 doing a lot of different things in the industry. As I
5 know I noted last week, as you change the proposal for
6 the high-premium excise tax, that by affecting what
7 people do in the insurance market, that affects the
8 number of employers that may offer different types of
9 plans or plans at all, which means that there are more
10 people in the exchange or not in the exchange, on the
11 small business side, more businesses that may be claiming
12 the small business credit, so that there are a number of
13 other moving pieces. This particular analysis was
14 saying, let us just look at that one piece and we are not
15 looking at the revenue effects in the exchange subsidy
16 or from the individual mandate, or from the small
17 business --

18 Senator Lincoln. So you are just looking at what
19 his bill would do in an isolated circumstance?

20 Mr. Barthold. That is fair. That is a fair
21 description.

22 Thank you.

23 The Chairman. All right.

24 Senator Ensign?

25 Senator Ensign. Thank you, Mr. Chairman. Let us

1 be very clear and fair. You said that low- and middle-
2 income people are going to be paying for this. Low- and
3 middle-income people pay 87 percent of this excise tax.
4 According to the official estimates from Joint Committee
5 on Taxation, 87 percent of the returns that will pay this
6 are less than \$200,000 a year, families that make less
7 than \$200,000 a year. And by the way, this is a 40
8 percent excise tax.

9 Let me read again, according to Joint Committee on
10 Taxation, "Generally speaking, we expect the insurer to
11 pass along the cost of the excise tax to consumers by
12 increasing the price of health coverage." So they are
13 not only going to be paying, a lot of these folks who are
14 not even in the 35 percent tax, the highest tax bracket
15 today, they are going to pay a 40 percent tax. These are
16 low-income, middle-income folks. They are going to be
17 paying a 40 percent excise tax.

18 The other point to make is that when this bill first
19 starts out, there are about 13 million families in
20 America that are going to be paying this tax. Thirteen
21 million. In six years, that goes up to almost 40 million
22 families in America. It is not a small number. It is
23 not like there are just a few people out there that are
24 going to be paying this excise tax. By 2019, almost 40
25 million tax returns are going to be subject to this,

1 which includes individuals and families.

2 So, Mr. Chairman, to not index this you said that it
3 raises less money. Well, that means it is raising less
4 taxes. It is subject to tax. That is why it raises less
5 money. That is why we are saying it should -- if you are
6 going to put this tax on -- at least not dramatically
7 increase it into the future where we are picking up more,
8 and more, and more of these plans and end up doing what
9 we did with the Alternative Minimum Tax, with a lot of
10 unintended consequences.

11 The Chairman. All right. I think we are ready to
12 vote. I think it is important to remind ourselves that,
13 according to CBO, this bill is a net tax reduction to
14 Americans. In the last year, 2019, it is \$40 billion net
15 tax reduction. Forty billion dollars.

16 The Clerk will call the roll.

17 The Clerk. Mr. Rockefeller?

18 The Chairman. No by proxy.

19 The Clerk. Mr. Conrad?

20 The Chairman. No by proxy.

21 The Clerk. Mr. Bingaman?

22 The Chairman. No by proxy.

23 The Clerk. Mr. Kerry?

24 The Chairman. No by proxy.

25 The Clerk. Mrs. Lincoln?

1 Senator Lincoln. No.
2 The Clerk. Mr. Wyden?
3 The Chairman. No by proxy.
4 The Clerk. Mr. Schumer?
5 The Chairman. No by proxy.
6 The Clerk. Ms. Stabenow?
7 The Chairman. Pass.
8 The Clerk. Ms. Cantwell?
9 Senator Cantwell. No.
10 The Clerk. Mr. Nelson?
11 Senator Nelson. No.
12 The Clerk. Mr. Menendez?
13 The Chairman. No by proxy.
14 The Clerk. Mr. Carper?
15 The Chairman. No by proxy.
16 The Clerk. Mr. Grassley?
17 Senator Hatch. Aye by proxy.
18 The Clerk. Mr. Hatch?
19 Senator Hatch. Aye.
20 The Clerk. Ms. Snowe?
21 Senator Snowe. Aye.
22 The Clerk. Mr. Kyl?
23 Senator Hatch. Aye by proxy.
24 The Clerk. Mr. Bunning?
25 Senator Bunning. Aye.

1 The Clerk. Mr. Crapo?
2 Senator Crapo. Aye.
3 The Clerk. Mr. Roberts?
4 Senator Hatch. Aye by proxy.
5 The Clerk. Mr. Ensign?
6 Senator Ensign. Aye.
7 The Clerk. Mr. Enzi?
8 Senator Hatch. Aye by proxy.
9 The Clerk. Mr. Cornyn?
10 Senator Hatch. Aye by proxy.
11 The Clerk. Mr. Chairman?
12 The Chairman. No.
13 The Clerk. Ms. Stabenow?
14 Senator Stabenow. Aye.
15 The Chairman. The Clerk will tally the vote.
16 The Clerk. Mr. Chairman, the final tally is 11
17 ayes, 12 nays.
18 The Chairman. The amendment does not pass.
19 The committee will stand in recess until 3:00.
20 [Whereupon, at 1:00 p.m. the meeting was recessed.]
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AFTER RECESS

[3:16 p.m.]

The Chairman. The Committee will come to order.

It has been a very productive morning. I deeply appreciate that, even though I was supposed to, but 114 amendments and finished with all Senators I think is reason for optimism. Do not want to get too hopeful here, but there is reason for optimism.

I am aware of roughly 15 remaining amendments, amendments that require action. And I believe that this is an achievable goal for today's consideration. But we know the Senate, but still I am hopeful that we can get these 15 brought up and acted upon.

The next order of business is an amendment by Senator Cantwell.

Senator Cantwell. Thank you, Mr. Chairman. I would like to call up Cantwell amendment number C-15 as modified.

The Chairman. All right.

Senator Cantwell. Mr. Chairman, I want to thank you and your staff and the committee staff for their help on this amendment. And obviously thank my staff, Hill Committee staff and the people from the state of Washington, both from the Governor's Office and from

1 Speaker Frank Chopp's office in helping us with the
2 drafting of this legislative.

3 The reason why I am offering this amendment that is
4 titled "The Basic Health Plan" is because the underlying
5 mark, which I appreciate its efforts and cost savings, I
6 am very concerned about the overall cost of health care
7 as we move forward.

8 Our objective is to drive down the cost of health
9 care for both the insured and for those who are seeking
10 insurance. By continuing to subsidize expensive
11 insurance, I don't think we are doing enough to drive
12 down the cost to individuals. I would hate to see us in
13 a situation where we are back here in a few years knowing
14 that insurance is still more expensive and people are
15 asking us to increase subsidies.

16 I have proposed, instead, taking at least a
17 percentage of the population eligible for subsidies in
18 this current mark, 200 percent of poverty -- from 133 to
19 200 percent of poverty, knowing that about 75 percent of
20 the uninsured in America are at about 200 percent of
21 poverty or below and saying, let us provide a more
22 affordable plan and competitive plan to provide coverage
23 for these individuals.

24 In the state of Washington we have been able to
25 provide a basic health plan and have been doing so for

1 the last 20 years. This proposal is modeled on the
2 results that we have achieved in actually getting between
3 35 and 40 percent savings for those individuals.

4 What we have done is basically put the state in
5 charge of negotiating on behalf of this population and
6 negotiating plans with the private sector.

7 This proposal is about giving federal dollars to the
8 state and putting them in the driver's seat to negotiate
9 on behalf of their own populations. It is a voluntary
10 program and so states would decide to opt in to this
11 model.

12 What is unique about it, or I guess I would say,
13 hits the sweet spot of interest, is that it is a public
14 plan, but negotiated with the private sector in ensuring
15 that there is a provider of choice for the individuals
16 who want to receive this public benefit option.

17 Why it works is because we are putting someone
18 finally in charge of negotiating rates. We are saying to
19 at least a certain population, someone is going to pull
20 the ability of negotiating for you and driving down
21 costs.

22 Now, in the state of Washington, as I said, we have
23 been able to be successful in driving down costs for
24 individuals enrolled in this plan. And the savings for
25 us have been quite significant. Not just for the

1 juxtapose to the individual, but also for everybody who
2 benefits from having cost effective health care models in
3 their state.

4 We have had a variety of providers, but this
5 particular proposal is focused on managed care. It is
6 focused on getting managed care providers to drive down
7 the cost of health care. And to provide and leverage
8 that to actually get better services for the individuals
9 in this market.

10 Because of this, the individuals in this market have
11 also been able to see providers that are paying better
12 than Medicaid rates. For example, primary care 25
13 percent more; specialty care 35 percent more; and basic
14 hospital needs 50 percent more.

15 So what we have essentially done is used that
16 leverage point to drive down the cost of service to be
17 able to make sure that there are providers in the market
18 by actually paying them better than Medicaid rates.

19 Now, we are not the only state in the country that
20 has used their negotiating ability to drive down the cost
21 of health care. There are other states. Connecticut,
22 for example, many states who have just used their
23 Medicaid population to drive down and negotiate rates at
24 something like 20 percent savings.

25 So this proposal, Mr. Chairman, I think improves the

1 underlying mark in helping us with affordability of
2 health care and putting a competitive model in place. I
3 think it will be the first time we have allowed for that
4 is type of negotiation on behalf of a population outside
5 of the exchange. But really the first time we have
6 allowed true negotiation with insurers to make sure we
7 are going to drive down the cost of health care.

8 So I encourage my colleagues to support the
9 legislation and I am happy to answer any questions that
10 they have as it relates to the details of this proposal.

11 Senator Bingaman. Mr. Chairman.

12 The Chairman. Senator Bingaman.

13 Senator Bingaman. Mr. Chairman, first, let me
14 congratulate Senator Cantwell for all the effort that has
15 gone into this. I know she has spent a great deal of
16 time looking into how this ought to be structured.

17 My staff has provided some suggestions to your staff
18 with regard to two things here. In order for a state to
19 participate in this basic health plan, the idea was, the
20 suggestion we made was that the Secretary of Health and
21 Human Services would have to certify two things.

22 First, that the financial cost to individuals and
23 families is no greater than it would be if the state had
24 not pursued the basic health plan option. And second,
25 that the scope and the level of benefits are at the same

1 level or better than they would otherwise be able to
2 access. It is my understanding that those are -- that is
3 a condition that does not cause you problems and you
4 would be willing to agree to those provisions; is that
5 accurate or not?

6 Senator Cantwell. Yes, the Senator from New
7 Mexico, those are clarifying points, exactly the intent
8 of the legislation.

9 Senator Bingaman. Thank you very much.

10 The Chairman. Is there further discussion?

11 Senator Stabenow?

12 Senator Stabenow. Thank you, Mr. Chairman.

13 I want to thank Senator Cantwell for what I think is
14 a very important part of the puzzle in providing
15 affordable health care for families and individual.
16 Proud to co-sponsor this with her. She has been working
17 diligently to come up with an approach that will both
18 provide additional coverage at lower cost. It will be
19 fewer taxpayer dollars.

20 I think it is also important in debating the fact
21 that Medicaid rates for doctors are well below what they
22 should be and interfering with access to care. The fact
23 that they have been able to do this in Washington state
24 and bring up the reimbursement rates so we have more
25 physicians, more providers that are able to cover people.

1 This is really a very important piece of how we put it
2 together in terms of covering all Americans with
3 affordable health care. It is done at the state level.
4 I think it meets a lot of the issues that people have
5 talked about. And I just want to congratulate Senator
6 Cantwell, again, and I am pleased to join her in this
7 amendment.

8 Senator Rockefeller. Mr. Chairman, I would ask the
9 Senator from Washington if I can be a co-sponsor?

10 The Chairman. Without objection.

11 Senator Kyl?

12 Senator Kyl. Mr. Chairman, I am a little bit
13 perplexed about the way that this interacts with the
14 basic desire to cover the people in the exchange between
15 133 percent and 200 percent of poverty. Obviously
16 everybody has the goal of making sure that everybody has
17 coverage. But I am not sure how this interacts with the
18 Chairman's mark.

19 And as I read it, or at least as it appears to me,
20 if a state decides to create this kind of basic health
21 plan, this population would be required to use the plan
22 rather than having access to the plans in the exchange.
23 And I do not think there is any requirement that a state
24 has to have more than one plan.

25 After all of the talk that we had about choices

1 during the debate over the public option, this is going
2 in the other direction. If a state decides to take
3 advantage of this provision, then the amendment could
4 prohibit people from choosing a plan in the exchange,
5 requires them to enroll in the state plan and they have
6 no option. There is only one state plan.

7 So I have two questions, Mr. Chairman. First
8 question for the staff, if I could. Has CBO analyzed
9 what the amendment would do to premiums for people above
10 200 percent of poverty?

11 Mr. Schwartz. No, Senator, they have not.

12 Senator Kyl. So all of the analysis so far has
13 been predicated on the idea that a large segment of
14 people between 133 and 200 percent of poverty would be
15 enrolling in the exchange. And if a state takes all of
16 these people out of that exchange risk pool, then it
17 would only raise premiums for everyone above 200 percent
18 because you would have a different size risk pool.

19 And I am also curious, and this is the second
20 question, about how a state would decide how to create
21 one of these state plans? Is there a requirement in the
22 legislation or the amendment, I should say, that either
23 the people of a state through referendum or the state
24 legislature is the entity that decides to create the
25 state plan?

1 Mr. Schwartz. Well, to go back to your first
2 point, we are getting a little bit out of my area of
3 expertise. But typically a higher-income population is a
4 lower-risk population. So I think that there is some
5 question about the effect of removing the 133 to 200
6 percent actually increasing the risk in the exchange.

7 Senator Kyl. You have a smaller risk pool.

8 Mr. Schwartz. You have fewer people. But if they
9 are lower risk than the average, risk might actually be
10 lower for the remaining exchange participants.

11 Senator Kyl. Yes, but as a general proposition,
12 one of the things that we have been going on throughout
13 this entire debate is we are trying to get larger risk
14 pools to spread the risk further.

15 Mr. Schwartz. Agreed.

16 Senator Kyl. So is there anything that would
17 prohibit -- well, that requires the legislature or the
18 people to put this into effect in a state?

19 Mr. Schwartz. The way that I read the amendment,
20 it doesn't specify. It just references that the states
21 would be able to choose this. It does say on the second
22 page in the paragraph right above cost savings, that
23 first sentence says "State administrators should seek
24 participation by multiple health plans to allow enrollees
25 a choice between two or more plans wherever possible."

1 So I thought I heard you say that it was only one
2 plan, but the amendment reads as --

3 Senator Kyl. No, what I was trying to suggest
4 there is there no requirement that there be any choice.
5 I think it is wherever possible or -- I forgot the exact
6 language.

7 Mr. Schwartz. That is correct.

8 Senator Kyl. Senator Wyden is not here, but I
9 thought that in the language that -- did we not adopt a
10 modification to the mark that gives states an opportunity
11 to opt out of some of the requirements and innovate their
12 own program? And if that is the case, would that be
13 broad enough to encompass the kind of thing that this
14 amendment would do?

15 Mr. Schwartz. If I could beg you indulgence while
16 my colleague, who can better answer that question, comes
17 to the table.

18 Senator Kyl. Sure, yes. I was hoping Senator
19 Wyden would be here. But I remember the state opt out
20 and I thought it would be broad enough to involve this so
21 that we could at least -- we would not have to mandate
22 this to be the case. If the states had the authority to
23 do it, that is one thing. But it is quite another, it
24 seems to me, to have somebody like just one person, the
25 governor, decide that he is going to do this and there is

1 only one plan available and the people in the state have
2 to participate in it.

3 A lot of what is in the Chairman's mark about this
4 group of people, all of the premium going through the
5 exchange and all the help that is supposedly going to be
6 given to them, would be wiped out if this alternative
7 were put into effect.

8 The Chairman. Senator, Ms. Fontenot might be
9 better able to answer your question.

10 Senator Kyl. Sure. That is fine.

11 The Chairman. Do you want to continue Senator, or
12 not?

13 Senator Kyl. If she wanted to answer the question,
14 that is fine.

15 Ms. Fontenot. Senator, I think the state opt out
16 that was a modification of an amendment offered by
17 Senator Wyden --

18 Senator Kyl. Right.

19 Ms. Fontenot. -- would allow a similar structure
20 but has several levels of criteria that the state has to
21 meet to get the waiver.

22 I think what Senator Cantwell is proposing is
23 slightly different in that it is a state option to pursue
24 that and receive a level of tax credits that would be
25 lower than 100 percent for doing so.

1 Senator Kyl. Mr. Chairman, while I am no fan of a
2 lot of the things in the mark, it seems to me that at
3 least the requirements that would be necessary for a
4 state opt out provide some kind of box around the kind of
5 practices that I am somewhat fearful that this amendment
6 would create.

7 Senator Schumer. Mr. Chairman?

8 The Chairman. Senator Schumer.

9 Senator Schumer. Yes, thank you. I am going to be
10 very brief.

11 First, I want to compliment Senator Cantwell. She
12 has worked so long and hard at this. And, again, has one
13 of the major changes in this legislation. The first one
14 she did was on making sure that those who are into
15 quantity, not quality, on an individual and group
16 practice basis as opposed to region are going to be
17 discouraged from that. That is going to do more for cost
18 cutting, I think, than anything in the bill. And it came
19 out of her hard work.

20 Now, this really excellent amendment, which really
21 gives states more choices and more options. It will help
22 states achieve a good health care plan at a minimal cost,
23 the lowest possible cost, if they are not very generous
24 right now with benefits. But it also is good for a state
25 like mine which is generous with Medicaid benefits and

1 give them the option of moving to another alternative
2 that might be much better for the state budget, might
3 produce a better kind of health care, and they will get
4 some transition money to help them get there without
5 forcing the state to go one way or the other.

6 So I think it is a great amendment and I think it
7 should get, no matter what your ideology or philosophy or
8 party is, I think it should get broad support. And I
9 thank Senator Cantwell for introducing it.

10 The Chairman. Senator Cornyn.

11 Senator Cornyn. Mr. Chairman, I have a few
12 questions about this. I wonder if the staff could
13 identify if every state implemented the Cantwell
14 amendment and took people between 133 percent and 200
15 percent of poverty out of the exchanges, how many people
16 would no longer be participating in the exchanges?

17 Mr. Schwartz. I apologize, Senator, I do not think
18 we have that number of people.

19 Senator Cornyn. Well, I would think that is an
20 important number. And I also -- there is no CBO score
21 for this amendment, is there?

22 Mr. Schwartz. No, that is correct, there is not.

23 Senator Cornyn. And for the reasons Senator Kyl
24 mentioned, where typically we are worried about having
25 larger pools of people to help keep the premiums down

1 rather than having smaller pools which will have a
2 tendency to jack premiums up, and this seems to me to be
3 moving in the wrong direction in that regard.

4 I think my concern is that I think under the Wyden
5 amendment there is already the flexibility that the
6 Chairman, I believe, has accepted, that there is already
7 the flexibility of the states to innovate. As a matter
8 of fact, I would love to see even more authority, more
9 choices given at the state level to innovate rather than
10 mandates.

11 But something Senator Stabenow said that maybe I
12 could ask the Senator from Washington, is there anything
13 in your amendment that would prohibit states from paying
14 at Medicaid rates? The providers?

15 Senator Cantwell. First of all, this is an option.
16 States opt in. And states would opt in on the same way
17 that they decide on their Medicaid programs.

18 Some states the governor decides what the Medicaid
19 program is. Some states the legislature has to approve
20 that Medicaid budget. So this would be the same process.

21 So states decide whether they want to do this and
22 then states are in charge of negotiating with providers
23 what the level of rate that they are willing to pay for
24 those beneficiaries. So the state is in the driver's
25 seat. And what we have seen is when the state is in the

1 driver's seat negotiating on behalf of these
2 beneficiaries, they have been able to negotiate better
3 discounts.

4 It makes sense, obviously, and that is the power
5 that we want to give to states so that they can do that
6 on behalf of state residents.

7 Senator Cornyn. If I may ask, Mr. Chairman, whether
8 --

9 Senator Cantwell. I am sorry, Senator Cornyn.
10 They do pay on average Medicaid plus 30. So they are
11 paying more, and that is what is so unique about the
12 experience. People would assume that if you are
13 providing these beneficiary rates, let us say \$3,000 as
14 opposed to paying \$4,500 or \$5,000 in the private market
15 that you probably could not get better negotiated
16 benefits. But Washington state has proven that you can
17 get both. That you can drive down the cost and you can
18 provide better than Medicaid benefits.

19 So the amendment is drafted so that each region,
20 each state, would negotiate for local rates. That way it
21 would protect those providers in that area for not having
22 service below a rate in which you could not get coverage.

23 Senator Cornyn. I do not know what the population
24 of Washington state is.

25 Senator Cantwell. Six million.

1 Senator Cornyn. I think there is some danger, Mr.
2 Chairman. My state has 24 million people, a much
3 different demographic. And I think while I congratulate
4 Washington state for doing something that works there, I
5 think there is a danger in trying to implement this on a
6 national basis without knowing what the consequences
7 would be.

8 But I would ask the Senator, I understand what you
9 said about Medicaid rates in Washington, but there is
10 nothing in your amendment that would prohibit the states
11 from paying at Medicaid rates; is there?

12 Senator Cantwell. The state would be in charge of
13 the negotiation.

14 Senator Cornyn. Mr. Chairman, I am --

15 Senator Cantwell. But it does say you cannot have
16 a benefit less than what is being offered in the
17 exchange. So basically the server plan. So you could
18 not shortcut the individual benefits.

19 Senator Cornyn. Well, the first reaction I have is
20 that if this is such a good deal for people making 133
21 percent to 200 percent of poverty, why do we not make it
22 available to Medicaid beneficiaries up to 133 percent who
23 are finding a lack of access to physicians? But I worry
24 that if there is nothing to prohibit the payment of
25 Medicaid rates under the amendment that 40 percent of

1 physicians would refuse to provide care to enrollees just
2 like they do now which is a national average under
3 Medicaid.

4 I wonder, Mr. Schwartz, if you would answer this
5 question. Given the state's history of negotiating
6 Medicaid rates, is it reasonable to be concerned that
7 there would be an access problem?

8 Mr. Schwartz. Senator Cornyn, I think the history
9 that states have varies when managed care was not a part
10 of Medicaid versus when managed care was incorporated
11 into Medicaid. And I think that states have seen
12 improved access through the use of managed care in
13 Medicaid. Although still admittedly as has been
14 discussed in this room, lots over the past two weeks,
15 there are access problems. The numbers that MedPAC has,
16 we have heard a couple of times about the 2002 MedPAC
17 Report and I think the 40 percent that you just cited
18 came from that.

19 They actually have updated that. It is a 2009
20 report on 2006 data. It says that on average nationwide,
21 40 percent of physicians will see any Medicaid patient.
22 An additional 30 percent of physicians will see some
23 Medicaid patients. So the average is about 70 percent,
24 which actually is pretty comparable to private insurance.
25 It is a little bit lower. I think private insurance is

1 in the mid 70s, maybe approaching 80, and Medicare is in
2 about that same range. So, Medicaid is behind, but maybe
3 not as much as we all thought originally. And a lot of
4 that difference does come from managed care. So it is
5 hard to know based on this amendment which is focused, as
6 Senator Cantwell said, on managed care. How much of an
7 access issue there would be.

8 I do not disagree with you that it certainly is a
9 concern. But I think it would be hard to quantify that.

10 Senator Cornyn. Mr. Chairman, I worry that because
11 it would take a pool of individuals from 133 percent to
12 200 percent of poverty out of the exchange. That would
13 have the results of cost shifting to other insured
14 populations. I worry that without a ban on paying
15 basically subpart reimbursement it would create the same
16 access problems that Medicaid does now. And I just think
17 there are a lot of questions about this. We have no idea
18 how this would -- what impact this would have on much
19 different regions of the country with much different
20 demographics. So I have those concerns.

21 Senator Cantwell. Mr. Chairman.

22 The Chairman. Senator Cantwell.

23 Senator Cantwell. If I could address those
24 comments by the Senator from Texas.

25 I do not know that our populations are so different.

1 Maybe they are. But this is about states negotiating
2 for local rates. As I said, we have been able to get
3 better than Medicaid rates, Medicaid plus 30. And some
4 for institutions like hospitals, which Senator Conrad has
5 talked a lot about in his state, we have been able to get
6 50 percent. So we certainly paid better than that.

7 What is unique about this is that in our health care
8 system we have to continue to drive for cost effective
9 delivery. And managed care is doing that. What we have
10 seen is where we have provided for the ability to offer
11 up a population saying that you are going to make that
12 negotiation based on managed care. It has actually
13 driven managed care into states and into regions that
14 haven't had it before. So, in effect, you are driving
15 more efficiency. Because when you serve up a population
16 of 30 or 40,000 people and you say, we are going to offer
17 that business to you, if you will provide a managed care
18 option, all of a sudden managed care starts popping up in
19 places where it has not popped up before.

20 So this is about driving efficiency. Now, if a
21 state does not want to do it, if a state does not want to
22 opt in to providing more efficient care, that is the
23 option that the state has. But if we want to drive
24 efficiency in our marketplace and we want managed care
25 which we know is coordinate, it is more cost effective,

1 it is more focused on primary care, then this is the way
2 to help the whole nation move more towards those kinds of
3 efficiencies.

4 Senator Cornyn. Mr. Chairman, may I ask one last
5 question.

6 The Chairman. Yes.

7 Senator Cornyn. Then I am through. I would just
8 ask the CBO representative with us today if you take --
9 do we have somebody with CBO at the table?

10 The Chairman. I do not think we have.

11 Senator Cornyn. Well, I will ask it rhetorically
12 and maybe we can get a specific answer at some point.

13 The Chairman. Right.

14 Senator Cornyn. If you take everyone who would
15 otherwise be in the exchange from 133 to 200 percent of
16 poverty and thus reduce the exchange by that number, what
17 would that do in terms of increased cost of premiums or
18 increased cost of covering those that remain in the
19 exchange? That would be a question that I would like --

20 The Chairman. Are you talking about in one state
21 or the nation as a whole?

22 Senator Cornyn. If every state took advantage of
23 the Cantwell amendment, what that impact would be?

24 Senator Cantwell. Can I -- if I can, Mr. Chairman?

25 The Chairman. Senator Cantwell.

1 Senator Cantwell. Because both Senator Kyl and
2 Senator Cornyn have addressed this issue about the health
3 of the exchange and I think Mr. Schwartz started with the
4 basic premise which is the fact that these lower-income
5 populations are the unhealthy or less healthy population
6 in an exchange. So when you give them the option to come
7 out, you are left with a healthier population. So you
8 are not making the exchange harder to serve, you are
9 making the exchange easier to serve.

10 And the fact is that when you look at this
11 population and what you are trying to drive, just doing
12 the exchange is not doing enough. Doing the exchange and
13 then basically saying, we are just going to continue to
14 subsidize higher rates, we are going to be back here in a
15 few years as premiums double again, and we are going to
16 be asked to subsidize and increase the subsidy.

17 We are not driving enough efficiency in the system.

18 Taking this population and saying, we are actually going
19 to negotiate. For the first time we are going to give
20 somebody the power to negotiate and, by God, they are
21 going to drive down the price in the market. We actually
22 now have the hardest-to-serve population under a plan
23 that is leveraging that to drive down the costs. So
24 everything is healthier in the costs that the Federal
25 Government has to pay, in the cost that the individual

1 has to pay, everybody is doing better under a managed
2 care system in which rates are negotiated.

3 The Chairman. Senator Kyl.

4 Senator Kyl. Mr. Chairman, I assume since there is
5 no CBO score, that you will rule this out of order. But
6 I presume also that the idea will come up on the floor.
7 It is not unlike the waiver that Arizona got for Medicaid
8 which is called "Access." It is a managed care program.

9 And I think it is an interesting idea to have different
10 state experimentation. So I grant that.

11 I wondered about whether or not the Wyden amendment
12 actually would have permitted something like this.

13 My biggest concern with this is that it becomes the
14 required policy for people between 133 and 200. In other
15 words, there is no option, there is no choice for those
16 people if a state decides to do this. That is a real
17 concern, whereas through the exchange there are at least
18 some options.

19 Then the final point I would make is that this group
20 that we are talking about are not necessarily sick
21 people. This is also the group of young people that just
22 graduated from college and are not sick at all and can
23 actually reduce the risks in terms of risk goals. So I
24 think you really need to get a professional answer to the
25 question that Senator Cornyn asked in order to know what

1 the impact on the exchange would be.

2 And, again, presumably this can be done on the floor
3 and we will have more information about it. And I
4 certainly do not oppose the concept. If something is
5 working for the state of Washington in a certain way, I
6 like the idea of the state of Washington getting to
7 experiment with that within the context of the overall
8 legislation here too. But I also do not like the idea of
9 denying the people the option of participating in more
10 than one plan. That this becomes the only plan that they
11 can participate in.

12 Senator Cantwell. Mr. Chairman.

13 The Chairman. Senator Cantwell.

14 The Chairman. Who seeks recognition?

15 Senator Cornyn. Mr. Chairman.

16 The Chairman. Senator Cornyn.

17 Senator Cornyn. Senator Kyl yielded for a question.

18 May I ask a question?

19 The Chairman. All right. Go ahead.

20 Senator Cornyn. I will be very brief, I promise.

21 The Chairman. Go ahead.

22 Senator Cornyn. Senator Kyl, I am advised that
23 during a recent budget crisis in the state of Washington
24 that the state legislature cut funding for basic health
25 by 43 percent and that administrators were forced to

1 increase premiums from \$36 a month to nearly \$62 a month,
2 almost double. Would that be the kind of issue that you
3 would be interested in exploring before we accept an
4 amendment like this with perhaps unintended consequences?

5 Senator Kyl. Well, Mr. Chairman, Senator Cornyn,
6 it is the kind of thing you would have to consider if
7 this is the only choice -- well, it is not even a choice.

8 If this is what the people of any particular state would
9 have to have, if the state decides to do it this way.
10 You do not know what kind of circumstances may affect
11 that and certainly a situation like the budget crisis you
12 mentioned could have an adverse effect.

13 That is why my general rule is, the more choices
14 people have the better. And whether it is the state
15 limiting the choices or the Federal Government, limiting
16 the choices, I do not like that. And that is one of the
17 reasons that I would be very concerned about this. But I
18 do think that the state ought to have a choice that does
19 not box all of the people within the state into that
20 particular plan.

21 Senator Cantwell. Mr. Chairman.

22 The Chairman. All right. I think we are about
23 ready to vote.

24 Senator Cantwell?

25 Senator Cantwell. Will Senator Stabenow --

1 The Chairman. Or Senator Stabenow.

2 Senator Cantwell. I will be happy to close the
3 debate, Mr. Chairman.

4 The Chairman. Wait, I was --

5 Senator Stabenow. No, I actually was just going to
6 ask a question. Because my friend from Arizona was
7 talking about the people have as many choices as
8 possible. I just was going to interject that that is why
9 many of us support having a public option.

10

11 Senator Kyl. That is why I mentioned the public
12 option in connection with that.

13 The Chairman. All right. Senator Bunning.

14 Senator Bunning. May I make a point of order since
15 there is no CBO score the Chair has ruled out of order
16 every other amendment without a score. Are you going to
17 make an exception for this one?

18 The Chairman. Yes, the Chair has ruled as non-
19 germane amendments that are not paid for. That is, that
20 cost money and are not paid for. I have not ruled out of
21 order amendments that raise revenue or raise income. And
22 this amendment is structured in a way to save money. And
23 so I think therefore it is in order.

24 Senator Bunning. Therefore, if I would make an
25 amendment --

1 The Chairman. Senator, I have the floor.

2 Senator Bunning. Oh, okay.

3 The Chairman. I will let you speak. You clearly
4 have a right when you are recognized.

5 But this amendment, again, is germane because it
6 saves money. If it did not save money, if it costs, then
7 it would be non-germane and out of order. This is
8 structured in a way to save money.

9 In fact, there is a provision here that only 85
10 percent of revenue would be -- that otherwise would be
11 raised or spent on the tax credits would go to a state
12 that exercises this option. So it does raise revenue.
13 It saves money, it does not lose money.

14 Senator Bunning. Well, there is no CBO score to
15 tell us that and that is in your opinion. And that is
16 why you are going to rule it that way.

17 The Chairman. It is structured in a way to save
18 money.

19 Senator Bunning. Well, there is no -- we do not
20 know that.

21 The Chairman. Well, I have got to use my best
22 judgment. And if you read the amendment -- a fair
23 reading of the amendment would compel one to realize it
24 will raise revenue. It will raise money. It will save
25 money.

1 Senator Ensign. Mr. Chairman.

2 The Chairman. I have so ruled.

3 Senator Ensign. Mr. Chairman, can I --

4 The Chairman. Before I --

5 Senator Ensign. Before you finish on that, the
6 other day when Senator Cornyn thought his amendment was
7 fairly structured and would raise money, you disagreed
8 with it, and that is why you ruled his amendment germane
9 because you did not have a CBO score that would do that.
10 So this just seems like a question of fairness.

11 If you are going to rule one, because we do not have
12 a CBO score, and there is a difference of opinion, you
13 should rule both of them non-germane.

14 The Chairman. The issue is not whether or not
15 there is a score. That is not the issue. That is not
16 the issue. The issue is whether it saves money or loses
17 money.

18 And I think it does not take a rocket scientist when
19 looking at an amendment to determine, even though there
20 is not yet a score, whether it saves or whether it loses.

21 And it is at the Chair's discretion exercising, being
22 reasonable, fair, and honest, a fair reading, that the
23 earlier amendment offered by the Senator from Texas
24 actually would have lost money. And this clearly saves
25 money and that is why I ruled the amendment to be

1 germane.

2 Senator Cornyn. Mr. Chairman, may I ask whether
3 you considered what impact the movement of people --

4 The Chairman. I am sorry, could you speak up,
5 please?

6 Senator Cornyn. I am sorry. May I ask whether
7 your judgment considered the fact that costs for those
8 people who remain in the exchanges will go up and thus
9 the cost to the taxpayer to subsidize them will go up as
10 a result of people making from 133 to 200 percent of
11 being excluded. Because it seems to me that there is a
12 potential for not only a shrinking of the pool of
13 insured's, there is also a risk of cost shifting and
14 other things that may interact with this in other parts
15 of the bill.

16 The Chairman. Well, it is my opinion, just looking
17 at the totality of all the circumstances, looking at the
18 amendment as a whole and all of its various provisions,
19 especially the provision in the amendment which provides
20 that not 100 percent of the revenue otherwise raised with
21 tax credit go to the state, but only 85 percent go to the
22 state. And that clearly saves revenue. And I therefore
23 believe that the amendment is germane.

24 Senator Grassley. Can I ask a question?

25 The Chairman. Senator Stabenow?

1 Excuse me, Senator Grassley.

2 Senator Grassley. Yes, let us just assume you are
3 right though.

4 The Chairman. That is a good assumption.

5 Senator Grassley. Well, let us just assume you are
6 right. And you say from the reading of the language.

7 The Chairman. Yes.

8 Senator Grassley. That you draw that conclusion.
9 Now, we probably do not have the capability of getting a
10 score. And that is not the issue, you said. But would
11 it not be a little bit better if we had a CBO look at the
12 same language that somebody else is looking at and say it
13 is going to raise revenue without expecting them to put a
14 figure on it of saying, yes, it is going to raise money
15 or it is not going to raise money? Would that not be a
16 better way of doing it?

17 The Chairman. In an ideal world, I suppose that is
18 true, Senator. But as we well know, a lot of the
19 Senators have asked the CBO to score amendments.

20 Senator Grassley. No, I did not say "score."

21 The Chairman. I am sorry.

22 Senator Grassley. I did not say "score." Just
23 have CBO look at the language, because they are God and
24 they are independent and they can say, yeah, this will
25 save money without saying it will save X number of

1 dollars. And would that not be a little more credible
2 way of convincing everybody that it is in order?

3 The Chairman. God has decided not to come to this
4 mark up, so God is not here. But, nevertheless, there
5 have been many amendments offered, not scored, and I know
6 you are not asking for an exact score, but it is hard to
7 ask -- many of the requests that we have made of CBO have
8 not been answered. They are just so busy. And one just
9 has to make one's best judgment.

10 And I dare say that a fair reading of this
11 amendment, just by looking at it, and reading the
12 amendment in its entirety one would reach the conclusion
13 that it actually does save.

14 Senator Stabenow.

15 The Chairman. Senator Cantwell, would you close?

16 Senator Cantwell. I am happy to close.

17 The Chairman. I might say if we --

18 Senator Cantwell. Well, I am happy to answer --

19 The Chairman. Well, I want to give you a few
20 accolades, Senator. I think this is a great amendment.

21 Senator Cantwell. Thank you, Mr. Chairman.

22 Senator Cantwell. And as Senator Schumer mentioned
23 earlier, you have been dogged at work on this amendment
24 with mongoose tenacity of trying to find a good way to
25 make this work. I highly compliment you for that.

1 But more than that, it is your emphasis on quality.
2 You are a real leader. You are ahead of the curve. You,
3 I think, probably more than most who are working in
4 health care reform recognize the importance of quality
5 and how quality not only improves quality but saves
6 dollars. And I very, very much compliment you for that.

7 You have quality provisions in this underlying mark and
8 what you are striving for here is based on the belief
9 that states who exercise this option are going to be
10 focusing more quality, negotiations and so forth. And I
11 compliment you. People in Washington should be very
12 proud of you and what you are doing here.

13 Senator Cantwell. Thank you, Mr. Chairman. And I
14 thank you for those comments because I know we come from
15 the same part of the country. And that the Pacific
16 Northwest does have an ethos somewhat driven by our low
17 reimbursement rate, but somewhat driven by just the fact
18 that efficiency saves tax dollars to everybody; to those
19 who are seeking health care and to our governments as
20 well.

21 And to my colleagues, the Chairman is right, the
22 structure of this amendment is such that we are limiting
23 to the amount of money that we are putting on the table
24 for the tax incentives. So it cannot be any more than
25 that, so it obviously is not more than that. The

1 question is, what is the efficiency in driving through
2 negotiation the ability to negotiate rates. And to my
3 colleagues who are worried about the fact that the
4 exchange is somehow going to be disserved by having a
5 healthier population, I would ask you to consider the
6 whole notion of the exchange and us continuing to
7 subsidize without real competition, the ability to drive
8 down costs, and where we are going to be with the
9 exchange in the future.

10 My colleague from Arizona keeps saying there is not
11 choice in this. There is choice. They opt to have two
12 providers, at least the state of Washington now provides
13 four different providers. The state can decide whether
14 they want to do this plan or not do this plan. So there
15 is choice by the state. But the real choice you are
16 giving to people, the real choice you are giving to them
17 is whether you are going to be on an incessant increase
18 in insurance prices or whether you are going to give to
19 the people of this country the power to negotiate. And
20 we are giving, in this amendment, the power to negotiate
21 to our states. If your governors and your legislatures
22 do not want to negotiate on behalf of them to drive down
23 the cost of insurance, that is their political problem.

24 But we are going to do everything we can to drive
25 down the cost of insurance for the citizens of this

1 country. And at least this amendment is a start.

2 I thank the Chairman.

3 The Chairman. The clerk will call the roll?

4 The Clerk. Mr. Rockefeller?

5 Senator Rockefeller. Aye.

6 The Clerk. Mr. Conrad?

7 The Chairman. Aye by proxy.

8 The Clerk. Mr. Bingaman?

9 Senator Bingaman. Aye.

10 The Clerk. Mr. Kerry?

11 The Chairman. Aye by proxy.

12 The Clerk. Mrs. Lincoln?

13 The Chairman. Mrs. Lincoln is no by proxy.

14 The Clerk. Mr. Wyden?

15 The Chairman. Aye by proxy.

16 The Clerk. Mr. Schumer?

17 The Chairman. Schumer must pass. I do not see
18 him.

19 The Clerk. Ms. Stabenow?

20 Senator Stabenow. Aye.

21 The Clerk. Ms. Cantwell?

22 Senator Cantwell. Aye.

23 The Clerk. Mr. Nelson?

24 The Chairman. Aye by proxy.

25 The Clerk. Mr. Menendez?

1 The Chairman. Aye by proxy.
2 The Clerk. Mr. Carper?
3 The Chairman. Aye by proxy.
4 The Clerk. Mr. Grassley?
5 Senator Grassley. No.
6 The Clerk. Mr. Hatch?
7 Senator Hatch. No.
8 The Clerk. Ms. Snowe?
9 Senator Snowe. No.
10 The Clerk. Mr. Kyl?
11 Senator Kyl. No.
12 The Clerk. Mr. Bunning?
13 Senator Bunning. No.
14 The Clerk. Mr. Crapo?
15 Senator Grassley. No by proxy.
16 The Clerk. Mr. Roberts?
17 Senator Grassley. No.
18 The Clerk. Mr. Ensign?
19 Senator Ensign. No.
20 The Clerk. Mr. Enzi?
21 Senator Grassley. No by proxy.
22 The Clerk. Mr. Cornyn?
23 Senator Grassley. No by proxy.
24 The Clerk. Mr. Chairman?
25 The Chairman. No. Oh, excuse me, aye. I am for

1 this.

2 The Clerk. Mr. Schumer?

3 Senator Schumer. Aye.

4 Senator Grassley. Mr. Chairman, now we are going
5 to have a Republican amendment?

6 The Chairman. Senator, I am not sure what we had.
7 We had -- this morning we had several -- excuse me, the
8 Clerk will tally the votes.

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

11 The Chairman. The vote has 12 ayes, 11 nays, the
12 amendment carries.

13 Senator Grassley. Mr. Chairman?

14 The Chairman. Just a second.

15 [Pause.]

16 Senator Grassley. Mr. Chairman.

17 The Chairman. Senator Grassley.

18 Senator Grassley. Senator Kyl is next, I hope.

19 The Chairman. No, I might --

20 Senator Grassley. And I hope -- we have been very
21 transparent on this side. We have been very transparent
22 on this side of what we have been trying to do. If you
23 call on Senator Schumer we are being punished for our
24 transparency.

25 So Senator Kyl should be called upon.

1 The Chairman. Senator, I appreciate your concern.

2 This morning I think there were about nine amendments
3 that were taken up. They were all amendments on your
4 side. And to balance things out here a little bit, so
5 far it is two to nine, maybe it is two to eight. In the
6 interest of balance and fairness, I think it is only fair
7 to have a couple more Democratic amendments so have we
8 get back in balance again.

9 Senator Grassley. Well, if that is true, then it
10 should be somebody other than Senator Schumer because
11 Senator Schumer should not go ahead of Senator Kyl
12 because we were very transparent in telling Senator
13 Schumer what amendment we were going to offer and what
14 our source of revenue was.

15 Senator Kyl. Mr. Chairman, the whole point here is
16 that revenue would be taken off the table if the Schumer
17 amendment is offered now and passed. Then my amendment,
18 which is on the list here would have to find another
19 offset. That is the whole point there. I do not think
20 that would be fair.

21 Senator Grassley. And the point is, Mr. Chairman,
22 you know, everybody that has got an offset around here
23 ought to be able to get it copyrighted and own it.

24 [Laughter.]

25 Senator Grassley. But it does not work that way

1 and when somebody else thinks up an offset and steals it,
2 it seems to me a lack aconite.

3 Senator Schumer. Mr. Chairman?

4 The Chairman. Senator from New York.

5 Senator Schumer. Yes, I was not involved in the
6 machinations here. But let us just go over the facts so
7 people know. I always was going to offer an amendment to
8 do the affordability waiver. Because I believed and
9 argued for weeks that 10 percent was too high. That
10 produced revenues. All right. And I have not offered it
11 yet.

12 Then Senator Kyl files an amendment before I even
13 offer my amendment, taking those revenues and using them
14 for something else.

15 Now, I agree, you have been transparent. But that
16 does not -- it is not appropriate in my judgment when I
17 have been offering this amendment and talking about this
18 amendment for Senator Kyl -- he can take the language. I
19 am glad he supports that part, that concept of lowering
20 the affordability waiver. It used to be called the
21 hardship waiver.

22 But for him to go first and take it and use it for
23 an offset he wants before I even offer it is not fair.

24 The Chairman. The Senator from New York is
25 recognized to offer an amendment.

1 Senator Schumer. Thank you. And I was just told
2 it was not the original offset that Senator Kyl offered
3 on his medical devices. He had another one. And then
4 when we put this amendment in, he put it in. So I do not
5 think it is unfair to have us go with this amendment.

6 Also, we use, instead of medical devices, to
7 eliminate the penalty in the first year and reduce it in
8 half the second which is actually Senator Snowe's
9 original idea. So in a sense we are all sort of like
10 spaghetti here a little bit on this amendment. But I
11 think us offering it is fair because the original offset
12 came up with ours.

13 So let me talk about the amendment. And I ask that
14 amendment C-3, as modified, be brought forward.

15 Now, what does this amendment do? Let us start out
16 here, it is the major amendment today of affordability.
17 We have an issue of affordability because of the dilemma
18 we are in. Health care is very expensive. Middle class
19 families need health care. We all know that. Some are
20 lucky. They are over 65 and they get it from Medicare.
21 Others are lucky, they are not 65, but their employer
22 gives them good health care. And others are lucky, they
23 have enough money to pay for a decent health care plan.
24 But it is harder and harder for the middle class to pay
25 for health care because it is getting so expensive.

1 And as we have heard before, now average families
2 both work about one out of five days a week to pay for
3 health care and it will go up to two and two and a half
4 days a week in the future if we do not reduce the costs.

5 And that is why reducing the cost is so important.

6 We are trying to help those middle class families
7 pay for the health care they want to buy. And so there
8 are subsidies here that run from two to 12 percent. And
9 that is a very good thing. Those are expensive because
10 health care is expensive. But it is the right thing to
11 do.

12 But there are large numbers of families who may not
13 be able to afford the 12 percent. And I know it is the
14 hope of the Chairman and it is the hope of many of us
15 that we will get that top 12 percent number down
16 significantly as we go to the floor and go to the House.

17 But at the moment it is still at 12 because we have to
18 find the revenues to pay for it.

19 So what this amendment does is say, that if a
20 family--and this would be aimed at people solidly in the
21 middle class--cannot find a health care plan they can
22 afford at 8 percent they do not have to buy the health
23 care. It is very fair. Eight percent is still a lot for
24 a lot of families.

25 I had introduced amendments to make it lower. But

1 we also want to have as much coverage as possible and 8
2 percent is the balance that we seek today in this
3 committee. Maybe it will get a little lower as we move
4 forward.

5 What it says, again, let me just -- if you cannot
6 find health care at 8 percent of your income or lower,
7 you do not have to buy it. It will do a few things.
8 Most importantly it removes the burden for families that
9 really cannot or do not prefer to pay more than 8 percent
10 of their income for health care. Most families want
11 health care, we know that. But they may be putting two
12 kids through college. They may have had an unusual
13 problem. Maybe a small business owner had real problems
14 in his or her small business. And this says, again, 8
15 percent. The original bill has 10, this brings it down
16 to 8.

17 The second thing it will do is just as important.
18 We want to make sure that people get as efficient an
19 insurance plan as they can. Insurance companies will
20 know if they do not offer a plan at 8 percent, they are
21 going to lose a large number of customers. And so it is
22 going to be a large incentive for insurance companies to
23 actually produce a less costly plan. Maybe it will have
24 some higher deductibles, maybe it will have some higher
25 co-payments. But that will be the choice of the average

1 middle-class family.

2 So this is a very important amendment. And this
3 amendment in third -- so those are two good things.
4 Helping the middle class who cannot afford health care
5 and does not want to be -- is not really able to buy it
6 at less than 8 percent -- more than 8 percent,
7 encouraging insurance companies to offer plans that will
8 be only at 8 percent of income.

9 The third thing it does is it raises some money.
10 And that means that we can use that for something else.
11 And what we have chosen on this side to do is take the
12 very good idea of Senator Snowe and use that money to
13 eliminate the penalty in the first year that the exchange
14 takes effect and reduce it in half in the second.

15 That would be in the years, I believe, 2014 and
16 2015. So it gives families a chance to prepare without a
17 penalty. Let us say there are families that want to buy
18 the health care but they are not quite ready. They have
19 not prepared. The exchange is new. This gives them a
20 year not to buy it without penalty no matter what level
21 the insurance is offered at, and then a much lower
22 penalty for the second year.

23 So this amendment is a win, win, win. It is a win
24 for middle-class families who, as much as they want
25 health care, might not be able to afford it at above 8

1 percent. It is a win because it makes the cost of health
2 care lower. And it is a win because in the offset we
3 give families a chance to adjust to this new world and
4 not be penalized for it.

5 Incidentally, I might add, we put language in there
6 to make it clear. If you do not pay the penalty and you
7 are supposed to, you may get civil punishment but not
8 criminal. No jail time or anything like that. We make
9 it clear in this amendment in case anyone is worried
10 about that.

11 Senator Conrad. We the Senator yield?

12 Senator Schumer. I would be happy to yield to my
13 colleague from North Dakota.

14 Senator Conrad. First of all --

15 Senator Schumer. And I want to thank him, by the
16 way. He has been a leader on this issue and very much
17 appreciate his help in crafting this idea and this
18 amendment. Please.

19 Senator Conrad. First of all, I would like to be
20 listed as a co-sponsor for the gentleman's amendment.

21 I want to --

22 Senator Schumer. I will.

23 Senator Conrad. -- if I could say to the Chairman.

24 The Chairman. Senator Conrad.

25 Senator Conrad. If I could be listed as a co-

1 sponsor of the gentleman's amendment.

2 I would just like to say to the gentleman from New
3 York, I appreciate very much the effort and the energy
4 that you have devoted to this, that Senator Stabenow has
5 devoted to this. Over and over and over you have come
6 back to this point. Senator Stabenow has come back to
7 this point. We have simply got to do better on
8 affordability.

9 I, for a long time, have tried to find a way to get
10 to 7.5 percent. But 8 percent is a dramatic improvement
11 over where we have been.

12 Second, making clear nobody goes to jail. The truth
13 is, nobody was ever going to go to jail.

14 Senator Schumer. Right.

15 Senator Conrad. Because if you look at the case
16 history on this, that is not what happens.

17 Senator Schumer. Right.

18 Senator Conrad. People might get fined, but nobody
19 goes to jail on this kind of -- you have made that clear,
20 it is not going to happen.

21 Third, and this is something that we should say
22 thanks to Senator Snowe for, and Senator Snowe is engaged
23 in a conversation with her staff, but I do appreciate the
24 idea that she brought to this in terms of phasing in
25 because that is a good idea as well.

1 I just want to thank the gentleman from New York for
2 putting this together in a way that I think substantially
3 strengthens the overall proposal.

4 Senator Schumer. Well, I thank --

5 Senator Conrad. I also want to thank the gentle
6 lady from Michigan. She has been indefatigable at going
7 to colleagues and saying, we have got to do more to make
8 this affordable for the middle class.

9 Senator Schumer. Would my colleague yield for a
10 second? Yes, I want to add my thanks to Senator Stabenow
11 who has been really working hard on this issue and has
12 been a colleague and ask unanimous consent she be added
13 as a co-sponsor.

14 You have been a real force on this. Senator
15 Rockefeller has, Senator Bingaman has, Senator Wyden,
16 Senator Menendez. We have had a lot of support for this
17 idea on the committee as have you, Mr. Chairman. And you
18 have worked your way to try and bring this amendment
19 here, and very much appreciate it.

20 The Chairman. Further discussion?

21 Senator Bingaman.

22 Senator Bingaman. Mr. Chairman, let me just
23 indicate my concerns about the amendment. And I do have
24 some concerns. I think there are two separate concepts
25 here that I just think it is useful to try to understand.

1 One is this whole issue of how do we make health
2 care insurance more affordable for folks? And the other
3 concept is, how do we reduce the financial burden that
4 might be imposed on them by virtue of this bill, even if
5 they do not get health care?

6 And clearly this amendment is not one that I see as
7 resulting in making health care coverage more affordable.
8 What it does, it does the second of those. It reduces
9 the financial burden. And it says, you do not have to
10 get coverage. Under the mark, the way the mark now
11 reads, you are exempt from getting coverage if your
12 income is 100 percent of poverty or less. You are
13 heavily subsidized or at least subsidized -- I guess you
14 can argue about how heavily -- but you are subsidized to
15 obtain coverage through these refundable tax credits if
16 your income is between 133 percent of poverty and up to
17 nearly 400 percent of poverty.

18 And you are exempt from getting coverage at all if
19 it would cost you more than 10 percent of your adjusted
20 gross income to obtain the coverage. And that is the so-
21 called "affordability waiver" that Senator Schumer is now
22 proposing to lower from 10 percent to 8 percent, as I
23 understand it.

24 In addition to those provisions that are in the
25 mark, Senator Snowe offered an amendment, which has been

1 adopted as part of the modification, which says that any
2 individual who would otherwise qualify for the exemption,
3 that is the 10 percent exemption, but now if this
4 amendment prevails it is the 8 percent exemption. Anyone
5 who would qualify for that is eligible to buy the young
6 invincible policy if they want to buy it.

7 And the young invincible policy, I think I am
8 correct that the staff, I think, Ms. Fontenot, you said
9 that the young invincible policy may have actuarial value
10 as low as 50 percent; is that what you indicated?

11 Ms. Fontenot. Yes. Around 50.

12 Senator Bingaman. Around 50 percent. So
13 regardless of the person's age, they could buy a policy
14 of 50 percent under the Snowe amendment.

15 I think the effect of this amendment is to reduce
16 the number of people who will have coverage. And maybe
17 staff can tell us what the estimate is on that. Is there
18 a CBO estimate as to how many fewer people will have
19 coverage --

20 Senator Schumer. Yes, two million.

21 Senator Bingaman. -- with this change?

22 Oh, yes, if you have that information.

23 Mr. Schwartz. Two million.

24 Senator Bingaman. Two million?

25 Senator Schumer. Over ten years it is two million.

1 It will be two million over the whole ten years.

2 Senator Bingaman. Two million fewer. Is that at
3 the end, by 2019? Is that what that means?

4 Senator Schumer. Yes.

5 Senator Bingaman. By 2019 there will be 2 million
6 fewer people who will have coverage and it will reduce
7 the resources that are provided to people to obtain
8 coverage. Because fewer people will be coming in and
9 presumably obtaining coverage. Or at least that is how I
10 would interpret it.

11 The overall effect of it, as I see it, would be to
12 reduce the number of healthy individuals that we have in
13 the insurance risk pool. Because a lot of folks who do
14 not have health problems will say, there is no reason why
15 I should go out and buy this insurance. I will just stay
16 out of it. I do not need the insurance. And that, of
17 course, runs up premiums for everybody else who is
18 insured. And it leaves a significantly larger amount of
19 cost shifting from people who have no insurance to people
20 who have insurance and are having to pay for that in
21 their premiums.

22 So I think it goes against the major thrust of
23 legislation. Our thrust being, we want to cover as many
24 Americans as we can. We want to provide as adequate a
25 set of health care benefits as we can afford to. And I

1 fear that this amendment will take us in the wrong
2 direction.

3 Senator Ensign. Mr. Chairman. Mr. Chairman.

4 The Chairman. Senator Ensign.

5 Senator Ensign. Mr. Chairman, a couple of points
6 to make here.

7 I think some of these arguments that are being made
8 today seem very inconsistent. I think Senator Bingaman
9 just pointed out some of the inconsistencies. On some of
10 our earlier amendments it was talked about that fewer
11 people would have coverage. Some of our amendments would
12 cause fewer people to have coverage because we wanted to
13 exempt them from an individual mandate.

14 Well, here you are exempting them from the
15 individual mandate. And we just found out that 2 million
16 fewer people are going to have coverage. And we were
17 decried earlier for saying that that eliminates the goal
18 of universal coverage. And it would seem to me that this
19 amendment is doing the exact same thing.

20 The other inconsistency that I see is that we are
21 putting in here to exempt folks from the criminal
22 penalties for these very folks, but yet the criminal
23 penalties will still apply to the rest of the folks in
24 the bill.

25 Senator Schumer. Would the gentleman yield?

1 In this bill we exempt all criminal penalties.
2 Everyone from any criminal penalty.

3 Senator Ensign. And does the criminal penalty also
4 include the \$25,000? Is that not part of the criminal
5 penalty? In other words --

6 Senator Schumer. No jail time. There is no one --
7 it never would have happened anyway. But just to make
8 sure, we said, anyone who does not pay the penalty does
9 not get any jail time, period, anyone.

10 Senator Ensign. You said civil penalties. Mr.
11 Barthold, is the \$25,000 fine part of the criminal
12 penalty?

13 Mr. Barthold. Senator Ensign, the material I
14 quoted to you from Section 7203 of the Code for willful
15 failure to file or pay, was a misdemeanor with the
16 maximum penalties of up to a \$25,000 fine and up to one
17 year in jail.

18 Senator Ensign. So under his amendment, then they
19 would not be subject to any fines either?

20 Mr. Barthold. You will have to ask Senator Schumer
21 his intent.

22 Senator Ensign. Well, he says the "criminal part";
23 is that part of the criminal part of the Code?

24 Mr. Barthold. Yes.

25 Senator Ensign. It is part of that criminal part?

1 I think that is great. I think exempting all of them is
2 terrific. I am actually probably going to vote for your
3 amendment. This is exactly what I was trying to do
4 earlier today. So I am glad that we have recognized that
5 they should not be penalized. I do not know what your
6 incentive is going to be for making them buy insurance
7 now if you are going to be exempting them, but I am glad
8 you are finally joining with us. So thank you.

9 Senator Schumer. I am glad to have the bipartisan
10 note added to this debate.

11 The Chairman. Senator Menendez.

12 Senator Menendez. Thank you, Mr. Chair.

13 Mr. Chairman, I am going to support Senator
14 Schumer's amendment. And I listened to what Senator
15 Bingaman had to say. I wish we could be in a position as
16 Senator Bingaman envisions it. That is where I would
17 like to be.

18 The problem is, and the Chair tried already to deal
19 with some of this when we took -- at the urging of myself
20 and others -- when the mark was at 13 percent in terms of
21 the cap and went down to 12, it was a good effort to try
22 to begin to make it more affordable.

23 The problem here at the end of the day is really a
24 question of premium costs. And so if a family of four
25 making \$66,000 has to pay \$661 a month, then at the end

1 of the day they may choose to do so. If it is important
2 enough to them that out of their budget that is what they
3 are going to take. But if they really cannot because
4 there are other challenging issues in their budget, then
5 they need relief. And that is what Senator Schumer does.

6 He provides relief for them so that not more than 8
7 percent of their total family income would exempt them
8 from having the penalty. And that is what it seems to me
9 is the big challenge here.

10 So we would love to have the premium costs be
11 reduced. And I know that there is still the floor and
12 there is still the conference and hopefully we can
13 continue to work on the premium costs at the end of the
14 day which is the critical issue. But in the interim we
15 need to give families relief -- middle-class families --
16 I mean, \$66,000, you know, that is two people working
17 together, entry level, one a teacher, maybe another
18 working as a station manager. It is not a lot of money.

19 It is very middle-class. So at the end of the day as we
20 strive to continue to drive down the premium costs, you
21 need an escape valve for those middle-class working
22 families. That is what Senator Schumer does and that is
23 why I will be supporting his amendment as we continue to
24 work to drive down premium costs in the process.

25 The Chairman. Senator Stabenow.

1 Senator Stabenow. Well, thank you, Mr. Chairman.

2 I want to thank Senator Schumer for his efforts. It has
3 been a pleasure to work with him on this and with others.

4 Senator Menendez has been a real champion for this as
5 well and thank you as well as Senator Conrad's efforts as
6 we have put this together.

7 We all know this is part of a big picture. And we
8 have in front of us a bill that creates a safety net for
9 the first time. If you lose your job you do not lose
10 your insurance.

11 With Senator Cantwell's amendment that we just
12 passed, we have now created the opportunity for up to 75
13 percent of the people in this country that do not have
14 insurance today to get a lower cost option if their state
15 chooses to do that. So we are bringing together a number
16 of ways to lower the cost for families. And I think the
17 Cantwell amendment is a very, very important part of
18 affordability.

19 My hope is that if we can get a score on that and we
20 know that it is going to save. We do not know how much.

21 My hope is, if we can get a score and get an exact
22 number, we can put that back into helping with those
23 above 200 percent, the middle class, to be able to do
24 exactly what Senator Menendez was talking about.

25 We need to continue to work. I pledge to work with

1 colleagues to continue to work to make sure in the end
2 when all of this is put together this is truly affordable
3 for middle-class families and for small businesses that
4 we are all trying to help. I think it is very
5 significant that we are talking about making sure the
6 exchange works and not starting with any kind of a
7 personal responsibility fee until we get through the
8 first year to make sure it is up and working and that
9 that is phased in. I think that is very important.

10 And certainly for me, and I know others, we are
11 going to watch very, very closely to determine how this
12 is going. And if it is not working for families, then we
13 can always change it.

14 The final thing I would say is, I think after
15 hearing so many times over and over again about how
16 somehow folks would end up in jail if they do not have
17 health care. I appreciate Senator Schumer including the
18 clarification in his amendment. You know, I find it
19 really unfortunate in this country today, actually, when
20 we talk about people going to jail. Because when you go
21 to jail you get health care. And that is what we are
22 trying to change. To make sure that people who are
23 following the rules and not going to jail get the
24 opportunity to have health care too.

25 Senator Grassley. Mr. Chairman.

1 The Chairman. Senator Grassley.

2 Senator Grassley. CBO just indicated to us a few
3 moments ago that they have not produced a score for the
4 modified Schumer amendment. We do not know the cost or
5 effect of the coverage. We do not even know whether it
6 will increase or decrease spending.

7 Then, also, compared to what the original version
8 was versus this version that came out five minutes before
9 it was brought up. I think it would be good if we would
10 set this aside and give us a chance to study it. But at
11 the very least, we ought to know whether or not it
12 increases or we ought to know what the cost is.

13 Senator Schumer. Mr. Chairman.

14 The Chairman. Yes, Senator Schumer.

15 Senator Schumer. CBO has sent us a letter that it
16 is revenue neutral at the very least. In fact, we did
17 have scored -- I introduced amendments for 3, 5, and 7
18 percent and the 5 percent was the 5 percent saved 30
19 billion dollars. So there is no question that this will
20 save money. We do not know how much, but we do have from
21 CBO a written statement that it is at the very least
22 revenue neutral.

23 Senator Grassley. So what you are saying is, the
24 left hand does not know what the right hand is doing in
25 CBO then?

1 You know, we had conversations directly with the
2 analyst. I think we ought to get settled whether we have
3 got real figures or we do not have real figures.

4 The Chairman. Well, Senator, you make a point.

5 Frankly, just a few moments ago, I directed my staff
6 to go back and make a deeper analysis to try to answer
7 that question. On the face of it, it is neutral because
8 it is designed to be neutral. Therefore, I decided not
9 to have a score. For example, moving the level down to 8
10 percent is designed to raise 5 billion and phasing in the
11 penalty over three years is designed to cost that same 5
12 billion.

13 I inquired of my staff, well, how do you know that?

14 So I am trying to answer your question.

15 Senator Grassley. All right. I thank you very
16 much.

17 The Chairman. Yeah, you bet.

18 Senator Ensign. Mr. Chairman.

19 The Chairman. Senator Ensign.

20 Senator Ensign. Could I just clarify one other
21 thing in the bill? Not being a lawyer and not being an
22 IRS agent, I just wanted to get something on the record.

23 Just to be sure, no one would be subject to any of the
24 criminal penalties regardless. So we have established
25 that absolutely for sure.

1 The second thing though is, you mentioned that they
2 would be subject to penalties. So even though low-income
3 people here would be subject to the garnishment of wages,
4 potentially losing their home, potentially losing any of
5 the rest of their assets, the IRS could go after their
6 other assets for not paying the penalties; is that
7 correct?

8 Senator Schumer. We do not eliminate the civil
9 penalties, just the criminal penalties.

10 Senator Ensign. So that is correct? They could
11 have their wages garnished, they could lose their house,
12 they could lose all the rest of their assets? I just
13 want to make sure we know for the record that that is
14 correct?

15 Senator Schumer. I do not -- you know, again, I do
16 not know the policies of the IRS when a small amount of
17 money is not paid. I doubt they --

18 Senator Ensign. Well, they can go after interest
19 penalties, they can go after -- I do not know about you,
20 but in my state the IRS is not thought of fondly.
21 Because the IRS is brutal in what they do. They go after
22 everything. In my state people are little afraid of the
23 IRS. And that includes cocktail waitresses, dealers,
24 slot hostesses, everything. So it is something that I
25 think that needs to be addressed so we get it on the

1 record that they would be subject to these civil
2 penalties.

3 Senator Schumer. I appreciate the gentleman.
4 Could we ask Ms. Fontenot -- yes, I cannot remember which
5 one was right and which one was wrong.

6 What is the penalty -- this is for all of the
7 penalties, if they were not paid, what happens? Is
8 Senator Ensign correct?

9 Ms. Fontenot. I am going to defer to my tax
10 colleague.

11 Senator Schumer. Ms. Baker. That is easy, Baker.

12 Ms. Baker. Nothing confusing about that. With
13 respect to the criminal penalties, there are actually
14 three criminal penalties that you would be eliminating in
15 your amendment. This would include tax evasion, will
16 failure to pay, and a false tax return. So those would
17 be eliminated.

18 Senator Schumer. Okay. So what is left if you do
19 not pay?

20 Ms. Baker. The IRS has various civil procedures
21 and mechanisms to collect any amounts that are unpaid,
22 any deficiencies. That would include, for example, if
23 you had a refund on your tax return and it was determined
24 that you owed the penalty that the refund might be
25 reduced. There are other collection procedures. The IRS

1 issues many --

2 Senator Ensign. Garnishing wages?

3 Ms. Baker. That could be a possibility. That is
4 an option. But I just wanted to clarify that it is a
5 gradation of effort that you would first go to the least
6 invasive approaches and then could proceed to some of
7 those.

8 But as someone pointed out, the amounts that would
9 be in question, the IRS has to weigh the use of its
10 resources. And so it would be unlikely in a situation
11 like this with these amounts that we are talking about
12 that you would get to a point where you would have a lien
13 or a levy. But it would be personnel.

14 Senator Ensign. It is possible. Thank you.

15 Senator Schumer. Yes, I would be happy just to
16 work with my colleague. This is not on this amendment,
17 but on the general issue of what kind of punishment
18 should be incurred. I am sure my colleague agrees, there
19 should not be no punishment at all; right?

20 Senator Ensign. Yep.

21 Senator Schumer. All right. So I would be happy
22 to work with you.

23 Senator Ensign. I would appreciate it.

24 [Simultaneous conversation.]

25 Senator Ensign. By the time we go to the floor to

1 make sure that we get the language very specific.

2 I just had somebody whisper in my ear who used to
3 work for the IRS, and they said the mark is not specific
4 and it needs to be when dealing with the IRS.

5 Senator Schumer. I will be happy to work with you
6 on that.

7 The Chairman. I might say, hopefully help clarify
8 a bit about whether this amendment saves or loses and so
9 forth.

10 At 4:26 today, we received an e-mail from CBO and it
11 is informal advice that this amendment probably is a
12 saver. Probably. Informal advice, probably, at 4:26,
13 that is their informal estimate. They think.

14 I suppose some great statistician can figure out
15 some probability analysis to apply to CBO.

16 Senator Schumer. Mr. Chairman.

17 The Chairman. But, anyway, that is what they say
18 right now.

19 Senator Schumer. Mr. Chairman, we do have an
20 estimate that a 5 percent, going from 10 to 5 saves 30
21 billion dollars. Now it may not be a straight line, but
22 it is pretty clear that if you go to 8 percent you are
23 going to save money.

24 The Chairman. Well, anyway, I am just saying --

25 Senator Schumer. We do not know how much.

1 The Chairman. -- CBO has sent an e-mail to us at
2 4:26 this afternoon, it is probably a saver.

3 Senator Schumer?

4 Senator Schumer. Let me, in conclusion, say that,
5 again, I agree with the sentiments with almost everyone
6 who spoke here. Not with the conclusion of Senator
7 Bingaman, but certainly with Senator Menendez who has
8 worked very hard on affordability that it would be good
9 if we would not have to do this. That we would have
10 enough dollars, given all the constraints we have to have
11 more generous subsidies. And we are going to work
12 towards that. To me we should get them lower. We have
13 gotten them somewhat lower with the Chairman's leadership
14 and hopefully we can get them lower as we move through
15 the process.

16 But I do not think, and, again, I agree with Senator
17 Menendez, and not with Senator Bingaman, because we
18 cannot get the subsidies lower, we should put the burden
19 on middle-class families. The burden may fall a little
20 bit on the insurance industry, the burden may fall a
21 little bit on the providers, and I know we are trying in
22 this bill to make everyone one big happy family, but if
23 you have to have a choice when there are limited dollars,
24 it seems to me this is the best choice.

25 And there is the added benefit that it will

1 encourage insurance policies at lower rates aside from
2 the one for the kids, you know, for the whatever it is
3 called; the young invincibles. It applies to everybody.

4 It sounds like a TV soap opera. But in any case, aside
5 from them to give them a better policy that would have
6 broader coverage.

7 So I hope we will get some -- and it also, of
8 course, reduces the penalties for year one and year two;
9 something we all discussed this morning and that we
10 wanted to do.

11 So I would hope that we could get some broad and
12 maybe bipartisan support for this amendment.

13 Senator Snowe. Mr. Chairman.

14 The Chairman. Senator Snowe.

15 Senator Snowe. I hope we could set this amendment
16 aside so that we can continue to work through some of
17 these issues. I appreciate what the Senator from New
18 York has offered as an amendment. And even though I know
19 we had a number of discussions, I am concerned certainly
20 about still the level of penalties that are involved.

21 We have an enormous responsibility as we are
22 transforming the health care system to ensure that there
23 is affordability. And I certainly do not want people to
24 be penalized at the outset of this process. Even with
25 the deferral of a year, to pay some very onerous

1 penalties, not to mention being administered by the
2 Internal Revenue Service.

3 I think the obligation should be first and foremost
4 on the United States Government to ensure that these
5 plans will be affordable in the marketplace, in the
6 exchange. And we have yet to know that. I mean, that is
7 a struggle, in essence, here on the committee, and has
8 been for months. How do we achieve affordability?

9 We can reconfigure and jigger these formulas, but we
10 do not know. And it just sort of surprises me that we
11 would suggest that we are going to have these high-level
12 penalties on the average American when we have no
13 certainty about whether or not these plans are going to
14 be affordable.

15 The onus should be on the United States Government,
16 on the Congress. So in 2013 or 2014 we ought to have an
17 assessment as to whether or not the plans that are
18 emerging from the marketplace are affordable to average
19 Americans. And I still have concerns because I see the
20 analysis that come out from the Congressional Budget
21 Office even on the silver plan as a percentage of one's
22 income in terms of the premiums and cost sharing. I
23 mean, there are still high levels. So why would we set
24 about to impose penalties on people of \$375, \$750 going
25 up to \$1,900. I mean, I just do not understand. It is

1 not about punishing people. It is about getting it right
2 on affordability.

3 And I just do not understand why there is this
4 impetus to keep driving this in a way to punish people.

5 Now, I understand the rationality behind the
6 individual mandate, certainly. We should not pay for
7 those who do not have health insurance. But at the same
8 time, it is not as if we could have demonstrated from the
9 outset that people could afford health insurance.

10 So let us give them the benefit of the doubt. Let
11 us make sure this system works for the average American.

12 And when you are talking about 200 percent of
13 federal poverty level but asking people to pay, you know,
14 at 66,000, you know, \$750 for a family. Well, every
15 dollar counts for that average family. And we do not
16 want them to pay penalties that go nowhere other than to
17 the federal treasury. If you look what this penalty is
18 raising in the context of what we are dealing with today,
19 it is not about raising the revenue. It is about getting
20 it right for affordability. So why punish the average
21 family or the individual to pay these onerous penalties?

22 I just do not get it, frankly. I really do not.

23 I just do not understand it. The burden is on us.
24 And I dare say, in 2013, in 2014, in 2015, we might not
25 know. And I think the Congress has a responsibility to

1 prove that it is done right before you start imposing
2 penalties. I think we should have an affordability study
3 before we impose any penalties. I think that that is
4 right. We ought to look at it. We should do an
5 analysis. Did we get it right? Then we come back and
6 decide whether or not people are just choosing not to get
7 health insurance and imposes a cost on everybody else.
8 Then that is a different story.

9 But right now we should not start out at the outset
10 of this labyrinthian task in reforming our health care
11 system and saying let us punish people. We will be
12 barely emerging from this economic recession in 2013 and
13 2014.

14 Senator Roberts. Would the Senator yield?

15 Senator Snowe. People are wondering about jobs.
16 They are wondering about exactly how they are going to
17 make it. So we are sitting here and talking about
18 onerous penalties. So I would hope that we could sort of
19 refrain from that and maybe reorient the burden. Put the
20 burden on the United States Congress to get it right.

21 Senator Roberts. Would the Senator yield?

22 Senator Snowe. Before we start talking about
23 penalties.

24 Senator Roberts. Mr. Chairman? Would the Senator
25 yield on that point?

1 The Chairman. Senator Snowe has the floor. Will
2 she yield or --

3 Senator Snowe. Who asked?

4 The Chairman. Senator Roberts had a question.

5 Senator Roberts. Except for the word
6 "labyrinthian" which I do not understand. That is a
7 Senate word. I agree with everything else that she said.

8 I would be happy to work with you and I think
9 everybody -- most everybody -- on this side would be as
10 well. And I would encourage you to try to -- I would be
11 more than happy to work with you on putting that in the
12 form of an amendment.

13 Senator Snowe. I appreciate that.

14 Senator Schumer. Would the Senator yield?

15 The Chairman. Let me ask the Senator of New York,
16 do you still have the floor Senator?

17 Senator Snowe. I will yield.

18 The Chairman. Well, let me ask. I think
19 discretion is the better part of valor here. I believe
20 this amendment should be set aside. And I ask the
21 Senator from New York if he is willing?

22 Senator Schumer. Yes, I am certainly willing. I
23 just want to make one point. I agree with the Senator
24 from Maine. I think most of us on this side do. The
25 original bill had \$3,800 for family penalties. At the

1 request of many of us on both sides, the mark was moved
2 down to 1,900. I have an amendment in there that moves
3 it down to 1,000. And the attempt here, of course, was
4 to delay it for a year or two which many of us had
5 discussed this morning in our Democratic meeting. So I
6 would be very happy to set this aside and try to work
7 with the Senator from Maine, the Senator from Kansas, and
8 everybody else. I do not think anybody likes this
9 concept of penalties. We have been moving in the right
10 direction to make them less onerous. But maybe we can
11 move further or figure out a better way.

12 I do want to come back to this amendment because I
13 think the first part, the affordability, is so important.

14 I would ask that it be the first on the affordability
15 waivers to be considered when we come back and consider
16 these things.

17 The Chairman. Well, I hear you. Senator, I do not
18 want to get locked in. I certainly respect the intent of
19 your request.

20 Senator Schumer. I ask that we set aside --

21 The Chairman. I understand it, I respect it, and I
22 agree with it.

23 Senator Schumer. Thank you. I got the picture.

24 I ask unanimous consent we temporarily set this
25 amendment aside?

1 The Chairman. The amendment is set aside.

2 Senator Kyl. Mr. Chairman.

3 The Chairman. Senator Kyl.

4 Senator Kyl. Thank you. Mr. Chairman, I would
5 like to bring up my amendment F-3 as modified.

6 The Chairman. What is that, please?

7 Senator Kyl. This is the striking of the tax on
8 medical devices.

9 The Chairman. All right.

10 Senator Schumer. Could I ask a point of order of
11 my friend from Arizona? A question rather?

12 Senator Kyl. Sure.

13 Senator Schumer. Do you pay for that with the
14 amendment that I have introduced?

15 Senator Kyl. It is paid for by a part of what you
16 were talking about. I am a little confused now as to
17 which is your C-3 and C-4. But part of it is the saver
18 that CBO apparently said exists in your amendment.

19 Senator Schumer. Yes. I would ask that that
20 amendment be set aside as well, so we can discuss these
21 all as a package.

22 The Chairman. I think in fairness that is the only
23 fair thing to do, Senator. We have to be fair here. I
24 encourage you to set aside.

25 Senator Kyl. We have to be fair so that the -- so

1 the offset that I had for my amendment, because we are
2 concerned about other aspects of the Schumer amendment
3 would not be available to me with respect to my
4 amendment.

5 The Chairman. Well, no, that is not accurate.
6 That is not fair either. Because it was Senator Schumer
7 who suggested an offset earlier. So we are in this crazy
8 land where everybody claims that he has his offset and he
9 wants to own it as his own offset and so forth.

10 Senator Kyl. Well, Mr. Chairman, I am happy to --

11 The Chairman. To be fair to everybody, they both
12 should be set aside so we can work this out.

13 Senator Kyl. I would not necessarily characterize
14 it as fair, but let me just ask this question.

15 Since we do need to eliminate this pernicious tax on
16 people who obtain medical devices, and we need to
17 accomplish that, I presume today. The question I have
18 is, when you and Senator Schumer think we might be able
19 to revisit the issue in order to accomplish that?

20 The Chairman. Well, let us get our staffs working
21 together and the Senators working together today on the
22 discussion of the amendments and just do our very best.
23 That is all we can do.

24 Senator Kyl. Clearly we will want to deal with
25 this before we conclude working on the bill?

1 The Chairman. I have a hunch we will deal with it.

2 Senator Kyl. I will be happy to turn to another
3 amendment. But perhaps for folks who might be watching
4 that do not quite understand what appears to be a game
5 that is being played here. In some senses I suppose it
6 is a game, but here is what it is all about.

7 There is a tax being imposed on medical devices. It
8 is about 40 billion dollars. And according to CBO, this
9 tax will be passed on to the purchasers or consumers, the
10 people who pay insurance premiums, because they cover
11 these medical devices. It could be a stint, it could be
12 -- well, it could be any number of things that you use in
13 recovery or treatment for a disease or illness.

14 That tax does not exist today. My amendment says
15 that we should not have that tax. So I just want to
16 leave everything just the way it is. Status quo. Do not
17 impose the tax. We do not have it today. I do not like
18 the fact that the Chairman's mark would impose that tax.

19 But because of the pernicious rules we have around
20 here, I cannot just say, leave the law alone. Unless I
21 come up with a different tax or way to raise revenue by
22 the amount of the tax that is in the mark of the
23 Chairman, even though I just want to leave things alone.

24 I am not trying to spend money so that I need money to
25 offset that. I am not trying to spend 40 billion dollars

1 so I need to raise 40 billion dollars to come out even,
2 make it budget neutral. No.

3 When I argue that I just want to leave things the
4 way they are and not impose this new tax on medical
5 devices, I have to come up with 40 billion dollars to do
6 that. Now, that does not make sense.

7 So part of the game that you see members here --
8 very serious members of the United States Senate playing
9 back and forth here has to do with the fact that we are
10 stuck with some rules that do not make sense. And since
11 nobody, I presume, really enjoys raising taxes, since I
12 would like to not raise a tax, I do not want to have to
13 raise another tax in order not to raise a tax. Does that
14 make sense?

15 And so if there is revenue available as there would
16 be in the Schumer amendment, I would prefer to have that
17 revenue available than to have to raise taxes somewhere
18 else so that we do not have to raise the medical device
19 tax.

20 This is a serious business that we are engaged in.
21 And some of the rules that we think we have to abide by
22 are foolish, foolish, indeed.

23 Mr. Chairman, the amendment that I would raise if
24 you are asking me to defer this until the Schumer
25 amendment is resolved --

1 The Chairman. Yes, I am asking.

2 Senator Kyl. -- would be my amendment number F-4
3 as modified.

4 The Chairman. F-4. All right.

5 Senator Kyl. And I will try to find my talking
6 points on that here.

7 Mr. Chairman, the F-4 description is this. This too
8 would eliminate a tax increase. It eliminates the --

9 The Chairman. I am sorry, Senator, it is F-4, is
10 this modified, is this original? Could you just help us
11 out a little bit here?

12 Senator Kyl. Yes.

13 The Chairman. Could you tell us what this is?

14 Senator Kyl. This eliminates the annual non-
15 deductible fee on the health insurance sector because in
16 the year 2010; 6.7 billion dollars annually. Do you have
17 it? Do I have the right number here? I think I do.

18 [Pause.]

19 Senator Kyl. Do you have it, Mr. Chairman?

20 The Chairman. Thank you, I have Kyl amendment F-4,
21 modification.

22 Senator Kyl. Right.

23 The Chairman. Would you describe your amendment
24 please, just to make sure?

25 Senator Kyl. Yes. This proposal -- my amendment

1 would eliminate the new tax or fee of 6.7 billion dollars
2 per year on the health insurance sector beginning in the
3 year 2012. The fee that provides to U.S. health
4 insurance providers including nonprofits.

5 Are you ready for me to proceed?

6 The Chairman. Yes.

7 Senator Kyl. This so-called "fee" would be
8 allocated by the providers' market share in the preceding
9 year. And an employer that self-insures its employees'
10 medical claims is exempt from the fee. Now, the point
11 here is, this is a new tax. I mean, some of the taxes
12 are called taxes. Some of the taxes are called fees. I
13 think this one is called a fee, but it is a tax on
14 insurance companies.

15 Nobody likes insurance companies, so let us just tax
16 them, goes the logic. Well, the problem is, as everyone
17 knows, when you put a tax on the insurance company, it
18 does not say thank you, we will just eat that. It passes
19 it on in premiums to its beneficiaries. According to
20 CBO, I quote, "Those fees would increase costs for the
21 affected firms which would be passed on to purchasers and
22 would ultimately raise insurance premiums by a
23 corresponding amount." end quote.

24 What the CBO says, in other words, is, that if you
25 are going to raise 6.7 billion dollars a year for ten

1 years through this fee, then you and I are going to pay
2 6.7 billion more per year in health insurance premiums.
3 That is what CBO means by a corresponding amount.

4 So, in effect, what we have decided to do here is to
5 tax everybody who buys health insurance by 6.7 billion
6 dollars per year. That is 67 billion dollars over ten
7 years passed on to consumers in the form of higher
8 premiums. Why does this make sense?

9 Well, it makes sense because the people who wrote
10 the bill came up a little short on cash because it spent
11 so much they needed some extra money. Who could they tax
12 and get away with it? Well, nobody likes insurance
13 companies, so let us do that. The problem, as I said,
14 is, we all know that it does not stop there, we end up
15 paying the tax and CBO has confirmed that.

16 When you add that to the other taxes or fees on
17 medical devices that I was going to talk about earlier,
18 branded drugs, and so on, you find that we are raising in
19 these taxes and fees 130 billion dollars over the ten
20 years, all of it passed on to consumers through higher
21 premiums.

22 So when folks tell you that we are going to reduce
23 your health care costs, we are going to cut your health
24 insurance premiums, we are going to bend the cost curve
25 down, they are conveniently neglecting to tell you that

1 they are also going to raise your taxes by 130 billion
2 dollars. They are going to raise your premiums because
3 that is the amount that is going to be passed on to you
4 that was first imposed on someone else.

5 And, what makes it worse is, since all of these so-
6 called "fees" go into effect immediately, that is to say,
7 in the year 2010, next year, but the subsidies to people
8 to help pay for all of this are not available until 2013.

9 The net impact of the legislation is to raise consumer
10 premiums for individuals in 2010, 2011, and 2012 by a
11 total of 39 billion dollars. Welcome to the kindness of
12 the Senator Finance Committee.

13 Now, it is especially tough for employers of less
14 than 500 employees. Because as I said, the ERISA plans
15 are exempt from this. That means those are the plans
16 that most of the larger companies have. So if you have
17 less than 500 employees, you are likely to get hit the
18 most because they are not going to self-insure, they are
19 not going to be exempt. Under the proposal, employers
20 that self-insure, as I say, are exempt, so the insurance
21 policies sold to the small businesses will pay most of
22 the fees. And this results in a disproportionate
23 increase in premiums for small business employees, the
24 workers, who are already struggling to afford health
25 insurance today. What a gift we are giving you.

1 So, Mr. Chairman, I think that while we all
2 recognize that the bill costs a lot of money and you have
3 to raise the money some how or other to pay for it, I
4 would submit this is not the way to do it. And you
5 cannot -- and I do not mean to suggest this was the
6 intention on any of the people in the committee, but
7 whoever came up with the idea of first of all imposing it
8 on the insurance companies so folks would not know that
9 they are the ultimate people that pay it, I think CBO has
10 confirmed the fact that we all will be the ones that pay
11 it in the form of higher premiums. So let us not delude
12 anybody into thinking that somebody else is going to pay
13 this tax.

14 My amendment would eliminate the tax.

15 The Chairman. Any further discussion?

16 Senator Grassley. I want to speak.

17 The Chairman. Senator Grassley.

18 Senator Grassley. I would like to speak in favor
19 of this amendment. And I am going to start out by
20 referring to some answers, I think, we got from Mr.
21 Barthold maybe a week ago now.

22 The Chairman. Are you addressing this amendment?

23 Senator Grassley. Yes.

24 The Chairman. This amendment?

25 Senator Grassley. Yes, right here. F-4.

1 The Chairman. Right.

2 Senator Grassley. I think a week ago we had Mr.
3 Barthold tell us that the fees on insurance providers and
4 device manufacturers would be passed through to health
5 care consumers or in the case of insurance that would be
6 premium people. And that this increase in premiums will
7 take place 2010, 11, and 12, and there are 177 million --
8 this is my figure. I think there are approximately 177
9 million people that have private health insurance. So
10 that it is either premiums go up. And, of course, this
11 would also happen to people that are under \$250,000 a
12 year. So this would also affect low- and middle-income
13 people.

14 Now, the tax credit for health insurance will not be
15 effective until July 1st, 2013. The fees on health
16 insurers and device manufacturers on the other hand are
17 effective January 1st, 2010. So this means the fees will
18 be effective three years and six months before the tax
19 credits are effective. So I hope the members of this
20 committee understand that this means premiums will go up
21 as early as 2010 and that there will be no tax credit to
22 help low- and middle-income people until 2013.

23 Members of this committee want to argue, on my side
24 of the aisle, that low- and middle-income people that
25 somehow we want low- and middle-income people to pay for

1 their amendments. But I ask the question, how is the
2 Chairman's mark paid for? I think it can be similarly
3 argued that the mark is paid for the same way then as
4 argued against us on the back of low- and middle-income
5 Americans. That is at least before these people will see
6 any relief that the mark makes. In other words, the
7 years between 2010 and 2013, three years and a half.

8 And even once the tax credits are effective,
9 Americans who are not eligible for the credit will
10 continue to see higher premiums and with no help from the
11 government. And the cost to the federal government will
12 actually increase because higher premiums mean a bigger
13 tax credit.

14 Now, I understand that some in the press would
15 describe anyone who opposes the fees as I've seen these
16 words, quote/unquote, "chilling for insurers and device
17 manufacturers." Now, make no mistake, I recognize that
18 there have been abuses in insurance and in device
19 manufacturing and we have to take steps to change that.
20 And some of these steps are taken in the mark.

21 But I also believe that greater competition needs to
22 be injected into the health insurance industry. And we
23 have not really talked in this mark or in these meetings
24 about how that can be done except just mentioning it. We
25 have not really pursued it the way we should probably.

1 But I ask supporters of these fees here in Congress
2 and the press to dig a little deeper. The opposition to
3 fees is based on the fact that they are going to be paid
4 by lower- and middle-income Americans. So that is why I
5 urge the support for the Kyl amendment and I yield.

6 The Chairman. Senator Stabenow is seeking
7 recognition.

8 Senator Stabenow. Thank you, Mr. Chairman. First,
9 I know we will be talking later about Senator Kyl's other
10 amendment. I did want to express that I shared the
11 concern about device manufacturers and would be happy to
12 talk about that later. I know Senator Kerry has the same
13 concern in terms of the level of cuts in the bill and
14 look forward to working with you Mr. Chairman, and with
15 colleagues to address that.

16 On this particular amendment I would just say,
17 again, that we are going after middle income tax credits
18 and this is now the eighth time, at least, the eighth
19 amendment that has been offered that would cut the tax
20 credits for middle income people while we have been
21 hearing over and over again concern about middle class,
22 working people, middle class. This is the eighth
23 amendment that would, unfortunately, pay for the
24 amendment by cutting the tax credits to middle class
25 workers and families. So I cannot support that.

1 Senator Ensign. Mr. Chairman.

2 The Chairman. Senator Ensign.

3 Senator Ensign. Mr. Chairman, when I was first
4 elected to the House of Representatives back in 1995, a
5 person who took over for Dan Rostenkowski as far as the
6 lead Democrat on the committee made a very interesting
7 observation. He said that -- and I think most economists
8 agree with this statement -- that businesses do not pay
9 taxes, people do. When taxes are levied on businesses,
10 whenever possible, they pass those taxes on. Whether it
11 is a device manufacturer, in this case, they pass it on
12 to their customers whenever possible. And I think that
13 that is exactly what CBO and joint tax have said. These
14 taxes are going to be passed on to the very middle class
15 people that Senator Stabenow was just talking about.

16 It is not only middle-class people, it is people all
17 up and down the line. And whether they are paying it
18 directly for a higher price or they are paying it in
19 higher premiums, because the whole health care system has
20 to pay higher prices, either way, they are the ones who
21 are going to be paying the tax. So this, quote, "pay
22 for" is just, once again, a cost shifting to somebody
23 else so that you can subsidize. I mean, if we are honest
24 with it, that is what we are doing. We are taxing across
25 the board. We are going to spread this tax across the

1 board for anybody who gets a device to be able to pay for
2 people who are lower income.

3 If you are honest, that is exactly what is happening
4 here. And that is why I think Senator Kyl is saying,
5 this isn't the way to do it. We should be just looking
6 at things that save money that are not just passing costs
7 and transferring costs to other people in the system. We
8 should be looking at things that are actually bringing
9 the costs down.

10 We talked about medical liability reform. The bill
11 that was passed here 19 to 4 last night, to try to do
12 preventative services. You know, the things that
13 introduce competition into the marketplace, those are the
14 things that will bring costs down. Overall that will not
15 just shift costs from one group of people to another.
16 And that is why I think that the Senator for Arizona is
17 exactly right with his amendment.

18 The Chairman. All right.

19 Senator Crapo. Mr. Chairman.

20 The Chairman. Yes, and then let us wrap us. Just
21 to remind you, this not the device manufacturing
22 amendment, but this is the insurance amendment that is up
23 right now.

24 Senator Crapo.

25 Senator Crapo. Understood. I just wanted to

1 follow-up because I want to be sure that as Senator Kyl
2 tried to do that we explain to people who are listening
3 exactly what this debate is all about. Because it is
4 constantly mentioned that Republicans have offsets in
5 their amendments that impact parts of the bill that are
6 construed by some to be reducing benefits or something.

7 I think the first point that needs to be made there
8 is, in every one of those Republican amendments there has
9 been an effort to try to stop either an offensive tax
10 that is going to raise the cost of premiums such as this
11 tax. My understanding is that Senator Grassley who just
12 mentioned the impact of this tax on premiums could have
13 gone further and said that one of the estimates on this
14 is as much as \$500 a year in terms of premium increases
15 could be caused by this tax.

16 What is occurring here is that when we bring an
17 amendment to try to address a problem or an inequity like
18 this, we are required, by the rules of the Senate and the
19 rules of the committee under which we are operating, to
20 provide an offset so that the impact on the bill -- not
21 the impact on the status quo, not the impact on the law
22 the way it is today, but the impact on the bill is
23 neutral.

24 And, therefore, we are required by the rules of the
25 committee to simply adjust the provisions in the bill in

1 our amendment so that there is a neutral impact. So in
2 this case, Senator Kyl is trying to stop what could
3 become as much as a \$500 per year for a family of four
4 increase in their premiums and he has to, under the
5 rules, provide some kind of an adjustment in another part
6 of the bill. And that automatically results in a
7 retaliatory response saying that there is an effort to
8 try to undo some other part of the benefits in the bill.

9 And I just think people need to understand the
10 nature of that debate. Because the impression I think
11 that was started to be created that the Republicans were
12 trying to change current law. And that is not the case.

13 And that is the point that Senator Kyl was trying to
14 make.

15 The bill is what is going to change current law.
16 What we are trying to do is to adjust the bill so that it
17 has a lesser impact on people across this country in many
18 different areas in terms of the ones I talked about this
19 morning in the middle class and lower income categories
20 who will be paying higher taxes. In fact, paying the
21 heaviest load of the taxes in the bill. Or the ones that
22 Senator Kyl is talking about right now who will be paying
23 higher insurance premiums. And as we seek to try to
24 adjust what we see as the harmful impacts of some of the
25 provisions in the bill, we necessarily get pushed by the

1 rules into these debates about what will be the impact of
2 our efforts to try to comply with the rules of the
3 committee that we cannot simply take those pieces out of
4 the bill.

5 I know that Senator Kyl and I -- and I believe all
6 the other members of the committee -- would be very glad
7 to just submit an amendment that took out this tax. But
8 the Chairman would and in fact has on other amendments
9 ruled that as a non-germane amendment. And then we would
10 not be able to debate or have a vote on the amendment
11 itself.

12 The Chairman. You stated the rules very fairly. I
13 mean, if we did not have those rules, Katie, bar the
14 door. I mean, we have to live within a budget here. I
15 mean, all of us, your side and the Democratic side,
16 clearly do not want to add to the budget deficit. And
17 these rules that we are all constrained under are
18 designed so we do not increase the budget deficit, at
19 least under the requirement, as far as the committee --

20 Senator Crapo. I understand, Mr. Chairman.

21 The Chairman. I think you probably agree it is not
22 a bad idea we have rules like this. Otherwise, my gosh,
23 you could imagine all the amendments that would be
24 offered around here and pretty soon the budget deficit
25 would just be going through the ceiling.

1 Senator Crapo. I understand. I was just making the
2 point that these rules that we are operating under impact
3 what is in the bill --

4 The Chairman. Correct.

5 Senator Crapo. -- not what is in the current law.

6 The Chairman. That is right.

7 Senator Crapo. And I think that we were starting to
8 get that point a little bit confused in the debate today.

9 The Chairman. Just to make a couple points here.
10 We purposely designed this fee as a way to have the least
11 effect upon consumers and individuals. Let me just give
12 you a list of some of the other considerations here we
13 thought of.

14 First, just remember, this is an annual lump sum
15 allocated among the companies, the industry according to
16 market share. This is a lump sum fee on the industry
17 allocated annually according to their market share. That
18 is what this is.

19 Now, there are lots of other options here. One is a
20 per head tax on consumers. Now, that is not a good idea.

21 So we rejected that one. Another is a percentage tax on
22 premiums. That has also an effect that all of us are
23 trying to get away from. Another option we looked at and
24 discarded was a tax on the profits of insurance company's
25 net of administrative costs, just on their profits only.

1 And the concern was that that too would be passed on more
2 likely.

3 Another option we took up and rejected was increase
4 the corporate tax rates of these companies. And one can
5 argue what happens with corporate tax rates. So the
6 thought was, or at least the intent, with the annual lump
7 sum allocated according to market share is a way where
8 companies are less likely to direct or to pass on costs
9 directly to consumers. That is a lump sum they could
10 decide themselves what they are going to do with it.
11 Some of it would come out of profits, some would come out
12 of R&D, who knows out of what. And that is why it was
13 allocated this way. It is going to minimize its effect
14 on consumers.

15 And as I recall a letter from CBO on this subject is
16 it is really hard to figure out all of these different
17 interactions what the actual imposition of a tax would be
18 on consumers. It is very difficult to determine. But
19 the fact is, this is a 67 billion dollars that the
20 Senator from Arizona wants to strike -- 67 billion
21 dollars over ten years -- and pays for it -- we make
22 rules, so we have to pay for things -- paid for by
23 lowering the premium credit income caps. That is,
24 lowering the tax credits that people receive in exchange.
25 And so in effect, I know it sounds like a little bit

1 demagoguery, but it really is not. It is true. The
2 effect is to take money away from middle- and lower-
3 income people and give it to the insurance industry.
4 That is what this is. That is the effect of this
5 amendment. It is to take money away from middle- and
6 low-income people to the tune of 67 billion dollars over
7 ten years, and give it to the insurance industry. I do
8 not think that is what you want to do here. And that is
9 why I think this should be rejected.

10 Senator Kyl. Mr. Chairman.

11 The Chairman. Senator Kyl.

12 Senator Kyl. Since you qualified the word
13 demagoguery I will use the same qualification. But it is
14 demagoguery to say that the point of my amendment is
15 taking money from people and give it to the insurance
16 industry as you just said.

17 This is a tax on the insurance industry which,
18 according to CBO, I'll quote again, and remember CBO is
19 the group that we all rely upon to tell us how money is
20 going to flow in the legislation, whether we make money,
21 whether we lose money, who bears the incidence of the
22 taxes and so on. Quote, "Those fees would increase costs
23 for the affected firms, insurance companies, which would
24 be passed on to purchasers and would ultimately raise
25 insurance premiums by a corresponding amount." So it is

1 exactly the opposite. Yes, the tax is first imposed on
2 the insurance company, but it ultimately is paid by a
3 corresponding amount. In other words, the entire amount
4 is then paid out by consumers in the form of higher
5 premiums.

6 So it would be demagoguery to say that we are taking
7 from people and giving to the insurance industry. In
8 fact, it is quite the other way around. We are making
9 the people of the country who buy insurance pay an extra
10 67 billion dollars over ten years in premiums. That is
11 according to the CBO. And why do we have to do that
12 under the rules of the committee here?

13 Well, under the law today we do not have to do it.
14 There is not this kind of a tax. So my amendment is not
15 necessary under existing law. Why would it be necessary?

16 Because the bill that we are debating here spends almost
17 a trillion dollars and they have to pay for it somehow.
18 Now they take a big bunch of it out of Medicare which is
19 what has seniors all in a dither, and they should be.
20 But they cannot pay it all by cutting Medicare. So the
21 rest of it is paid for in fees and taxes. And what the
22 Congressional Budget Office is saying is, guess who pays
23 the fees and taxes? We do. The people who buy insurance
24 because the insurance companies pass it right on through
25 the form of higher premiums. That is why we have to do

1 this what we call here in the committee "a pay for". We
2 have to pay for the almost trillion dollar cost of the
3 legislation.

4 I just want to close with this point. Senator
5 Stabenow said that once again, or for the eighth time, we
6 are quote, "going after the tax credit." No, Senator
7 Stabenow, you know why that pay for is in my amendment.
8 We have to have it under the rules. We are not going
9 after it. As Senator Crapo said, I would just as soon
10 not go after it. I would just as soon leave it alone.
11 But somehow or other we have to quote, "pay for" keeping
12 the law exactly the way it is. So there is no intention
13 to go after that. What we are trying to do is to save
14 the people of Michigan and the people of Arizona about
15 500 bucks a year in extra premiums by not passing this
16 tax.

17 The Chairman. I think we are prepared to vote.

18 Senator Stabenow. Mr. Chairman, since my name was
19 mentioned --

20 The Chairman. Senator Stabenow.

21 Senator Stabenow. My name was invoked, I wonder if
22 I might just take a moment, because I appreciate the
23 frustration that we are requiring that we pay for things
24 in this bill so that we are not adding to the deficit.
25 But there are choices we make, and they are tough

1 choices. And the choice that we have seen over and over
2 again is to lower the tax credits for middle-class
3 families to do other things.

4 In this case, we have an insurance industry that
5 will get more customers under the exchange rate. They
6 are going to be covering more people, making more
7 dollars. I reject the notion that we should accept their
8 passing this on to customers.

9 When we look at the fact that this is an industry
10 that saw profits of 425 percent in the last 8 years--
11 which, by the way, Michigan would love to have that. We
12 would take a third, a quarter, 10 percent. The reality
13 is that they do not have to pass that on. Now, they are
14 passing it on right now in higher premiums and copays and
15 costs going up for families even though there has been a
16 425-percent profit increase.

17 But I guess I reject the notion that asking them to
18 contribute to paying for this because they are going to
19 get all these customers is an unfair thing to do, and
20 certainly I think it is unfair when we are taking it from
21 the help we are trying to give to make health care more
22 affordable for middle-class families.

23 The Chairman. The clerk will call the roll.

24 The Clerk. Mr. Rockefeller?

25 Senator Rockefeller. No.

1 The Clerk. Mr. Conrad?
2 The Chairman. No by proxy.
3 The Clerk. Mr. Bingaman?
4 The Chairman. No by proxy.
5 The Clerk. Mr. Kerry?
6 The Chairman. No by proxy.
7 The Clerk. Mrs. Lincoln?
8 The Chairman. No by proxy.
9 The Clerk. Mr. Wyden?
10 Senator Wyden. No.
11 The Clerk. Mr. Schumer?
12 The Chairman. No by proxy.
13 The Clerk. Ms. Stabenow?
14 Senator Stabenow. No.
15 The Clerk. Ms. Cantwell?
16 The Chairman. Pass.
17 The Clerk. Mr. Nelson?
18 Senator Nelson. No.
19 The Clerk. Mr. Menendez?
20 The Chairman. No by proxy.
21 The Clerk. Mr. Carper?
22 The Chairman. No by proxy.
23 The Clerk. Mr. Grassley?
24 Senator Grassley. Aye.
25 The Clerk. Mr. Hatch?

1 Senator Grassley. Aye by proxy.
2 The Clerk. Ms. Snowe?
3 Senator Snowe. No.
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?
11 Senator Roberts. Aye.
12 The Clerk. Mr. Ensign?
13 Senator Ensign. Aye.
14 The Clerk. Mr. Enzi?
15 Senator Grassley. Aye by proxy.
16 The Clerk. Mr. Cornyn?
17 Senator Cornyn. Aye.
18 The Clerk. Mr. Chairman?
19 The Chairman. No.
20 The Clerk. Mrs. Lincoln?
21 Senator Lincoln. No.
22 The Clerk. Ms. Cantwell?
23 Senator Cantwell. No.
24 The Chairman. The clerk will tally the vote.
25 The Clerk. Mr. Chairman, the final tally is 9

1 ayes, 14 nays.

2 The Chairman. The amendment does not carry.

3 Now I have been advised that the pending Grassley-
4 Snowe amendment number C11 is ready for disposition, and
5 I am also advised that we can adopt the amendment by a
6 voice vote. If there is no further debate, the Committee
7 will vote on the amendment. All those in favor, say aye?

8 [A chorus of ayes.]

9 The Chairman. Those opposed, no?

10 [No response.]

11 The Chairman. The ayes have it. The amendment is
12 adopted.

13 Senator, do you wish to make a statement on this?

14 Senator Grassley. I guess I better, or my staff
15 will fire me.

16 [Laughter.]

17 Senator Grassley. After negotiating with your
18 staff and with Senator Snowe's staff, I believe that we
19 have reached a reasonable compromise. We listened to the
20 debate last night. There was an obvious modification
21 that we should make to the amendment. The modification
22 reads: "The States can only drop non-disabled, non-
23 pregnant adult Medicaid populations if they are running
24 deficits or are projected to run deficits."

25 Because the Federal Government is not providing

1 States additional resources to cover optional Medicaid
2 adults, this amendment gives States facing deficits the
3 right to take the tough choice between taxes, Medicaid,
4 schools, roads, law enforcement, et cetera, as they are
5 forced to balance their budgets.

6 I appreciate the Chairman's willingness to work with
7 us on this amendment, and I thank you very much for its
8 adoption.

9 The Chairman. Well, thank you, Senator, and I also
10 thank you for your hard work in working this out. Thank
11 you, Senator Snowe, too.

12 Okay. My intention is next to go to the amendment
13 offered by the Senator from West Virginia, Senator
14 Rockefeller, and we will move to that amendment very
15 shortly.

16 [Pause.]

17 The Chairman. I know we are all interested in the
18 health of Senator Snowe. She is fine. Somebody had his
19 foot out, and she was walking back and stumbled over the
20 foot and fell down. But she is fine. She is just
21 collecting herself. She is fine.

22 Senator Rockefeller?

23 Senator Rockefeller. Mr. Chairman, this is a
24 modified America to C9 to Title I, and it has been an
25 interesting experience the last couple days. I will just

1 say this and then get on to the substance of my
2 amendment, which I think is a very important one and
3 probably somewhat controversial.

4 Scoring. There is a demand for precise and accurate
5 scoring, which actually was not much talked about by the
6 other side before several days ago, and now it is being
7 used, I think, as a slow-walk tactic, which is okay by me
8 because we have got all weekend, we can go as long as we
9 need to. But it is a matter of interest to me.

10 Now, my amendment, as modified, would require
11 insurers, health insurers who cover the exchange to
12 demonstrate a medical loss ratio of 85 percent. There is
13 a reason that people are not happy about health insurance
14 companies. It is not simply because they woke up and
15 decided that they would decide they wanted to be like
16 that.

17 We have done a lot of work in my office and in the
18 Commerce Committee about the way that health insurance
19 companies have their customers for lunch and their
20 customers never know it until they are deep inside the
21 whale. And this has been going on for a long time, and
22 it is something that hurts my people in West Virginia
23 very much and everybody's people all around this table
24 and around the Congress. Again, the people are not that
25 particularly aware of it because it is a shark that

1 glides underneath the waters.

2 But they are rapacious, health insurance companies--
3 I am not say insurance companies generally, but health
4 insurance companies--and they have done very well, as the
5 Senator from Michigan has just pointed out.

6 So I think it is only fair to ask them, at a time
7 when we are going to be insuring a lot of new people and
8 a lot of new revenue is going to be coming in for them,
9 that they actually spend the money on health insurance,
10 or at least a large portion of it.

11 Now, they will claim that they are, and I will talk
12 about that. But my amendment really just says that they
13 have to demonstrate a medical loss ratio of 85 percent,
14 and they have to demonstrate that to the Secretary of
15 Health and Human Services.

16 This is what it would mean. It would mean that 85
17 percent of every premium dollar must, in fact, go towards
18 medical care. That would seem to me to be a reasonable
19 and fair requirement for a health insurance company whose
20 business in public life is to provide health insurance
21 with premiums that go back and forth. But regardless of
22 what those premiums might be, the majority of the
23 premiums, the majority of what they make is spent on
24 medical care for the people that they are in business to
25 insure.

1 Now, we have discovered--and I have discussed this
2 before--the Ingenix the case, which is owned by United
3 Group Health and which is going out of business because
4 they were taken to court in New York; and faced between a
5 choice of paying \$350 million or not, they picked \$350
6 million because, had they not, they would have been
7 charged with fraud.

8 Now, why is this important? It is important because
9 Ingenix was, in fact, the engine and the sole interpreter
10 of what people could charge, and insurance companies took
11 all of their advice, all health insurance companies, from
12 that one particular subsidiary of group health insurance.

13 Just on health insurance. That is all I am talking
14 about.

15 That is an amazing thing. They are going to go out
16 of business because of this New York court case. But it
17 talks about how little we know about what they do and yet
18 how much we pay for what they do in all of its various
19 iterations.

20 So the Secretary of Health and Human Services, who
21 under this mark is required to collect data on medical
22 loss ratios, would be authorized to enforce this
23 requirement, not just collect the data but to enforce the
24 requirement. That is commonly done. Rules and
25 regulations can be drawn up to do that, to watch.

1 You remember when we were talking about self-
2 insured? The self-insured market, they are watched over
3 not by State insurance commissioners but by the Federal
4 Government, the Department of Labor, which does
5 absolutely nothing to overlook them because of the fact
6 they do not have any people, they do not have any money,
7 or they may have no will. I have no idea, but in any
8 event, large self-insured companies have no protection.

9 Insurers that fail to meet this requirement would be
10 required to issue rebates for the missing dollars to the
11 enrollees and the Federal Government. The amendment is
12 based on the Fairness in Health Insurance Act--I should
13 say, in all candor, legislation which was introduced by
14 Senator Al Franken, myself, and a number of other
15 Senators.

16 Now, as an original cosponsor of this legislation,
17 and particularly given the events regarding what happened
18 in the public option, which was to me a very important
19 way of holding down the cost of health insurance and
20 disciplining competition within the health insurance
21 market, that did not pass for the moment. So I then
22 needed to move to this amendment. I feel even more
23 strongly that this Committee has a responsibility to make
24 sure that hard-earned taxpayer dollars that are funding
25 the subsidies for the coverage, subsidies which make up

1 more than half of all the money that we are spending for
2 health care in this bill in any form, that--and this is
3 under the subsidies, the coverage in the exchange, are
4 indeed going towards medical care and not for a profit
5 for insurance companies for frivolous purposes and very,
6 very, very high profits.

7 Again, \$465 billion is going towards the insurance
8 companies' subsidies. I wonder why. Why is that? So
9 many health care needs, why are they getting these
10 subsidies? But there it is.

11 Now, as the Senator from Michigan has pointed out,
12 insurance companies, health insurance companies have seen
13 their profits soar over 400 percent since 2001. Nobody
14 knows that, but we know that now. I appreciate the
15 Chairman's provisions to report on medical loss ratios--
16 that is important--and require greater definitions and
17 transparency for insurance coverage. However, given the
18 amount of the subsidies, there are few provisions in this
19 bill to improve Federal oversight of insurers of these
20 taxpayers' dollars, or any kind of oversight. It is time
21 we demanded something from insurers in exchange for these
22 subsidies.

23 I am going to end up by saying they are going to
24 make a 15-percent profit which is going to be, you know,
25 well over \$50, \$60 billion, so, I mean, do not start

1 weeping. At the very least, we need strong assurances,
2 again, that this money will be spent in the main, 85
3 percent of the subsidies will be spent on medical care.

4 Now, the medical loss ratio is one of the basic
5 financial measures that health insurance companies use to
6 measure their performance. It is simply the value of the
7 premiums a health insurance company collects from
8 consumers divided by the value of the medical claims that
9 it pays. That is what medical loss ratio is.

10 For an example, if a company's medical loss ratio is
11 75 percent, it means the company has spent 75 percent of
12 every premium dollar on health care, while it used the
13 remaining 25 percent for other purposes, such as
14 underwriting, marketing, administrative costs, and
15 profit.

16 The truth is a little bit complicated. In West
17 Virginia, for example, our insurance commissioner reports
18 that consumers and small businesses do not get medical
19 ratio anywhere near close to 87 percent. In fact, in
20 West Virginia, in the individual market, health insurers
21 are spending 65 percent of their premiums on health care,
22 and the rest, who knows what? For small group, it is 75
23 percent. For large group, expectedly, it is pretty good.

24 It is 90 percent, and that is true, I think, more or
25 less throughout the country.

1 In Texas, we do not have the large-group numbers,
2 but we know that they are probably fairly decent. But in
3 the small group, it is, again, Texas medical loss ratios
4 is 73 percent, which means that 27 percent is going for
5 something else, most of which I think is return on
6 investment to shareholders to satisfy Wall Street or to
7 pay higher salaries or have more marble in their
8 buildings.

9 I think it is a very wrong system that we do not say
10 to them, "You have got to do what your business is."
11 They are not doing it. I would not put up this amendment
12 if they were doing it. But everything we have learned is
13 they use every trick in the books to purge, rescissions,
14 all the rest of it.

15 Now, the Chairman's mark, happily, takes part of
16 that out, but not all of it. And the lump sum of what
17 they spend on medical insurance and medical care for
18 their consumers and their customers is not anywhere laid
19 out.

20 In most States, this kind of information simply is
21 not available, and were the Senator from Florida here, I
22 am sure he would agree with that.

23 I can understand why insurance companies do not want
24 people to know how much of their money they use for
25 overhead and for profits. I understand that. I had a

1 great-grandfather who was probably pretty good at that.
2 But I am another generation. This is another situation.

3 But it is something that consumers should know, and I
4 want the people I represent in West Virginia to
5 understand this, to know they are getting ripped off, and
6 to know that we can do something about making sure that
7 they get the medical care they expect when they pay the
8 insurance companies.

9 Now, in August, I wrote the insurance companies--
10 lots and lots and lots of them--asking for a detailed
11 accounting of their medical loss ratios. They still have
12 not turned all of this information over to me that I
13 requested. They just do not want their customers to know
14 how much of their money is being wasted or, in other
15 words, not used for medical care.

16 What this amendment is saying is that insurers who
17 participate in the exchange have to spend 85 percent--or
18 85 cents out of every dollar on health care. What is
19 wrong with that? That leaves ample money over. I would
20 say 40, 50--probably \$50 to \$60 or \$65 billion over for
21 profits in a given year.

22 Now, this is only 2 percent less than the insurance
23 industry claims they are already doing. The problem is--
24 therefore, you could say, well, it is not a very big
25 amendment. But the problem is we do not know what they

1 are doing. And we do know that they are merging their
2 large business customers and their small individual
3 markets and group markets, they are kind of merging all
4 those together to come out with figures that look as
5 favorable for them as possible. So they say, Well, heck,
6 we are only 2 percent less than what you are suggesting
7 today.

8 Now, again, the Chairman's mark provides \$465
9 billion in subsidies to the insurance industry to provide
10 health care to American consumers, and I think in a
11 health care bill we are required to be serious about
12 that. And this bill is saying that they can only keep
13 \$69.8 billion of those subsidies for overhead and
14 profits. Let us \$70 billion. They are going to get \$70
15 billion for overhead and profits. Is that not
16 sufficient? Is that not sufficient when we are asking
17 them to spend money on health care for their people?

18 So, to close, I want to reiterate that while
19 reporting of medical loss ratio is an important first
20 step, it is only that. We must require a minimum medical
21 loss ratio for all plans at some point that receives
22 subsidies through the exchange. If we include the
23 magnitude of subsidies for private insurance in this
24 mark, with no requirement that a significant portion of
25 over half a trillion dollars or almost half a trillion

1 dollars in premium subsidies actually goes towards
2 coverage, then I do think that this could be a
3 significant Government giveaway to private insurers and
4 Wall Street.

5 Now, I have made my point. You can disagree or
6 agree. But I think this is extraordinarily important,
7 and I reiterate--yes, that is the first chart. I
8 reiterate again, medical loss ratio, what does it mean?
9 According to the National Association of Insurance
10 Commissioners, the medical loss ratio measures the
11 relationship between premiums earned and claims incurred.

12 Eighty-five percent is a fair amount. I originally had
13 it at 90 percent. The House has in some of theirs 85
14 percent, so I just took it back to 85 percent.

15 I think this is an important amendment. I realize
16 it is a heavy-hitting amendment. But, on the other hand,
17 they say it is only 2 percent more than what they are
18 already doing. So they should not be too worried about
19 it if they are telling the truth.

20 The Chairman. Discussion? Senator Stabenow.

21 Senator Stabenow. Thank you, Mr. Chairman. I
22 appreciate very much what Senator Rockefeller is bringing
23 to our attention in his amendment, which I support. This
24 really goes to the heart of the challenges we have with a
25 primarily for-profit insurance system through which we

1 provide health care for people. And I have always felt
2 that it was concerning when providing a cancer treatment
3 or a heart surgery or some other health care for somebody
4 is viewed as a loss by the health care provider. It is a
5 loss.

6 I understand in car insurance, you know, if somebody
7 has an accident, well, the payout is viewed as a loss; or
8 if you have home insurance and there is a fire, that that
9 is a loss. But when you are settled to provide health
10 care, the purpose is to provide health care. That should
11 not be viewed as a loss. And so I think it is very
12 important that we define what we expect, that in our
13 system--again, we are opening this up for more customers
14 with the insurance industry. It is important that the
15 majority--I do not think it is too low say we should
16 expect that 85 percent of what they have, what they
17 spend, goes to actually providing health care for people,
18 because if they are going to be participating, we should
19 be requiring that they be spending their funding on
20 providing health care for people.

21 So thank you, Senator Rockefeller, for the
22 amendment.

23 Senator Grassley. Mr. Chairman?

24 The Chairman. Senator Grassley.

25 Senator Grassley. I presume that the amendment is

1 well intentioned, but as I look at it, I see an
2 administrative nightmare that is going to do considerable
3 harm to a lot of progress that we have tried to make in
4 the delivery of health care. And I will try to explain
5 that, but I also want to ask staff some questions in the
6 process.

7 One thing I cannot fault with, Senator Rockefeller,
8 is that there is greater transparency. I have always
9 been a strong supporter of transparency, so I am not
10 necessarily objecting to making some of this information
11 public, although I think it is important to point out
12 that a lot of people question the effectiveness of using
13 medical loss ratios as proxies for quality and
14 efficiency.

15 In fact, I want to quote from a newspaper or a
16 magazine, Health Affairs. "The medical loss ratio is an
17 accounting monstrosity that enralls the unsophisticated
18 observer and distorts the policy discourse."

19 So I do have concerns about using this measure to
20 decide who is doing a good job and who is doing a bad
21 job.

22 I also have some concerns about setting an arbitrary
23 medical loss ratio standard that all health plans must
24 adhere to, and adhere to regardless of where they are
25 located, regardless of their risk pool, and regardless of

1 the level of medical utilization in a particular area.
2 Medical loss ratios dictate the percentage of premium
3 dollars that have to be spent on medical care. So, put
4 simply, it involves the Government using a highly
5 questionable measure to dictate how private companies
6 manage their operations.

7 I have concerns about the Federal Government, which
8 clearly has some problems of its own, keeping its own
9 house in order, being involved in the daily activities of
10 private companies. And I will tell you, at town meetings
11 you hear about the nationalization of banks and you hear
12 about nationalization of General Motors, and it is not a
13 very popular thing to have the Federal Government getting
14 that deeply involved. And I do not propose that that is
15 what Senator Rockefeller is trying to do, but it has some
16 unintended consequences that occur as a result of this
17 amendment. And I am worried about those.

18 Just to see if those concerns are justified, some
19 questions.

20 Do we know why the amendment uses 85 percent as an
21 appropriate medical loss ratio for all plans to meet?
22 Whichever one of you folks are qualified to answer that.

23 Do we know where the 85 percent comes from?

24 Ms. Fontenot. I think Senator Rockefeller mentioned
25 that--

1 Senator Rockefeller. It comes from me.

2 Ms. Fontenot. --the current industry average is 87
3 and--

4 Senator Grassley. Okay. So it is your view of a
5 legitimate breaking point, I presume. I will just leave
6 it at that because a lot of times you have to be
7 arbitrary. But let us say that it is arbitrary then.

8 Let me ask another question. Disease management
9 programs encompass both administrative spending and
10 medical spending. How would we differentiate between
11 medical and administrative spending in these types of
12 programs?

13 Ms. Fontenot. Senator, I think Senator Rockefeller
14 mentioned that the National Association of Insurance
15 Commissioners has a working definition for "medical loss
16 ratio measures." I am not familiar enough with that
17 definition to tell you.

18 Senator Grassley. Okay. But at least there is--I
19 mean, I guess I respect that organization. They do do
20 some work in this area.

21 Ms. Fontenot. They do work in this area, but I
22 would say the amendment actually defers to the Secretary
23 of HHS to develop a standard definition. So I assume
24 there would be some relation, but I am not certain.

25 Senator Grassley. Well, whether it is arbitrary or

1 whether something in the first question--let us say the
2 85 percent is arbitrary in the place of the other, there
3 might be some intellectual basis for it. But I guess it
4 causes me to worry about undermining these programs that
5 we have out there.

6 We have made a lot of progress in the last few years
7 to improve, for instance, the use of health information
8 technology for providers and health plans. Actually, the
9 Chairman has in the mark been expanding on those efforts
10 through some of the administrative simplification
11 provisions.

12 I would ask you, would the use of health information
13 technology be considered medical or administrative
14 spending?

15 Ms. Fontenot. Again, I cannot say. The amendment
16 defers to the Secretary of HHS to actually develop a
17 standard definition, so I cannot say what would be
18 included in that definition.

19 Senator Grassley. Do you know, have the State
20 commissioners worked in that direction?

21 Ms. Fontenot. Again, I am just not familiar enough.
22 I apologize.

23 Senator Rockefeller. Would the Senator yield?

24 Senator Grassley. Yes.

25 Senator Rockefeller. There is a chart here that

1 comes from AHIP, based on PricewaterhouseCoopers'
2 analysis, in which the industry says that they are
3 already spending 87 cents on every dollar. Now, it just
4 so happens that I do not believe that. I do not believe
5 that. And so what I am saying is that I want 85 cents;
6 they are saying they already do 87 cents; so this should
7 not be that much of a threat if they are doing what they
8 say they are doing.

9 Would the Senator not agree with that?

10 Senator Grassley. Well, I guess, then, what is the
11 beef?

12 Senator Rockefeller. The beef is that they have
13 used--and I wish the Senator were on the Commerce
14 Committee, because we had people come before us and
15 testify that--I mean, it was astounding. The purging,
16 the incentivizing people who work at insurance companies
17 to find reasons to cut people off.

18 Look, what is insurance? Insurance is that you make
19 money on some people and you lose money on others. You
20 make money on healthy people; you lose money on less
21 healthy people.

22 What they have done systematically over the years--
23 and a former high executive for 20 years in CIGNA came
24 and told us this; he said he just could not live with it
25 anymore--that their whole business is about trying to

1 purge the rolls. And I think actually we came up with a
2 figure of some \$9 million that they had cut off for
3 arbitrary reasons. And then you get into stuff we have
4 already described here with some male, for example, being
5 told that, yes, he has health insurance but it has been
6 discovered that he has gall stones. And this is a true
7 example. If a male has gall stones, my guess is he is
8 probably going to know something about that; he is going
9 to feel that. So I do not have gall stones, they say.
10 Well, the insurance company says, yes, you do and we are
11 cutting you off.

12 The same has been used with acne. A person had
13 acne. That is a revelation. And, therefore, we are
14 cutting you off.

15 Senator Grassley. So there are abuses, Senator
16 Rockefeller. Nobody--

17 Senator Rockefeller. There are massive--

18 Senator Grassley. Nobody denies that there are
19 probably abuses. And one of the main points of almost
20 every bill here on the Hill, including a lot of
21 Republican bills, is to eliminate a lot of those abuses
22 within private health care. But it would seem to me your
23 amendment does not deal with those abuses. Your
24 amendment goes beyond this.

25 So can I please proceed?

1 Senator Rockefeller. Of course.

2 Senator Grassley. One other question, Ms.
3 Fontenot, that maybe you have to give me the same answer
4 to, but I want to ask it anyway. When it comes to
5 understanding what health plan efforts to reduce waste,
6 fraud, and abuse--and, by the way, let me say before I
7 ask the question, waste, fraud, and abuse, private
8 insurance companies do a heck of a lot better than
9 Medicare does in that area. Can you imagine just the
10 billions of dollars that comes out every spring in a
11 report that we get about waste, fraud, and abuse within
12 Medicare? You do not hear that much in the private plans
13 because they put a great deal of effort into reducing it.

14 Would this be considered administrative spending?

15 Ms. Fontenot. Again, Senator, to the extent that it
16 is left to the Secretary, I cannot really answer that
17 question.

18 Senator Grassley. Okay.

19 Senator Rockefeller. Would the Senator yield for
20 another question?

21 Senator Grassley. Yes.

22 Senator Rockefeller. What is the objection for
23 setting a medical loss ratio floor? What is the
24 objection? Eighty-five percent is already the law, State
25 law in California. I do not know of any insurance

1 companies fleeing that State. They have got a lot of
2 customers there. This is not original. This is not
3 novel. This is trying to, particularly in view of the
4 loss of the competition--the public option, et cetera--
5 this is trying to find some way to corral them into doing
6 what they are meant to be doing and not focusing as much
7 on profits, and perhaps, radically enough, to even think
8 about trying to help people and provide medical services
9 for people.

10 Senator Grassley. Well, maybe I can ask the
11 Senator a question in exchange. Does this 85 mean that
12 anybody below or any company below 85 is not providing
13 enough medical care or is doing a bad job? I do not
14 think so. What if they were building up reserves or
15 implementing a more sophisticated disease management
16 program, as maybe progressive companies would be trying
17 to do?

18 You are going to create an opportunity for
19 incentives and improvements. You are going to try to
20 micromanage every company in the country.

21 Senator Rockefeller. Senator, I am not, and I
22 think the Senator, with all due respect, knows of my
23 great admiration for him. Even during election time, I
24 believe he knows of my great admiration for him. I think
25 you are stretching. You are trying to find--you are

1 trying to make up situations which undermine this.

2 What is wrong with having a basic footing set like
3 they do in California? What is wrong with that?

4 Senator Grassley. By the way, next year is an
5 election year. I might need those repeated.

6 Senator Rockefeller. And you will probably get
7 them.

8 Senator Grassley. I will finish with this, Mr.
9 Chairman. I tried to ask these questions in good faith,
10 and I have made some quotes from health experts. At
11 least the magazine is considered an expert. So I raise
12 these concerns. I said I had a great deal of respect for
13 transparency. Nothing wrong with that.

14 What I have asked in questions are just a few
15 examples of initiatives that a lot of us support that
16 could be discouraged if we put in place an arbitrary
17 medical loss ratio requirement. If health plans are told
18 that health IT, disease management, reducing waste, and
19 fraud, and abuse all count towards higher administrative
20 spending, they will naturally cut back on those efforts.

21 So this amendment I do not think provides enough
22 detail on how we would differentiate between medical and
23 administrative costs, and it also uses questionable
24 measures to tell private companies how to run their
25 business. So it is quite obvious I think it is a bad

1 amendment.

2 The Chairman. Senator Cornyn, did you seek
3 recognition?

4 Senator Cornyn. Thank you, Mr. Chairman. I would
5 just like to respond briefly.

6 I think we all know one of the main causes of health
7 care inflation is overutilization, and I think one of the
8 strong things in this mark is trying to realign
9 incentives--both individual incentives, as Senator Carper
10 and Senator Ensign tried to do with their amendment last
11 night--to encourage people to do the right thing
12 personally, and we want to encourage providers to go for
13 value over volume, which is what we have said.

14 My information is that insurer profits are on a
15 national basis roughly 3 cents on every dollar. Now, I
16 realize--I think Senator Kyl pointed out insurance
17 companies are wonderful to hate. Nobody likes insurance
18 companies. But the fact of the matter is insurance is
19 based on a contract. Contracts are enforceable by not
20 only the parties to the contract, but here we pointed out
21 that they are also--enforcement can also be undertaken by
22 the insurance commissioners, by the attorneys general,
23 and by private individuals under State consumer
24 protection laws.

25 In Texas, for example, I am advised that the small

1 group loss ratio is below what the distinguished Senator
2 would set, but the large group is higher, at 90 percent;
3 and that nationally it is roughly 88 percent. So, first
4 of all, I do not understand the need for the legislation-
5 -or for the amendment.

6 Secondly, I agree with Senator Grassley, I do not
7 see any case for Government micromanagement and
8 intervention into what is a private contractual
9 relationship between an insured and an insurer,
10 particularly when there are other enforcement mechanisms
11 available. And, frankly, with the excise taxes we are
12 putting on insurance companies, the \$60 billion in fees
13 on insurance companies, and now trying to micromanage
14 their medical loss ratios, I just wonder if we are not
15 likely to run many insurers out of business so that we
16 have less and less opportunity for people to make choices
17 about their health care.

18 Those are all concerns I have, and I urge my
19 colleagues to oppose the amendment.

20 Senator Bingaman. Mr. Chairman?

21 The Chairman. Senator Bingaman.

22 Senator Bingaman. Mr. Chairman, I reluctantly am
23 compelled to speak against the amendment and vote against
24 it. I do agree with Senator Rockefeller that there are
25 all kinds of abuses that have been amply demonstrated by

1 the industry, and I believe this legislation will correct
2 the worst of those abuses. And there may develop a need
3 for further legislation in the future, but I think the
4 legislation does a good job of identifying the abuses we
5 know about and correcting them.

6 In addition, as I think his amendment points out,
7 there is a requirement in the Chairman's mark for health
8 plans to report the proportion of premium dollars that
9 they spend on items other than medical care or their
10 medical loss ratios, and I think that is a very good
11 provision. And I hope that information is taken by the
12 Secretary and widely publicized and that it will help
13 people to choose which companies to purchase insurance
14 from to the extent that they decide to purchase insurance
15 from private sources.

16 But the proposal to put in law a strict limit of 85
17 percent of their earned premiums having to go to medical
18 claims I think is a very major change in the way we have
19 tried to regulate insurance, and particularly health
20 insurance, since we have begun to try to regulate it.

21 As I see it, this is very analogous to what we do
22 with utilities. When I was Attorney General of my State,
23 we represented the State of New Mexico before the Public
24 Regulation Commission, which had the job of essentially
25 looking at the various utilities that were doing business

1 in the State and ensuring that their rate of return was
2 appropriate and that their charges were appropriate. And
3 it was a much, much different structure than what we have
4 ever had in the area of health insurance, at least at the
5 national level.

6 So I am not saying that I would not be open to
7 argument that we should go to some kind of a utility
8 model in the future. But I do not think the case has
9 been made that we should, and if we did go to a utility
10 model for the regulation of the insurance sector, health
11 insurance sector, I think the more appropriate course
12 would be to set up a national commission and give them
13 that kind of a responsibility instead of saying, by the
14 way, this is another responsibility of the Secretary of
15 Health and Human Services, because I do think this is a
16 very major undertaking. There are a lot of companies in
17 this country that sell health insurance at the current
18 time, and I would not want to just have this be one
19 additional responsibility that we would load on the
20 Secretary without more understanding of the import of it
21 and what it would do the insurance market.

22 So for that reason, I would not support the
23 amendment.

24 Senator Rockefeller. Mr. Chairman?

25 The Chairman. Senator Rockefeller.

1 Senator Rockefeller. Not quite making the closing
2 argument here, but I am forced to look at the West
3 Virginia medical loss ratios as reported by the insurance
4 industry, and they say for individuals only 65 percent of
5 their premium goes to health care coverage; the rest goes
6 for other things. And I am forced to report that in the
7 small-group market, which is called small business, et
8 cetera, the ratio is 75 percent, and the rest goes for
9 whatever it goes for. Yes, in the large-group market,
10 where things are much more certain, the percentage is
11 much higher.

12 But we have put--I would just put this to my
13 colleagues--over half of the money of this bill into
14 subsidies for insurance companies. And I ask my
15 colleagues, why is it so difficult to be like California--
16 --and perhaps other States that I do not know about--to
17 say that 85 percent ought to go to health care? I mean,
18 this is a serious part of health reform. We are giving a
19 lot of money to insurance companies who are already
20 making a lot of money, hundreds of billions of dollars.
21 And they may say it is 3 percent, but it is a fortune.

22 Why wouldn't we do that? Why wouldn't we do that if
23 we are spending all that money in this health care bill
24 and it is meant to encourage medical coverage of people?

25 But we are not doing that. We are deciding, evidently,

1 that we are not going to do that, that we are going to
2 let things go on as they have been, status quo, with some
3 modification from the Chairman's mark.

4 I find this unacceptable. I can count the votes,
5 but--and I will not ask for a vote on this, in part
6 because we do not have a CBO score, although I am
7 confident that it is budget neutral. But, you know, the
8 argument of the day is that does not work, you have got
9 to have a CBO score, so we will have to wait for that.
10 And we have not given them very much time, in their
11 defense. I am not blaming them.

12 I think it is very important. I think not to do it
13 would be a statement about us, and I think to do it would
14 be a statement about us.

15 The Chairman. The amendment is withdrawn. Any
16 further amendments? We are looking for amendments. You
17 know, we can finish tonight.

18 Senator Kyl. Mr. Chairman?

19 The Chairman. We do not have to offer all these
20 amendments, you know.

21 [Laughter.]

22 Senator Kyl. Mr. Chairman?

23 The Chairman. Senator Kyl.

24 Senator Kyl. I believe that the next amendment of
25 mine is amendment number F6 as modified, and the

1 modification is strictly the so-called pay-for, the
2 offset. This relates to flexible spending account caps,
3 spending caps.

4 The Chairman. Senator, I do not know if this is
5 fair because I understand you have the same offset that
6 you had for an earlier amendment. Maybe you have a
7 different offset, but in the interest of comity here,
8 please tell us what your offset is.

9 Senator Kyl. I am sorry. I thought that this had
10 been amended to use the Stabenow offset, if I can be
11 facetious.

12 The Chairman. Oh, you want to do that.

13 Senator Kyl. I thought that we had done that. No,
14 no, Senator Stabenow, the one that you so graciously
15 noted had been used, I think, eight times. But since it
16 always fails--

17 Senator Stabenow. Oh, yes. The one cutting
18 middle-class tax credits?

19 Senator Kyl. Since it always fails, we will just
20 call it "the perennial," would that work?

21 Senator Stabenow. Yes, that would be good.

22 Senator Kyl. I thought that my amendment had been
23 modified to do that, Mr. Chairman. Hold on just a
24 second.

25 The Chairman. It is like customs user fees?

1 Senator Kyl. I am sorry?

2 The Chairman. It is like customs user fees?

3 Senator Kyl. Except there would actually be real
4 money with this one.

5 The Chairman. All right.

6 Senator Kyl. Okay. Shall I go ahead?

7 The Chairman. Yes, please.

8 Senator Kyl. Thank you. As you know, in the
9 modified mark, beginning in 2011, contributions to health
10 flexible spending arrangements, FSAs, would be limited to
11 \$2,500 a year. Under current law, there is no indexing
12 factor, and my hope would be that we would not have one,
13 so it would eliminate this cap.

14 Now, the question is: What is the impact of
15 imposing a cap on the arrangements? Well, one thing, you
16 raise money by it, which I presume is why the Chairman
17 wrote it into the mark. But it hurts the people who
18 utilize these arrangements.

19 Under current law, employees can make tax-free
20 contributions for medically necessary goods and services
21 to pay out-of-pocket costs. There is no legal
22 limitation, as I said, right now on the amount that can
23 be contributed. So employers generally establish their
24 own limitation at \$5,000. The mark would limit that to
25 \$2,500, and Joint Tax estimates that this limit would

1 raise \$15 billion over 10 years.

2 I note that the average FSA election in the year
3 2008 was only \$1,386, an amount that is substantially
4 under the cap. There are some who incur higher out-of-
5 pocket expenses that would exceed the proposed \$2,500
6 limit for elements like diabetes, autism, even things
7 like purchasing braces.

8 While healthy Americans spend, on average, about
9 \$850 per year for out-of-pocket medical expenses,
10 individuals with chronic conditions can spend nearly
11 \$4,400 a year. According to the Employers Council on
12 Flexible Compensation, the 35 million people who use FSAs
13 spend 43 percent on hospital admissions and physician
14 visits, 26 percent to purchase prescription and over-the-
15 counter drugs to manage chronic diseases, 21 percent for
16 dental, and 10 percent for vision. The median income for
17 a policyholder utilizing an FSA is \$55,000 a year.

18 It is important to emphasize the point that,
19 relative to current law, a \$2,500 cap is still a tax
20 increase on people with chronic diseases who earn
21 \$55,000, which, I would note, is in violation of the
22 President's pledge not to raise taxes on families who
23 earn under \$250,000, and the reason is obvious. When you
24 have a tax benefit today and we are taking that away by
25 imposing this limit, you impose a new tax liability on

1 people that did not exist before.

2 Mr. Chairman, I had previously used a different
3 offset, the one that we have been precluded from using,
4 and that is the reason for adding the other offset.

5 Mr. Chairman, there is--I am having a little trouble
6 thinking here. We have got a lot of conversation going.

7 The Chairman. I am sorry, Senator--

8 Senator Kyl. No, I appreciate that. I just wanted
9 to close by saying we have a long list from IRS of
10 expenses that can be reimbursed through FSAs. These are
11 really important. And if we are talking about families
12 at \$5,500 a year that have these--if they have got a
13 chronic condition, over \$4,400 in expenses, I would just
14 hate to put a \$2,500 limit on these accounts. We are
15 talking everything from artificial limbs to breast
16 reconstruction, ambulance, diagnostic services, dental
17 treatment, eye surgery, all kinds of medicines, oxygen,
18 and many other things.

19 So I would hope that we would not impose an
20 additional tax on our constituents by putting a cap on
21 the amounts that could be spent for these kinds of items
22 under flexible savings arrangements.

23 The Chairman. Is there discussion?

24 [No response.]

25 The Chairman. Let me ask, if I might--Mr.

1 Barthold, perhaps you know, or Mr. Hughes--what is the
2 average income of persons significantly utilizing
3 flexible savings accounts?

4 Mr. Barthold. Well, Mr. Chairman, we actually do
5 not have really good information on FSA use by income
6 that I could give you an answer that is sort of
7 consistent with the distribution tables that we prepared.

8 But I can tell you that FSAs are most prevalent in large
9 firms, and large firms tend to be higher-wage firms. So
10 the first that Senator Kyl cited, that the median income
11 of someone with an FSA was \$55,000 per year, is within
12 plausible range.

13 The Chairman. What would the income be for those
14 who meet the caps?

15 Mr. Barthold. The mark's proposed--

16 The Chairman. Right, but if we are to meet the
17 proposed cap.

18 Mr. Barthold. Actually, that is the more difficult
19 part for us to determine, because the take-up rate among
20 eligible employees is less than 20 percent, although we
21 project that that is growing somewhat over the budget
22 period. And that is one of the reasons that we do not
23 have really good information on how this matches up.

24 The Chairman. All right.

25 Senator Roberts. Mr. Chairman, on that point?

1 The Chairman. Senator Roberts.

2 Senator Roberts. I have here from one of the many
3 hearings--I cannot really detail which one it was when we
4 had the FSAs testify, but I think it was indicated there
5 were 35 million Americans that now participate and it is
6 growing. They are a key benefit for individuals for whom
7 health insurance does not cover or does not cover
8 adequately, as Senator Kyl has pointed out, but the other
9 thing I wanted to mention as to your specific question,
10 they are primarily used by individuals with an average
11 income of between \$50,000 to \$70,000.

12 So this is clearly, I think, a health care benefit
13 that aids middle-income families.

14 Mr. Reeder. Mr. Chairman, I have some statistics I
15 can add.

16 The Chairman. Mr. Reeder.

17 Mr. Reeder. The Bureau of Labor Statistics did a
18 survey for 2006, and on the income level, I agree with
19 Mr. Barthold that we do not have detailed specifics on
20 income level, but they did do a breakout between people
21 who make above \$15 an hour and people who make below \$15
22 an hour. And for those who make about \$15 an hour, 45
23 percent have access to an FSA, while those who make below
24 \$15 an hour, only 21 percent have access to an FSA.

25 The Chairman. I approximately that. You know,

1 there are all kinds of statistics on this, and nothing is
2 very precise that I can tell thus far. According to
3 Mercer, a human resource consulting firm, in 2005, 4
4 years ago, the average contribution was \$1,235 among
5 employees in all firms participating, and the average
6 account in 2006 had \$1,261. Just lots of stats here that
7 just indicate to me that they are somewhat used, but
8 there is not a huge demand for these as one might think.

9 The second point is that all the numbers I see,
10 there is just nothing that shows that there is a big bump
11 against the proposed \$2,500 cap. There just does not
12 seem to be a huge, big cry for that.

13 So with the availability still there in the mark,
14 for the vast majority of people they will still be able
15 to utilize these flexible savings accounts.

16 Second, I do think it makes some sense to put some
17 cap on these. We are trying to bend the cost curve, but
18 we are trying to do it fairly. It is a balance. What
19 should we put a cap on? What is too tight? What is too
20 loose? et cetera. And my judgment is--and everybody is
21 entitled to his own judgment, but my judgment is that a
22 \$2,500 cap is well within reason. It is probably not
23 going to have much effect, if any, on the cost curve. It
24 may have some, but I do not know that it is going to have
25 a heck of a lot because they are not utilized that much.

1 I frankly think that we should--

2 Senator Roberts. Mr. Chairman?

3 The Chairman. Also, one other major point here,
4 who is paying for this amendment? Well, just to repeat
5 myself, this is paid for by middle-income and lower-
6 income people. They are the ones who are paying for
7 this. You know, I think the people utilizing these tend
8 to be a little higher income, and the pay-for tends to be
9 those people with lower income.

10 Now, I do not want to overdramatize the point or
11 overstate the point, but I think if you look at this
12 amendment and the proposal, that is basically what the
13 shift would be--that is, lower-income people under this
14 amendment would be paying for relief to middle- and
15 higher-income people, and I do not know if it is a good
16 thing to do because it is not being utilized--FSA is not
17 utilized that much, anyway.

18 Senator Kyl. Mr. Chairman?

19 The Chairman. Senator Kyl.

20 Senator Kyl. Just a couple of points. I remember
21 a friend of mine bought an old vehicle one time, and it
22 was kind of rusty, and he wanted it painted. So we went
23 to a place called Earl Scheib--and I do not meant to put
24 down the Earl Scheib paint shops. But we took it in, and
25 it was kind of a rusty bucket of bolts. And he said,

1 "How much does it cost to paint it?" He said, "All of
2 our paint jobs are \$19.95." And he says, "Well, can you
3 cover this?" And he said, "It will cover it \$19.95's
4 worth."

5 The point is this is going to hurt people \$14.6
6 billion worth. I mean, you say it will not have much
7 effect, there is not a huge demand, and so on. Well, it
8 is \$14.6 billion. That is not peanuts.

9 So that is a tax increase. Somebody is going to
10 have to pay \$14.6 billion. Now, who is it? The median--
11 of course, median means that half the people are above
12 and half the people are below. So half the people are
13 below \$55,000 a year income, half the people are above
14 \$55,000 in income. The \$15 per hour, that is, I think, a
15 \$30,000 income. You have a lot of people in that range,
16 and they are going to be paying for this.

17 It is hard to know exactly what income level
18 benefits from this more or less, but we do know what kind
19 of folks in terms of medical expenses, and it is folks
20 with chronic conditions. They are the ones that end up
21 taking advantage of this and being benefited.

22 And it is a little bit like the deduction, the
23 itemized deduction above 7.5 percent. We determined a
24 long time ago--and IRS treats it this way; remember when
25 we had this conversation?--that, you know, folks that

1 have a catastrophic medical condition, IRS does not treat
2 that as an intentional act, but an unintentional
3 consequence of life. And, therefore, we tend to treat it
4 in a tax way in a more benign fashion. We give people an
5 income tax deduction for those huge expenses,
6 catastrophic expenses.

7 Here, too, we give people a bit of a tax break if
8 they have a chronic condition that puts them into that
9 \$4,400 a year expenditure because of a chronic condition.

10 That is who this really helps. Some of them are going
11 to make more than \$50,000 a year; some are going to make
12 less than \$50,000. But we know the total impact is \$14.6
13 billion.

14 Finally, Senator Roberts points out the fact that I
15 do not think that this amount is indexed, so before long
16 it is not going to be worth much at all. And I would
17 hope, as you proceed to write legislation that is melded
18 with the HELP Committee and take the bill to the floor
19 and all of that, that you would consider that fact, that
20 indexing is something that you would want to consider
21 here.

22 So, anyway, my bottom line is we know we are hurting
23 a lot of folks. A lot of them do not make that much
24 money. It is \$14.6 billion worth. That is a big tax
25 increase.

1 The Chairman. Well, we have a simple choice. Who
2 pays the \$14.6 billion? Lower-income--middle-income and
3 lower- people, or middle-income and higher-income people?
4 That is the question. Who pays the 14.6? I frankly
5 think it is wrong for the middle-income and lower-income
6 people to be paying the 14.6.

7 The clerk will call the roll--

8 Senator Kyl. Well, Mr. Chairman, as you know, the
9 top 5 percent of taxpayers pay almost all the taxes in
10 this country. That is who pays it. It is not poor
11 people. This is a tax break. And so it falls on the
12 entire taxpaying public in general. And I think it is
13 two-thirds of the taxes are paid by the top 1 or 2
14 percent of the taxpayers. So it is rich people that are,
15 in effect, subsidizing people who have these chronic
16 conditions who take advantage of this tax provision.

17 The Chairman. Okay. The clerk will call the roll.

18 The Clerk. Mr. Rockefeller?

19 Senator Rockefeller. No.

20 The Clerk. Mr. Conrad?

21 The Chairman. No by proxy.

22 The Clerk. Mr. Bingaman?

23 Senator Bingaman. No.

24 The Clerk. Mr. Kerry?

25 The Chairman. No by proxy.

1 The Clerk. Mrs. Lincoln?
2 The Chairman. No by proxy.
3 The Clerk. Mr. Wyden?
4 The Chairman. No by proxy.
5 The Clerk. Mr. Schumer?
6 Senator Schumer. No.
7 The Clerk. Ms. Stabenow?
8 The Chairman. No by proxy.
9 The Clerk. Ms. Cantwell?
10 The Chairman. Pass.
11 The Clerk. Mr. Nelson?
12 Senator Nelson. No.
13 The Clerk. Mr. Menendez?
14 The Chairman. No by proxy.
15 The Clerk. Mr. Carper?
16 Senator Carper. No.
17 The Clerk. Mr. Grassley?
18 Senator Hatch. Aye by proxy.
19 The Clerk. Mr. Hatch?
20 Senator Hatch. Aye.
21 The Clerk. Ms. Snowe?
22 Senator Snowe. Aye.
23 The Clerk. Mr. Kyl?
24 Senator Kyl. Aye.
25 The Clerk. Mr. Bunning?

1 Senator Bunning. Aye.
2 The Clerk. Mr. Crapo?
3 Senator Hatch. Aye by proxy.
4 The Clerk. Mr. Roberts?
5 Senator Roberts. Aye.
6 The Clerk. Mr. Ensign?
7 Senator Hatch. Aye by proxy.
8 The Clerk. Mr. Enzi?
9 Senator Hatch. Aye by proxy.
10 The Clerk. Mr. Cornyn?
11 Senator Cornyn. Aye.
12 The Clerk. Mr. Chairman?
13 The Chairman. No.
14 The Clerk. Ms. Cantwell?
15 Senator Cantwell. No.
16 The Chairman. The clerk will tally the vote.
17 The Clerk. Mr. Chairman, the final tally is 10
18 ayes, 13 nays.
19 The Chairman. The amendment fails.
20 Senator Bunning, do you want to offer an amendment?
21 Senator Bunning. I will go.
22 The Chairman. Okay. Thank you.
23 Senator Bunning. Let me call up amendment F1 as
24 modified.
25 The Chairman. F1 modified.

1 Senator Bunning. I think everybody--

2 The Chairman. I do not know if I have it.

3 Senator Bunning. Well, I will wait.

4 The Chairman. Okay. That would be a good thing to
5 do.

6 Go ahead, Senator. Why don't you proceed?

7 Senator Bunning. All right. Thank you, Mr.
8 Chairman. This is a simple amendment, like the other
9 three simple amendments I have offered on this bill. It
10 sunsets in 2019 every tax increase in this bill.

11 Note that this is a different amendment from my
12 earlier amendment, which only affected tax increases that
13 increased costs for consumers. We have already had
14 discussions about how the tax increases in this bill will
15 be passed along to consumers and drive up out-of-pocket
16 health care costs. I will not rehash that again.

17 I think the American people will be surprised to
18 learn that the only way Congress can enact health care
19 reform is to increase the tax burden. I do not accept
20 that. But at the very least, we should ensure that this
21 new tax burden does not last forever, especially when so
22 many of these tax increases would cause permanent
23 increases in health care costs.

24 On one of the Sunday talk shows this past weekend,
25 former President Clinton was asked if tax increases would

1 be necessary in order to have health care reform. He
2 first equivocated on the question. But when pressed to
3 answer it, President Clinton said that tax increases
4 might be necessary in the short run, but in the long run,
5 health care reform would reduce costs so that tax
6 increases would not be necessary. So let us put
7 President Clinton's theory to the test.

8 Since tax increases will only be required in the
9 short run, let us sunset all those new taxes by 2019.
10 Then we will have several years to see what impact all
11 these taxes will have on health care costs and whether
12 they have made health care more affordable or less
13 affordable for the American people.

14 How many of us remember the astonishment from our
15 constituents when they found out that the 2001 and 2003
16 tax cuts would expire in 2010? Apparently it is okay
17 when tax relief expires, but every tax increase must last
18 into eternity.

19 Earlier today, the Chairman was quick to point out
20 that CBO said the bill is a net tax cut. But I think
21 most Americans would strongly disagree with that
22 statement. To most Americans, tax relief means that you
23 get to keep more of the money that you earn. But here is
24 how it works under this bill. You earn your money, you
25 send it to Washington, and then Washington forces you to

1 buy health insurance. Then for some lucky Americans, the
2 Government will send your money to insurance companies.

3 You do not get to keep this so-called tax relief to
4 use in any way you decide is best for your family. I
5 think most Americans would be stunned to learn that this
6 is a new definition of a tax cut.

7 I also point out that billions of dollars of this
8 so-called tax cut would go to people who do not even pay
9 income tax at all. Even CBO considers this to be a
10 Government spending outlay rather than a tax reduction.

11 I am not saying that this is the right policy or the
12 wrong policy, but it is certainly spending rather than
13 tax relief.

14 Earlier today, the Chairman said that we would be
15 irresponsible if we did not make all of these tax
16 increases last forever. Let me repeat the reasons this
17 is not the case. I hope every deficit hawk will be
18 paying attention.

19 If we are worried about what will happen to our
20 deficits after 2019, there are three solid options for
21 you under this amendment.

22 First, President Obama and former President Clinton
23 have said repeatedly that health reform will reduce
24 costs. If all those savings we were promised magically
25 appear, there will be no need for tax increases to

1 finance health care reform.

2 Or if the savings do not magically appear, there is
3 a second option. Congress will have 10 years, from 2010
4 to 2019, to find spending cuts rather than tax increases
5 to finance the mandates in this bill. Surely we can find
6 spending cuts and efficiencies in the trillions of
7 dollars Americans spend on health care.

8 And there is a third option for our future Congress.

9 By 2019, Americans will be so in love with the health
10 reform they have gotten that they will not mind paying
11 higher taxes. In that case, our constituents would
12 joyfully contribute their shared responsibility, and a
13 future Congress will have no political problems simply
14 restating the tax increases. In fact, they will probably
15 be hailed as heroes.

16 If anyone claims that my amendment does not bend the
17 cost curve after 2019, then this is a stunning admission
18 that the only way this mark can claim to bend the cost
19 curve is to raise taxes.

20 I hope my colleagues will stand up for their
21 constituents and their taxpayers and support my
22 amendment. Thank you, Mr. Chairman.

23 The Chairman. Let us see. Does anybody wish to
24 speak?

25 Frankly, Senator, this is similar to one--I think it

1 was you--offered earlier. This is even more sweeping.
2 Maybe it was somebody else, somebody sitting over there.

3 Senator Bunning. I mentioned the fact that I had
4 offered a similar--

5 The Chairman. That is right. Okay. But this is
6 even more sweeping. Essentially it says that we are
7 going to sunset the pay-fors but not sunset the spending,
8 and I think that is irresponsible. I mean, it would be a
9 little bit more responsible to sunset both, but that is
10 not your amendment. Your amendment is to sunset the pay-
11 for but not sunset spending. I think that is just not
12 the responsible thing to do, and I suggest we not vote
13 for the amendment.

14 Senator Bunning. Well, let me just remind the
15 Chair that if, in fact, the savings in this bill occur as
16 you have and most people have predicted, there will be no
17 need in 2019 to have any kind of tax increases. We will
18 have the spending we need, the American people will have
19 their health care, and they will be overjoyed with the
20 health care that they do have.

21 The Chairman. Well, I might say to my good friend,
22 we have a problem as it is with the accumulated deficits.

23 I saw, I guess, CBO, I think--or maybe it was Joint Tax-
24 -that, all things being equal, the projection is about a
25 trillion dollars in total additional deficits over the

1 next 10 years. I do not think we want to take action
2 that adds to that. Most of us would like to kind of get
3 deficit spending down a little bit, not get deficit
4 spending up. I think we should not support this
5 amendment.

6 Senator Bunning. Well, if I can just respond, and
7 this is the last thing I will say. If what you say is
8 true, that there is \$40 billion savings in this bill--

9 The Chairman. No. I said \$40 billion in net tax
10 cuts in the year 2019.

11 Senator Bunning. Forty billion.

12 The Chairman. Forty billion.

13 Senator Bunning. Yes, sir. Then why would we
14 continue to have more taxing at the end of that time if
15 you are going to save \$40 billion?

16 The Chairman. Because at the end of the 10-year
17 period, we have to have offsets for the spending, and you
18 want to discontinue the offsets but continue the
19 spending. I am a little surprised at that because most
20 Members of the Senate do not like deficit spending very
21 well.

22 Senator Bunning. Well, no, I agree with that. But
23 I think your statement is contradicting exactly what you
24 have promised in your mark. So I would urge my
25 colleagues to vote for this amendment.

1 The Chairman. Okay. The clerk will call the roll.
2 The Clerk. Mr. Rockefeller?
3 Senator Rockefeller. No.
4 The Clerk. Mr. Conrad?
5 The Chairman. No by proxy.
6 The Clerk. Mr. Bingaman?
7 The Chairman. No by proxy.
8 The Clerk. Mr. Kerry?
9 The Chairman. No by proxy.
10 The Clerk. Mrs. Lincoln?
11 Senator Lincoln. No.
12 The Clerk. Mr. Wyden?
13 The Chairman. No by proxy.
14 The Clerk. Mr. Schumer?
15 Senator Schumer. No.
16 The Clerk. Ms. Stabenow?
17 The Chairman. No by proxy.
18 The Clerk. Ms. Cantwell?
19 The Chairman. Pass.
20 The Clerk. Mr. Nelson?
21 Senator Nelson. No.
22 The Clerk. Mr. Menendez?
23 The Chairman. No by proxy.
24 The Clerk. Mr. Carper?
25 The Chairman. No by proxy.

1 The Clerk. Mr. Grassley?
2 Senator Hatch. Aye by proxy.
3 The Clerk. Mr. Hatch?
4 Senator Hatch. Aye.
5 The Clerk. Ms. Snowe?
6 Senator Snowe. No.
7 The Clerk. Mr. Kyl?
8 Senator Kyl. Aye.
9 The Clerk. Mr. Bunning?
10 Senator Bunning. Aye.
11 The Clerk. Mr. Crapo?
12 Senator Hatch. Aye by proxy.
13 The Clerk. Mr. Roberts?
14 Senator Roberts. Aye.
15 The Clerk. Mr. Ensign?
16 Senator Hatch. Aye by proxy.
17 The Clerk. Mr. Enzi?
18 Senator Hatch. Aye by proxy.
19 The Clerk. Mr. Cornyn?
20 Senator Hatch. Aye by proxy.
21 The Clerk. Mr. Chairman?
22 The Chairman. No. The clerk will tally the vote.
23 The Clerk. Mr. Chairman, the tally is 9 ayes, 13
24 nays, and one pass.
25 The Chairman. The amendment does not pass.

1 Senator Kyl. Mr. Chairman, if you want me to, I
2 have an amendment.

3 The Chairman. Okay. Senator Kyl?

4 Senator Kyl. Thank you, Mr. Chairman. This is
5 amendment number C17. I had brought this up before. We
6 set it aside because I was trying to get a different
7 offset than the one that we have been using in the past.

8 The Chairman. You know what? I appreciate that.
9 You are exercising good faith here, and I deeply
10 appreciate that.

11 Senator Kyl. I appreciate it. And because you
12 have not agreed with any of my amendments so far, that
13 offset is still available, and, therefore, I will be
14 happy to provide it again. But, again, to my friend
15 Senator Stabenow, it is not that I am trying to enact a
16 policy of the offset. I have a different idea in mind.

17 This is actually a very simple amendment dealing
18 with the health savings account. The effect would be
19 simply to conform the amount that individuals can
20 contribute to high-deductible health plans and enable
21 contributions to health savings accounts to equal the
22 same amount--in other words, allow individuals to
23 contribute money to their HSAs equal to the amount of the
24 out-of-pocket limits for high-deductible health plans.

25 Mr. Chairman, I think we are all well aware of the

1 advantages of HSAs, so I will simply summarize it with a
2 couple of points.

3 Republicans have generally believed that we want to
4 empower consumers and enable them to take more direct
5 responsibility. Part of that has to do with getting some
6 skin in the game so that they will be better health
7 consumers. And as a result, these HSAs have proven to be
8 a very popular way to have a relatively low-cost
9 insurance policy but still provide for catastrophic
10 coverage and not bankrupt you if you have something
11 really bad happen to you.

12 The other point that I want to make is there is kind
13 of a misconception--let me make this point first. The
14 difference, for example, on the average is about \$2,200--
15 in other words, you can get an HSA about \$2,200 less than
16 you can the average employer-sponsored family premium.
17 So it is a way to save money, and you have more skin in
18 the game, you are a better consumer of health care, and
19 save money in the process.

20 The second thing I want to mention is there is kind
21 of a myth that the people that invest in these are all
22 younger and more wealthy and so on, and we just got these
23 statistics together, which I think will put the lie to
24 that myth. Forty-six percent of the people with HSAs--
25 these are last year's numbers, by the way--lived in

1 lower-middle-income neighborhoods, 34 percent in middle-
2 income neighborhoods, for a total of 80 percent who live
3 in, at best, middle-income neighborhoods and more than
4 that in lower.

5 Fifty-three percent of all individual market
6 enrollees were 40 or older. In other words, the majority
7 are over 40 years of age. And small employers are one of
8 the fastest-growing markets for these kinds of products.

9 So these are popular with the folks that we want to
10 try to help here. Small business folks, it is a way for
11 them to provide cheaper coverage for their employees and
12 still make sure that they have what they need. And there
13 is no reason why we should not, therefore, allow them to
14 contribute more. The obvious amount would be the same
15 amount that can be contributed to a high-deductible
16 health plan.

17 And so the amount that they should be able to deduct
18 in the HSAs we believe should be conformed, and I have
19 those actual numbers. I think Senator Conrad pointed
20 them out before, the 2009 annual contribution limits:
21 individual, \$3,000; family, \$5,900. But the out-of-
22 pocket limits are \$5,800 for an individual and \$11,600
23 for a family. So this would be a substantial benefit to
24 folks who rely upon HSAs.

25 Thank you, Mr. Chairman.

1 The Chairman. Thank you, Senator. I am sorry. I
2 missed--what is the revenue shift here? How much?

3 Senator Kyl. It is \$15.2 billion.

4 The Chairman. Okay. I do not want to get into a
5 big argument here, but, again, as I understand it, we
6 offset--you offset it how? Increasing the income cap is
7 the same offset we have been talking about.

8 Senator Kyl. Yes, sir.

9 The Chairman. I wonder how many times we have used
10 this offset.

11 Senator Kyl. I think this is it--well, excuse me.
12 Depending upon the Schumer amendment, I have one more
13 amendment on this subject, and it will follow the Schumer
14 amendment, pursuant to your request. So if I have the
15 misfortune of not prevailing on this amendment, this
16 offset could be offered one more time.

17 The Chairman. Okay.

18 [Laughter.]

19 The Chairman. Well, I really do appreciate your--

20 Senator Kyl. Unless someone has a better idea.

21 The Chairman. I think we are finally getting to
22 figure out what the offset is after so many times.

23 Again, it is tantamount to income shift from middle-
24 and lower-income people to higher-income people. That is
25 not the right thing to do, and I suggest we not vote for

1 it.

2 The clerk will call the roll.

3 Senator Kyl. Mr. Chairman, do we have a quorum.

4 The Chairman. We need eight. One, two, three,
5 four, five, six, seven. We do not have a quorum.

6 Senator Kyl. But we are going to grab somebody.

7 The Chairman. Here we go. Blanche is here. We
8 have eight. We do have a quorum.

9 The clerk will call the roll, but thanks for
10 checking. The clerk will call the roll.

11 The Clerk. Mr. Rockefeller?

12 Senator Rockefeller. No.

13 The Clerk. Mr. Conrad?

14 The Chairman. No by proxy.

15 The Clerk. Mr. Bingaman?

16 The Chairman. No by proxy.

17 The Clerk. Mr. Kerry?

18 The Chairman. No by proxy.

19 The Clerk. Mrs. Lincoln?

20 Senator Lincoln. No.

21 The Clerk. Mr. Wyden?

22 The Chairman. No by proxy.

23 The Clerk. Mr. Schumer?

24 The Chairman. No by proxy.

25 The Clerk. Ms. Stabenow?

1 The Chairman. No by proxy.
2 The Clerk. Ms. Cantwell?
3 The Chairman. Pass.
4 The Clerk. Mr. Nelson?
5 Senator Nelson. No.
6 The Clerk. Mr. Menendez?
7 The Chairman. No by proxy.
8 The Clerk. Mr. Carper?
9 Senator Carper. No.
10 The Clerk. Mr. Grassley?
11 Senator Hatch. Aye by proxy.
12 The Clerk. Mr. Hatch?
13 Senator Hatch. Aye.
14 The Clerk. Ms. Snowe?
15 Senator Snowe. Aye.
16 The Clerk. Mr. Kyl?
17 Senator Kyl. Aye.
18 The Clerk. Mr. Bunning?
19 Senator Bunning. Aye.
20 The Clerk. Mr. Crapo?
21 Senator Crapo. Aye.
22 The Clerk. Mr. Roberts?
23 Senator Hatch. Aye by proxy.
24 The Clerk. Mr. Ensign?
25 Senator Hatch. Aye by proxy.

1 The Clerk. Mr. Enzi?

2 Senator Hatch. Aye by proxy.

3 The Clerk. Mr. Cornyn?

4 Senator Hatch. Aye by proxy.

5 The Clerk. Mr. Chairman?

6 The Chairman. No.

7 The Clerk. Ms. Stabenow?

8 Senator Stabenow. No.

9 The Chairman. Will the clerk tally the vote?

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

12 The Chairman. The amendment is not agreed to.

13 I think, Senator Lincoln, you have an amendment you
14 want to offer and withdraw. Is that correct? That is my
15 understanding that Senator Lincoln has an amendment.
16 Senator Lincoln, you are recognized to offer an
17 amendment.

18 Senator Lincoln. Thank you, Mr. Chairman.

19 Mr. Chairman, I would like to call up my amendment
20 D11. This amendment is to overturn a portion of recent
21 Medicare regulations that would significantly cut
22 reimbursement to radiation oncology services based on
23 what I believe is really a faulty assumption.

24 In its annual physician fee schedule released this
25 year, CMS rebalances reimbursement to physicians based

1 upon new practice expense data. I recently was joined by
2 31 Senators in sending a letter to the administration
3 expressing some concern we had specifically regarding
4 assumptions used to determine the radiation oncology
5 payment rates. But I wanted to also highlight them here
6 as we are discussing physician payment issues in the
7 context of health care reform.

8 Mr. Chairman, the CMS rule changed payment to
9 physicians in a budget-neutral way so that many primary
10 care specialists received increases in Medicare payment
11 and other specialists received reductions in their
12 payments under Medicare. And I certainly applaud the
13 administration in recognizing that primary care
14 physicians should be reimbursed adequately. For those of
15 us who come from small rural States, having enough
16 primary care physicians is absolutely critical in making
17 sure that access to health care.

18 We have been talking an awful lot about coverage,
19 and coverage does not necessarily equate access if you
20 live in areas where it is difficult to find access to
21 health care, where medical providers are not there.

22 So I certainly applaud them in recognizing that
23 primary care physicians do need to be reimbursed
24 adequately, whether they are serving in large areas or
25 small areas. And that should help to address our

1 workforce shortages that are particularly pronounced in
2 primary care.

3 However, as a part of the payment rates, the rule
4 established for radiation oncologists, CMS used data that
5 should never have been applied to radiation oncology.
6 Now, remember, when we talk about radiologists, we are
7 talking about diagnostic imaging.

8 Some of what we have seen here in this
9 misinformation or the data being misinterpreted stems
10 from a misreading of a proposal by the Medicare Payment
11 Advisory Commission, MedPAC, which we have talked an
12 awful lot about here. And I have expressed my concerns
13 in making sure that MedPAC is adequately represented by
14 rural areas, which I think is going to be critical.

15 But the misreading of the proposal by MedPAC
16 regarding diagnostic imaging services, there is a clear
17 distinction between radiation therapy and diagnostic
18 imaging. Radiation therapy, many of us certainly
19 remember our good friend Senator Kennedy. When using
20 radiation therapy, oncologists use radiation to actually
21 pinpoint to cancer in difficult-to-reach spaces or
22 sensitive spaces. But it is used as a therapy instead of
23 imaging.

24 In fact, in its comment letter to CMS on the
25 proposed rule, MedPAC states, "MedPAC did not contemplate

1 applying this equipment utilization policy to radiation
2 therapy machines."

3 So, in other words, those machines that are
4 radiology therapy are going to get the same 90-percent
5 utilization--they are going to be subjected to the same
6 90-percent utilization rate that diagnostic imaging is
7 going to see.

8 So, Mr. Chairman, I think that there was clearly a
9 mistake on the way that CMS interpreted this. MedPAC was
10 clear that it was misunderstood, that that was not their
11 intent to see that happen. And I just would love to see
12 us make sure that we recognize that, particularly for
13 those radiation oncologists that really need this
14 equipment and oftentimes, because of its specialization,
15 are not going to see that 90-percent utilization that you
16 would see in a regular diagnostic therapy practice.

17 I hope, Mr. Chairman, that you will work with me to
18 solve this problem. I am glad to withdraw the amendment
19 if it becomes a complication. But I think many of my
20 colleagues understand this issue, and I had 31 other
21 Senators join me in my letter to CMS and would really
22 appreciate the opportunity to continue to work with you,
23 Mr. Chairman, and the administration to address these
24 cuts and ensure that the cancer patients will continue to
25 have access to the vital radiation oncology services that

1 they are now receiving.

2 It is wonderful that we have these technologies.
3 They are miraculous in many ways, and I would hate to see
4 us lose those practices and that technology because we
5 have misinterpreted--or that CMS has misinterpreted what
6 MedPAC's recommendation actually was.

7 The Chairman. Senator Stabenow.

8 Senator Stabenow. Thank you, Mr. Chairman. I just
9 want to thank Senator Lincoln for her amendment and join
10 her in expressing great concern about the cut to
11 radiation oncology in the upcoming physician fee schedule
12 proposed rule, because I share the concern that this
13 could create serious risk for patients in Michigan,
14 Arkansas, and across the country.

15 The cuts to certain families of radiation therapy
16 procedures provided in free-standing centers is more than
17 35 percent on average and up to 44 percent or more for
18 certain procedures critical to the provision of radiation
19 therapy. In Michigan, there are 24 free-standing
20 radiation therapy centers which represent about one-third
21 of our capacity to treat cancer patients with radiation
22 therapy. More than half of these centers are considered
23 at risk for closure under the various estimates of the
24 proposed rule's impact.

25 Obviously, this would be very bad for patients.

1 Research shows that increasing the travel time for cancer
2 treatment not only imposes a burden on cancer patients,
3 but also can impact patient compliance and even the
4 choice of treatment.

5 So I thank Senator Lincoln for bringing it to the
6 Committee's intention, and I look forward to working with
7 you to address this.

8 Senator Lincoln. I would just like to thank
9 Senator Stabenow and the other Senators that I know have
10 a concern with this. You may have 44 centers. We do not
11 have nearly that many in Arkansas, but even trying to
12 reach those 90-percent utilization rates, it is going to
13 drastically decrease our ability to serve cancer
14 patients. And you are exactly right: The distance that
15 cancer patients are now going to have to travel to get
16 that kind of specialized care is going to be enormously
17 disproportionate because of this misrepresentation.

18 So I thank the Senator from Michigan.

19 The Chairman. Thank you, Senator. I share your
20 concern. I have heard some of the same concerns, and, I
21 might say, more than once. I very much do want to work
22 with you on this and see if we can find a solution.

23 Senator Lincoln. Well, I appreciate it, and I
24 appreciate the Chairman's willingness to work with us,
25 and I will withdraw my amendment.

1 The Chairman. You bet. Thank you.

2 Senator Lincoln. Thank you.

3 The Chairman. Okay. It is my understanding there
4 will be three votes on the floor shortly, and we have
5 about ten amendments left to complete action on this
6 bill. And my hope is and my expectation is that during
7 this short recess we have this evening, we can perhaps
8 work out some of those amendments, maybe combine one or
9 two. And then when we come back, it would also be my
10 hope that Senators can keep their remarks short, maybe we
11 can taken an amendment by voice or two.

12 We are within striking distance. I can see the
13 light at the end of the tunnel. And it may be a little
14 dark, but we will finally get to that light at the end of
15 the tunnel. But I am going to do my best tonight to see
16 if we can wrap up. And I really thank Senators. We have
17 been working so cooperatively on this bill on both sides,
18 and I really appreciate that.

19 Unless Senators have something they want to say, my
20 intention is to recess until 8:30 tonight, and we will
21 come back at 8:30, and with a little extra effort and
22 cooperation we can wrap this up.

23 The Committee stands in recess until 8:30.

24 [Whereupon, at 6:46 p.m., the Committee recessed, to
25 reconvene at 8:30 p.m., this same day.]

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AFTER RECESS

[8:40 p.m.]

The Chairman. The committee will come to order.
All right. Here we go. This is it. It is the last
laugh.

Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman. This is
amendment number C-14.

The Chairman. C-14.

Senator Kyl. And no offset is required, Mr.
Chairman.

The Chairman. I like that.

Senator Kyl. Mr. Chairman, the tax subsidy in this
legislation, under the way the mark is written, would be
available for legal immigrants who have not been in the
country for five years.

The law has been that public benefits of this kind
are available to such immigrants once they have been in
the country five years. My amendment would reestablish
that requirement. Specifically, starting in 2013, when
many of the provisions become effective, legal immigrants
would have immediate access to the tax subsidy in the
state exchange program and that is what would be delayed
for five years after their initial entry.

1 Current law requires that Medicaid recipients, with
2 the exception of pregnant women and children, be U.S.
3 citizens or legal residents who have lived in the country
4 for five years. So if you are eligible for Medicaid, you
5 would be eligible for this. It marries the requirements
6 for this benefit to those of Medicaid, as well.

7 I said most other federal welfare programs require
8 that an individual be in the country for five years.
9 That is pursuant to originally a law that dates back to
10 1882, but we specifically provided, in Section 403 of the
11 Welfare Reform Act of 1996, the specific definition,
12 which reads that aliens "are not eligible for any federal
13 means-tested public benefit for a period of five years
14 beginning on the date of the alien's entry into the
15 United States," end quote.

16 So, Mr. Chairman, there is more that I could say
17 about this. I think, obviously, we welcome immigrants to
18 our shores. We want them to be productive citizens, when
19 they become a citizen.

20 For a period of five years, they agree not to, in
21 effect, take public welfare, and this, of course, is one
22 of those means-tested benefits that otherwise would be
23 denied to them. Nothing, of course, prohibits them from
24 buying insurance; obviously, we would like to encourage
25 that. But we do not have to subsidize them and that is

1 what this amendment would do.

2 Senator Menendez. Mr. Chairman?

3 The Chairman. Senator Menendez?

4 Senator Menendez. Mr. Chairman, let me just put
5 this name out there -- Specialist Rodrigo Gonzalez Garza
6 of San Antonio, Texas. He was the first soldier to die
7 in Iraq. He was a legal permanent resident of the United
8 States.

9 Under Senator Kyl's provisions, he and his family
10 would have been barred. Now, this amendment sets up a
11 catch-22 for legal immigrants. Unlike the suggestion
12 that these are welfare programs, a subsidy under this
13 will, when someone is mandated to have insurance and pays
14 a penalty if they cannot meet that mandate is much
15 different than a welfare program.

16 I certainly do not consider any of the subsidies
17 under these bills for U.S. citizens and legal permanent
18 residents to be a welfare program. We are talking about
19 creating affordability for families. That is first and
20 foremost.

21 Secondly, the reality is that we are going to put a
22 mandate on legal permanent residents of the United
23 States. This is new and it exists for those who are
24 already here as legal permanent residents of the United
25 States.

1 So now they have a mandate placed on them and they
2 are told, even though they serve in the Armed Forces of
3 the United States, even though they pay all taxes that
4 any other citizen would pay in this country, that in
5 addition to the fact that they meet all those
6 obligations, that when we mandate them to have insurance
7 and/or pay a penalty, they cannot have subsidies that are
8 established for everyone else. So that clearly is a
9 catch-22.

10 This amendment prevents low and middle income
11 families from applying for critical tax credits for
12 purchasing health insurance, putting quality affordable
13 health care out of the reach of those working families.

14 And to make matters worse, as I said, it would force
15 them to pay a tax penalty for not having insurance under
16 the new individual mandate.

17 Now, under this amendment, legal permanent residents
18 would be prevented from accessing federal health programs
19 which they help fund. They pay taxes just like any
20 citizen.

21 In fact, we have moved in a different direction,
22 particularly in a bipartisan vote of the Children's
23 Health Care Initiative, where, in fact, we removed that
24 hurdle.

25 By imposing wait periods, this amendment undermines

1 the goal that I think this legislation is all about,
2 health care form, and driving up the cost of health care
3 for all Americans.

4 I heard various arguments here earlier today,
5 including legal permanent residents paying into the
6 system to make health care affordable for everyone.
7 Artificially restricting legal permanent residents from
8 enrolling in affordable health care coverage at the same
9 time we put a mandate on them limits the pool of
10 participants and increases the cost of health care for
11 everyone.

12 It also creates a set of circumstances under which
13 simple problems that could be addressed through
14 preventative care will be delayed. They will become more
15 complex and more costly emergencies at the end of the
16 day.

17 So I believe, Mr. Chairman, that you cannot have it
18 both ways. I heard various of the arguments here earlier
19 today, including legal permanent residents paying into
20 the system to make health care affordable for everyone.
21 Artificially restricting legal permanent residents from
22 enrolling in affordable health care coverage at the same
23 time we put a mandate on them limits the pool of
24 participants and increases the cost of health care for
25 everyone.

1 It also creates a set of circumstances under which
2 simple problems that could be addressed through
3 preventative care will be delayed. They will become more
4 complex and more costly emergencies at the end of the
5 day.

6 So I believe, Mr. Chairman, that you cannot have it
7 both ways. You cannot put a mandate and say "You have to
8 have health insurance, you pay your taxes, you can serve
9 in the Armed Forces of the United States. But guess
10 what? As we put this new mandate on you, you do not have
11 any access to the subsidies."

12 That is far different than the suggestion of welfare
13 and the amendment should be rejected.

14 The Chairman. Further discussion?

15 Senator Bingaman. Mr. Chairman?

16 The Chairman. Senator Bingaman?

17 Senator Bingaman. Mr. Chairman, let me just
18 underscore the points that Senator Menendez was making.
19 These are legal permanent residents. They have come here
20 and complied with all the laws of this country.

21 They are taxpaying citizens and it would be a grave
22 mistake for us to deny them the right to participate in
23 this effort to expand coverage that we are talking about.

24 This mark, which the Chairman has presented to us
25 and which we have before us, does not change the law with

1 regard to Medicaid. That is my understanding.

2 Let me ask staff if I am accurate on that. Is that
3 correct?

4 Ms. Baker. That is correct.

5 Senator Bingaman. So that the five-year ban that
6 the Senator from Arizona is now trying to impose in the
7 exchanges, which, frankly, I do not agree with, I do not
8 agree with having the five-year ban in Medicaid, but we
9 are not trying to change that in the mark.

10 What we are saying is that this program of advanced
11 refundable tax credits to assist people in obtaining the
12 health care coverage we are requiring them to obtain is
13 not welfare, it is not Medicaid. It is something that is
14 in our interest as a country to see as many people as
15 possible participate in, and that certainly includes the
16 legal residents who have come to this country.

17 So I would strongly oppose the amendment by the
18 Senator from Arizona.

19 The Chairman. Further discussion? Senator Kyl?

20 Senator Kyl. Mr. Chairman, first, with regard to
21 the individual who served in the military, of course, he
22 has got military care. His family has the benefit of
23 TRICARE, I would presume.

24 It is true that Medicaid is different and that was
25 the point I made. It would be inconsistent to deny

1 people Medicaid, but then provide the benefits that are
2 authorized in this legislation.

3 There is a point, when you say that they are
4 mandated, of course, I would prefer that the mandate did
5 not exist either and would be happy to modify the
6 amendment to that extent.

7 I would like to preserve the law as it is. As it
8 is, a permanent resident, until he has been here five
9 years, would not be entitled to this benefit. This mark
10 changes our law.

11 I suggest that an "aye" vote for the amendment is to
12 keep the law the way it is today. Thank you, Mr.
13 Chairman.

14 The Chairman. The Clerk will call the roll.

15 The Clerk. Mr. Rockefeller?

16 Senator Rockefeller. No.

17 The Clerk. Mr. Conrad?

18 Senator Conrad. No.

19 The Clerk. Mr. Bingaman?

20 Senator Bingaman. No.

21 The Clerk. Mr. Kerry?

22 The Chairman. No by proxy.

23 The Clerk. Mrs. Lincoln?

24 Senator Lincoln. No.

25 The Clerk. Mr. Wyden?

1 The Chairman. No by proxy.
2 The Clerk. Mr. Schumer?
3 Senator Schumer. No.
4 The Clerk. Ms. Stabenow?
5 Senator Stabenow. No.
6 The Clerk. Ms. Cantwell?
7 Senator Cantwell. No.
8 The Clerk. Mr. Nelson?
9 Senator Nelson. No.
10 The Clerk. Mr. Menendez?
11 Senator Menendez. No.
12 The Clerk. Mr. Carper?
13 The Chairman. No by proxy.
14 The Clerk. Mr. Grassley?
15 Senator Grassley. Aye.
16 The Clerk. Mr. Hatch?
17 Senator Hatch. Aye.
18 The Clerk. Ms. Snowe?
19 Senator Snowe. Aye.
20 The Clerk. Mr. Kyl?
21 Senator Kyl. Aye.
22 The Clerk. Mr. Bunning?
23 Senator Bunning. Aye.
24 The Clerk. Mr. Crapo?
25 Senator Crapo. Aye.

1 The Clerk. Mr. Roberts?

2 Senator Grassley. Aye by proxy.

3 The Clerk. Mr. Ensign?

4 Senator Grassley. Aye by proxy.

5 The Clerk. Mr. Enzi?

6 Senator Grassley. Aye by proxy.

7 The Clerk. Mr. Cornyn?

8 Senator Grassley. Aye by proxy.

9 The Clerk. Mr. Chairman?

10 The Chairman. No. The Clerk will tally the vote.

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

13 The Chairman. The amendment is not agreed to. I
14 note, for my colleagues on my side, that we have a list
15 here and it is unclear exactly how many amendments there
16 are. It is in the nature of 11 or 12 amendments.

17 I also note that most of them are amendments offered
18 by Democrats. There are only three on the list that are
19 Republican amendments.

20 Maybe some of our amendments can be accepted, maybe
21 some can be folded into another amendment, maybe we can
22 offer them on the floor. I just point out that there are
23 some on our side and perhaps -- without having not a
24 recorded vote, maybe a voice vote, et cetera.

25 Senator Conrad. Mr. Chairman?

1 The Chairman. Senator Conrad?

2 Senator Conrad. Mr. Chairman, they are not on that
3 list, but I had two amendments that I had offered still
4 pending and I just would notice now that I do not intend
5 to offer those amendments, in the interest of allowing
6 people to complete their work and get home to their
7 families and live to fight another day. That is my
8 intention.

9 The Chairman. Well, thank you, Senator, very much.
10 Senator Lincoln?

11 Senator Lincoln. Thank you, Mr. Chairman. Mr.
12 Chairman, my amendment is pretty straightforward. The
13 plan we have before us will require all American
14 consumers to purchase health insurance coverage in the
15 private marketplace.

16 This will bring millions of new customers to private
17 insurance companies. This amendment would set a
18 reasonable executive compensation limit of \$500,000
19 annually that can be deducted as a business expense for
20 businesses that provide coverage meeting the individual's
21 mandate requirements.

22 It does not dictate at all what a business pays an
23 employee, but it does limit the taxpayer subsidies for
24 that compensation. Let me be very clear on this point.
25 Without this change, under current law, every Arkansas

1 taxpayer, every U.S. taxpayer subsidizes these big
2 insurance executive unlimited salaries and deferred
3 compensation packages.

4 It is my hope, Mr. Chairman, that this amendment
5 will encourage the insurance companies to put the
6 additional premium dollars they will be bringing in as a
7 result of the new mandate, the new insistence that all
8 Americans be covered, towards lower rates and more
9 affordable coverage for consumers, not in their own
10 pocketbook.

11 We heard from Senator Rockefeller earlier this
12 evening about the importance of that loss ratio and how
13 important it is that everyone be at the table in trying
14 to achieve what it is we are working hard to achieve
15 here, and that is health care reform that is going to
16 benefit all Americans and, also, be effective for our
17 economy.

18 There is evidence that this companies need this
19 encouragement, particularly now. Over the last two
20 decades, the medical loss ratio or the formula that
21 determines what percentage of profits goes to patient
22 care versus the administrative and marketing
23 expenditures, which Senator Rockefeller mentioned
24 earlier, has shifted.

25 Where health insurers spent more than \$0.90 of every

1 dollar on patient care in the early 1990s, that number
2 has decreased to \$0.81 of every dollar in 2007.

3 And according to testimony in Senator Rockefeller's
4 Commerce Committee earlier this year, the shift in the
5 medical loss ratio in recent years has translated into a
6 difference of several billion dollars in favor of
7 insurance company shareholders and executives at the
8 expense of health care providers and their patients.

9 So we need to do what we can to reverse that trend,
10 particularly now when the number of dollars coming into
11 these companies will be increasing substantially.

12 We have heard conversations from the other side
13 about how important it is to create incentives for good
14 behavior, making sure that we are working to encourage
15 people, Americans, to have healthy habits, and it is so
16 important here as we are providing a whole new
17 marketplace for the American insurance industry to be
18 able to encourage, again, those healthy habits, of moving
19 back to where we were in the 1990s, where \$0.90 of every
20 one of those dollars was going into patient care.

21 I think it is so important as we look at this bill
22 that we do present incentives. Again, I do not preclude
23 any of them, any insurance industries or anyone from
24 being able to pay what they would like to pay to their
25 employees, but just simply saying that subsidizing it by

1 American taxpayers' dollars is not going to be something
2 that is acceptable.

3 Those defending the status quo for health insurance
4 companies in opposition of my amendment have argued that
5 if we do not maintain the existing tax subsidy for this
6 executive compensation, then the cost of the compensation
7 will be passed on to the consumers.

8 What they do not really seem to understand is that
9 the American people are the ones footing the bill anyway.
10 This is a tax windfall for health insurance executive
11 pay.

12 Additionally, with an estimated 20 million new
13 customers and their corresponding premium dollars rolling
14 in, we can most definitely assume that health insurance
15 companies will have additional profits coming in.

16 So if we are not lowering definitely the premiums
17 for consumers with those profits, what exactly will they
18 be doing with those profits?

19 And a final point, the opposing view that this will
20 result in higher premium costs to consumers illustrates a
21 lack of forward thinking and understanding of what the
22 Chairman's mark actually does. Their assumption is based
23 on the current broken marketplace, where insurance
24 companies bully their customers and monopolize choices.

25 But the insurance market reforms we are

1 implementing, along with more consumer choices through
2 the exchange, these insurance companies are going to have
3 to have to work to keep the business that they have and
4 our hope is that they will be working hard to supply the
5 product for those new members that are in the exchange.

6 We want to ensure that our private insurers stay
7 healthy. We also want to make sure that as we provide a
8 captive audience in terms of consumers with the mandates
9 that we are putting into this bill, that there is not a
10 windfall or a temptation to those in the industry to be
11 able to continue to use those tax subsidies to pay
12 outrageous amounts of executive compensation.

13 Mr. Chairman, I think this is a fair policy change
14 that is aimed at reassuring American consumers and
15 taxpayers that health insurance executives are not
16 receiving a personal windfall and the companies they work
17 for are not receiving excessive tax breaks, while, at the
18 same time, profiting from a government mandate.

19 So I appreciate it, Mr. Chairman, for you allowing
20 me to bring up my amendment. I think it is so critical
21 as we look forward in what we are trying to do
22 comprehensively in changing health care, making sure we
23 create greater choices, more competition in the
24 marketplace that is going to really benefit everybody,
25 moving ourselves from that volume-based health care

1 delivery to value and to quality, and making sure that
2 more Americans are covered.

3 So I hope that my colleagues will take a look at
4 this. I have tried very desperately to make it a
5 reasonable amendment that really does reassure the
6 American public that what we are doing is not creating
7 something as a windfall to the insurance executives, but
8 more importantly, creating a balance with the resources
9 that we have to cover more Americans under health
10 insurance in a private system.

11 So, Mr. Chairman, with that, I would like to also
12 mention that I have got two others on this amendment,
13 Senator Menendez and Senator Conrad, who both have a
14 portion of the amendment that we are offering here
15 tonight, and I will punt it over to Senator Menendez.

16 Senator Menendez. Thank you, Senator Lincoln, Mr.
17 Chairman. Let me say I associate myself with the remarks
18 of Senator Lincoln on this. This is, in essence, simply
19 saying you are not going to be allowed to deduct
20 excessive remuneration from a tax code which we all pay
21 to, if, in fact, it goes beyond a certain level,
22 particularly from the proceeds of what are \$0.5 trillion
23 in subsidies.

24 I appreciate specifically Senator Lincoln working
25 with me to have a part of that savings be used for

1 federally qualified health centers. It is incredibly
2 important. We are both big supporters of community
3 health centers and the services they provide.

4 This amendment is important, because once Congress
5 passes health reform legislation and expands health
6 coverage to millions more of our fellow citizens, our
7 task does not end there. We have to ensure that the
8 promise of expanded coverage translates into the reality
9 of access to care.

10 In the wake of this reform, we will be looking to
11 our nation's federally qualified health centers or
12 community health centers to bring access to care to those
13 who gain coverage through this reform effort.

14 This amendment would ensure that community health
15 centers would not lose revenue when treating newly
16 insured patients, specifically those insured through the
17 exchange.

18 They have an exemplary track record when it comes to
19 delivering high quality care, often to the patients in
20 communities most in need, in both rural and urban parts
21 of the country. In my home state, over 300,000 of our
22 most vulnerable citizens receive high quality, affordable
23 primary and preventative care at more than 100 health
24 center sites across the state.

25 So with that, Mr. Chairman, I strongly support

1 Senator Lincoln's amendment and look forward to a very
2 supportive vote of the committee.

3 Senator Grassley. [Presiding.] As Chair pro tem,
4 I would like to use the privilege of it not to speak for
5 or against her amendment, but there is some involvement I
6 have had, through nonprofit investigations, certain
7 abuses of nonprofit.

8 I want to put a long statement in the record, but I
9 would like to just read three paragraphs from it so you
10 kind of know what I am getting at when I put this in the
11 record.

12 Now that the Chairman is back, I better ask if I can
13 put it in the record.

14 The Chairman. [Presiding.] Without objection.

15 Senator Grassley. There was much discussion
16 Tuesday about the motives of nonprofit organizations
17 versus for-profit organizations.

18 Let me just say that all nonprofits are not tax-
19 exempt, as my staff recently released analysis of ACORN
20 highlights. More importantly, tax-exempt entities can be
21 just as profit-driven as investor-owned entities.

22 Sometimes the only difference is that investor-owned
23 entities returned profits to shareholders, while tax-
24 exempt returned profits to executives. In the bill
25 before us, there is nothing that would prevent nonprofit

1 co-ops from paying their executives what AIG executives
2 get, just as an example.

3 I had an amendment that I am not going to bring up.

4 It was F-8. It does not set limits on compensation. It
5 would just hold tax-exempt organizations more accountable
6 for what they pay their executives.

7 I am going to put the rest of the statement in the
8 record. Thank you.

9 The Chairman. Without objection.

10 [The information referred to appears at the end of
11 the transcript.]

12 Senator Conrad. Mr. Chairman?

13 The Chairman. Senator Conrad?

14 Senator Conrad. Mr. Chairman, first of all, I want
15 to thank Senator Lincoln for her amendment that saves
16 \$700 million and \$200 million of that is going to the
17 Menendez amendment on federally qualified health centers,
18 which I strongly support.

19 In my state, we have five community health center
20 networks, with 12 clinics across the state. I have been
21 so impressed by how they conduct their operations. They
22 are providing a medical home, which almost all of the
23 health care reform advocates say is important to
24 improving the health care system in the country, and they
25 are operating at substantially lower cost than many of

1 the other medical facilities in my state.

2 So they play a very important role in reaching a
3 population that might not otherwise be reached.

4 My part of this amendment is far more modest. It is
5 \$50 million and it will follow legislation that I
6 introduced with Senator Susan Collins that will correct a
7 longstanding inequity in the reimbursement for nurse
8 midwives.

9 Nurse midwives, as every member of this committee
10 knows, provide very important services to women. My
11 amendment would provide reimbursement for services within
12 their defined scope of practice, as determined by state
13 law.

14 Nurse midwives currently receive only 65 percent of
15 what other health professionals receive for providing
16 similar care, and this addresses that inequity.

17 I might indicate that, interestingly enough, the
18 American College of Obstetricians and Gynecologists,
19 along with the American Nurses Association and the
20 National Rural Health Association, strongly support this
21 equitable reimbursement for nurse midwives.

22 I know in many parts of the country, they perhaps
23 are not as familiar with nurse midwives as we are in our
24 part of the country, but they play a very, very important
25 role in our communities.

1 I want to thank the Chairman for working with us on
2 this amendment, and, certainly, again, to Senator Lincoln
3 and Senator Menendez.

4 Senator Kyl. Mr. Chairman?

5 The Chairman. Senator Kyl?

6 Senator Kyl. Thank you. If I could ask a couple
7 of questions to the sponsor of the amendment. Does this
8 amendment apply to hospital executives?

9 Senator Lincoln. No.

10 Senator Kyl. Does it apply to drug company
11 executives?

12 Senator Lincoln. No. It is executives of
13 insurance.

14 Senator Kyl. How about executives of firms that
15 receive subsidies from the United States Government, like
16 solar companies or wind companies, that sort?

17 Senator Lincoln. No. I do not think that is the
18 purview of the bill.

19 Senator Kyl. Mr. Chairman, I would just make a
20 point.

21 Senator Lincoln. But I do not think we are
22 providing them a captive group of consumers, either.

23 Senator Kyl. Right. No. What we are doing is
24 providing them with direct cash money. I am talking
25 about all of the businesses that the United States

1 Government subsidizes.

2 This is really establishing an incredibly,
3 astoundingly bad precedent. I actually jokingly told a
4 person who was involved in one of these lobbying firms
5 downtown, it had something to do with insurance, I said,
6 "You know, if those folks that you're working for think
7 that they're going to do themselves a big favor by making
8 some kind of a deal with the Congress," I said, "the next
9 thing you know, Congress will be setting their pay."

10 Well, I thought it was a joke and now I see it has
11 actually come to pass. The United States Government
12 should not be setting private firms' salaries or putting
13 caps on them for tax deduction purposes, and yet that is
14 what is being done.

15 But it is mostly, I gather, because it is either a
16 disfavored group of people who do not have a lot of
17 friends around here anymore or it is on the theory that
18 we are doing them a favor, in this case, providing a
19 mandate that people buy their product. But as I said, we
20 provide a lot more direct subsidy for people we just give
21 cash to.

22 Robert Reich, who is a former Labor Secretary in the
23 Clinton Administration, wrote an op-ed piece in which he
24 talked about this and he said the worst thing you want to
25 do in today's -- he calls it the super-competitive

1 capitalism environment -- is to punish the people who
2 provide the ideas that enable a firm to do better than
3 its competitors, and he goes into a lot of reasons for
4 this.

5 But he says, "How does the modern corporation
6 attract and keep consumers and investors who have better
7 and better comparative information? How does it
8 distinguish itself?" More and more, that depends on its
9 CEO, who has to be sufficiently clever, ruthless and
10 driven to find and pull the levers that will deliver the
11 competitive advantage.

12 The reference to the TARP legislation also is a bit
13 misleading, because there we limited this to specifically
14 the chief executive officer, chief financial officer, and
15 the three highest paid officers other than those two.

16 But this amendment applies to all officers,
17 employees, directors and other workers or service
18 providers, such as consultants performing services. So
19 it does not apply just to the top five people. It
20 applies to anybody that has any connection working for
21 the company, including consultants.

22 Mr. Chairman, if we start down this road, this may
23 play well in some groups of constituents, but the reality
24 is it is involving the United States Government in more
25 and more places where the government has no business.

1 We are not taking over the insurance companies, but
2 we are dictating to them what kind of insurance policies
3 they can offer. They can offer no more than four
4 specific kinds. They have to offer two of them.

5 We set the exact value of those policies, many of
6 the conditions, all of the things that have to be
7 covered. Now, we tell the executives that they can make
8 up to a certain amount of money and have it tax
9 deductible.

10 I think the American people are tired of Congress
11 meddling in the private sector and this is one more
12 example this committee I do not think will be very proud
13 of if it passes this amendment at the end of the day.

14 Senator Lincoln. Mr. Chairman?

15 The Chairman. Are we ready to vote? Senator
16 Lincoln?

17 Senator Lincoln. Can I just make a few last
18 comments? I certainly appreciate Senator Kyl's comments.
19 I think there are good folks out there in the insurance
20 industry. I know I have worked with an awful lot of them
21 and certainly appreciate that and appreciate what they
22 do.

23 I will say, just to qualify, that it only applies to
24 insurance companies that get 25 percent of their revenues
25 from the premiums from mandates. So we want to make sure

1 that it is those that are participating and that are
2 working hard to make this a success and who are taking
3 advantage of the fact that we have required every
4 American to participate in this.

5 And we are not dictating what they can pay their
6 employees. We are just simply saying that if they want
7 to pay more than \$500,000, they are not going to get
8 incentivized to do so by tax deductions, that the
9 taxpayers are not going to pay for that subsidy to
10 increase that executive's pay.

11 I would just say to the gentleman, you look back
12 from 2007 and there are some good apples and there are
13 some good folks in the insurance industry and I do not
14 disagree with that, but there are others that are making,
15 in executive positions, upwards of \$23 million annually.

16 So if we are looking to these companies where we are
17 going to provide a captive audience of consumers, I think
18 it is only fair to ensure to the consumers that they are
19 not going to subsidize the tax incentive for them to
20 increase that executive pay over the \$500,000 limit.

21 I would just end by saying, Mr. Chairman and to my
22 colleagues, I heard a speech the other day that talked
23 about why people do the right thing, and there are really
24 four reasons why people do the right thing.

25 First of all, they sometimes do it out of guilt.

1 They feel guilty, so they do the right thing. Some of
2 them do it out of fear. I have got teenage boys and if
3 they know they are going to get grounded, they pretty
4 much do the right thing.

5 Some people do it out of selfishness, there is
6 something in it for them. And then sometimes you do the
7 right thing because it is the right thing.

8 I think this is the right thing and the right
9 message to the American people as we move forward in
10 trying to put our country back on track and its economy
11 back on track, with health care that is going to be more
12 efficient and effective. It is going to be broader
13 coverage for all Americans, and we are going to require
14 them to get into that marketplace.

15 I think it is only fair to say that they are not
16 going to subsidize any windfall for the executives of
17 these companies.

18 So thank you, Mr. Chairman, I appreciate it. I
19 would also like to compliment my colleagues, thank
20 Senators Menendez and Conrad for working with me to craft
21 this amendment package.

22 Arkansas's federally qualified health centers serve
23 more than 100,000 patients in our state with
24 comprehensive, preventive and primary care, mental
25 health, dental, pharmacy, other services. They are often

1 the lifeblood of our communities and we are grateful to
2 them and to Senator Menendez.

3 Without a doubt, the certified nurse midwives in
4 Arkansas have done a tremendous job and I want to
5 compliment Senator Conrad on moving forward with that.

6 Thank you, Mr. Chairman.

7 The Chairman. Thank you, Senator. We are ready to
8 vote on your amendment. The Clerk will call the roll.

9 The Clerk. Mr. Rockefeller?

10 Senator Rockefeller. Aye.

11 The Clerk. Mr. Conrad?

12 Senator Conrad. Aye.

13 The Clerk. Mr. Bingaman?

14 The Chairman. Aye by proxy.

15 The Clerk. Mr. Kerry?

16 Senator Kerry. Aye.

17 The Clerk. Mrs. Lincoln?

18 Senator Lincoln. Aye.

19 The Clerk. Mr. Wyden?

20 Senator Wyden. Aye.

21 The Clerk. Mr. Schumer?

22 Senator Schumer. Aye.

23 The Clerk. Ms. Stabenow?

24 Senator Stabenow. Aye.

25 The Clerk. Ms. Cantwell?

1 Senator Cantwell. Aye.
2 The Clerk. Mr. Nelson?
3 Senator Nelson. Aye.
4 The Clerk. Mr. Menendez?
5 Senator Menendez. Aye.
6 The Clerk. Mr. Carper?
7 Senator Carper. Aye.
8 The Clerk. Mr. Grassley?
9 Senator Grassley. No.
10 The Clerk. Mr. Hatch?
11 Senator Hatch. No.
12 The Clerk. Ms. Snowe?
13 Senator Snowe. Aye.
14 The Clerk. Mr. Kyl?
15 Senator Kyl. No.
16 The Clerk. Mr. Bunning?
17 Senator Bunning. No.
18 The Clerk. Mr. Crapo?
19 Senator Crapo. No.
20 The Clerk. Mr. Roberts?
21 Senator Grassley. No by proxy.
22 The Clerk. Mr. Ensign?
23 Senator Grassley. Pass.
24 The Clerk. Mr. Enzi?
25 Senator Grassley. No by proxy.

1 The Clerk. Mr. Cornyn?

2 Senator Grassley. No by proxy.

3 The Clerk. Mr. Chairman?

4 The Chairman. Aye. The Clerk will tally the vote.

5 The Clerk. Mr. Chairman, the final tally is 14
6 ayes, eight nays, and one pass.

7 The Chairman. The amendment carries. Next
8 recognized, Senator Grassley.

9 Senator Grassley. This is amendment F-5. I offer
10 this amendment in pursuit of the President's philosophy
11 that he expressed in the joint session of Congress that
12 health care reform would not add to the deficit.

13 Quote, "I will not sign a plan that adds one dime to
14 our deficit either now or in the future. I will not sign
15 it if it adds one dime to the deficit now or in the
16 future, period," end quote.

17 The President did not stop with a hollow pledge on
18 this point, however. He backed up his promise with a
19 promise to have a fail-safe mechanism to ensure that
20 health care reform would not add to the deficit.

21 Here is what he said on that point, quote, "To prove
22 that I'm serious, there will be a provision in this plan
23 that requires us to come forward with more spending cuts
24 if the savings we promise don't materialize," end of
25 quote.

1 CBO may well estimate that this bill is deficit-
2 neutral. CBO could be wrong. We have, unfortunately,
3 seen this several times. That is not saying anything in
4 a denigrating way to the professionals at CBO, because
5 they have a tremendous tough job sometimes looking to the
6 future.

7 So let us face it. It is really pretty impossible
8 to predict exactly how the spending in this bill will
9 play out, especially when you think about predicting 10
10 years down the road.

11 Yet, right now, there is nothing to prevent
12 provisions in this bill from adding to the deficit in the
13 likely event that the spending under health reform turns
14 out to be different than CBO is predicting, and that
15 increased spending will add to the deficit.

16 So I go back to the President's strong commitment
17 that he made in the joint session of Congress. He said
18 he wants a fail-safe mechanism.

19 So my amendment would require a fail-safe to make
20 sure there are no deficit increases because of health
21 care reform, not even one dime, as the President said.

22 This amendment would work this way. Starting in
23 2012, the director of White House Office of Management
24 and Budget would be required to certify whether or not
25 health reform will add to the federal deficit in the

1 coming fiscal year, and that certification would be
2 included in the President's budget.

3 If the OMB director finds that health reform is
4 adding to the deficit, then Congress must be notified and
5 exchange subsidies are automatically reduced to the point
6 that they are fully paid for and not adding to the
7 deficit.

8 At that point, Congress can always intervene and
9 pass additional cost reductions to keep exchange
10 subsidies in place.

11 So my amendment is a circuit-breaker. If it turns
12 out that health reform starts adding to the deficit, it
13 kicks in and dials the spending back.

14 We are all aware of our ballooning budget deficit.
15 Both CBO and OMB estimate 2009, \$1.6 trillion, 11 percent
16 GDP. This is the highest since World War II. August,
17 OMB increased its cumulative 10-year deficit projection
18 \$2 trillion.

19 According to CBO, the publicly-held national debt in
20 2019 will be \$14 trillion or 68 percent of GDP. So I
21 think we are all alarmed by this and I could go on and on
22 about why we need to do this as we look into the future.
23 But I think you can see that we have something here that
24 will make sure that this does not happen and keep the
25 President's promise. And I will put the rest of the

1 statement in the record.

2 [The statement appears in the appendix.]

3 The Chairman. Senator, thank you very much. We
4 are all committed to not add to the deficit. We believe
5 this bill will not add to the deficit. I believe CBO's
6 determination that it will not.

7 But I clearly want to do what we can to achieve that
8 objective and I am willing to accept the amendment.

9 Senator Grassley. Thank you very much.

10 Senator Wyden. Mr. Chairman?

11 The Chairman. Without objection, the amendment is
12 agreed to. Senator Wyden?

13 Senator Wyden. Mr. Chairman, I would call up D-17,
14 as modified.

15 The Chairman. Senator, are you ready?

16 Senator Wyden. Yes. Thank you, Mr. Chairman. Mr.
17 Chairman, this amendment is one that has been authored by
18 Senator Nelson, Senator Schumer and yourself. I will be
19 brief.

20 The goal of this amendment, as it is for health care
21 generally, is to reform our system so as to promote high
22 quality care. What this amendment would do is move the
23 Medicare Advantage program into exactly that kind of
24 incentive-based, reward-driven system.

25 The amendment would increase payments for the very

1 best plans. And this amendment, in the context of the
2 mark, is budget-neutral.

3 Mr. Chairman, I think you have helped to move
4 Medicare Advantage in the right direction. I am very
5 appreciative of it and I think this is an effort to go
6 further.

7 The government now provides what amounts to a
8 quality rating system, where, in effect, senior citizens
9 can now go to Medicare.gov and see, for example, how many
10 stars a program actually has. It is possible to compare
11 health plans on the basis of quality.

12 What our amendment would do is boost the payments by
13 1 percent to those plans that receive a very high rating.
14 Right now, not only are these high quality plans in
15 Oregon, but there are ones in Massachusetts, New York,
16 Florida, Idaho, Montana, Kentucky, Washington, and a
17 number of other states in our country.

18 Seniors across the country are going to benefit from
19 this amendment. We all have seniors in our home states
20 who are looking for high quality health care plans.

21 Let me wrap up by just making a short reference as
22 to what constitutes a high quality plan. The government
23 makes a number of judgments with respect to quality.
24 They focus on staying healthy, screenings, tests and
25 vaccines, getting timely care from physicians and

1 specialists, managing chronic or long-lasting conditions,
2 and, also, the appeal rights that would be available to
3 senior citizens under the plan.

4 Mr. Chairman, let me close by saying that I believe
5 modernizing the Medicare program is an integral part of
6 reforming our health care system nationally. Rewarding
7 plans across the country ensure that it will be possible
8 to give the best possible care for the nation's older
9 people, and I hope my colleagues will accept the
10 amendment.

11 I thank my colleagues, particularly Senator Nelson,
12 Senator Schumer and yourself, Mr. Chairman, for your
13 assistance in this effort.

14 Senator Schumer. Mr. Chairman?

15 The Chairman. Senator Schumer?

16 Senator Schumer. Thank you, Mr. Chairman. I rise
17 in support of this amendment. Thank Senators Wyden,
18 Nelson and yourself for helping with it.

19 It does not add any new costs. It rather says what
20 we are going to do for Medicare Advantage and puts it
21 into the high quality programs in my State of New York.
22 We have a good number of very high quality programs,
23 everyone agrees, and they should not be given the same
24 type of treatment as the programs that are not high
25 quality and do have many of the abuses we have talked

1 about.

2 So I hope we can move this amendment quickly.

3 The Chairman. I am willing to voice vote this
4 amendment. Seeing no objection, all those in favor, say
5 aye.

6 [A Chorus of Ayes.]

7 The Chairman. Those opposed, no?

8 [No response.]

9 The Chairman. The ayes have it and the amendment
10 is agreed to.

11 I understand Senator Kerry has an amendment or two.

12 Senator Kerry. Mr. Chairman, thank you. I would
13 call up Kerry amendment number 235 C-10. Mr. Chairman,
14 obviously, we are wrestling with this issue of
15 affordability and this morning at our meeting, we had
16 some discussion about it, and both of my amendments are
17 geared to try to deal with components of that.

18 All of us know, we have heard this for the last few
19 days, everybody understands that people have an
20 increasingly difficult time affording health care and
21 even those who have the insurance are finding it
22 increasingly difficult to hold onto it.

23 So people make a lot of choices, health care or
24 savings, college education, other things. I know you
25 have been trying to deal with this issue of

1 affordability, but I still think we have to make some
2 progress on it, to be honest with you.

3 I guess we are going to have a vote at some point on
4 the Schumer amendment, which will address one component
5 of that.

6 But you have tried to deal with it, Mr. Chairman, in
7 the mark by creating a system that bases the cost of
8 health care on people's ability to pay, and the modified
9 mark reduces the maximum amount of income that a person
10 can spend on a health care premium.

11 We have a range from 2 percent for those with income
12 at 100 percent of the poverty level and 12 percent is the
13 maximum amount of income you can spend if you are at 300
14 to 400 percent of the poverty level.

15 I think that is a good start. But still, under that
16 plan, too many low and middle income families, I believe,
17 would still be paying too much. And those percentages do
18 not include out-of-pocket expenses. So the total
19 expenses for those families could be even higher.

20 What concerns me here is that perhaps one of the two
21 most essential ingredients, and I have said this since
22 day one, is what we do here has to slow the rate of
23 growth in health care costs and hopefully lower the
24 premiums for a lot of Americans.

25 The second thing is it has to guarantee we deliver

1 at least equal quality care, if not better quality care.
2 Now, I am concerned that the low actuarial values of the
3 plans may make it difficult for some folks to afford the
4 out-of-pocket expenses. That is one concern.

5 But, also, if I had my druthers, I would rather
6 include an additional cost-sharing subsidy, and I am
7 going to look for it when we get to the floor today and
8 that may be a better place to do that.

9 But I do believe we could improve on the mark here
10 by making the premium tax credits more affordable for
11 those with low incomes. I talked previously about the
12 age rating band -- so older Americans do not have to pay
13 premiums that are prohibitively expensive, and we have
14 sort of moved beyond that now.

15 But here is what happened. There is a chart that
16 shows where we go here. The Chairman's mark forces low
17 income families to pay a greater percentage of their
18 income on health insurance premiums over time, and I am
19 not sure a lot of colleagues have necessarily focused on
20 that, maybe they have.

21 Premiums cannot consume more than 2 or 12 percent of
22 income based on your level of poverty. However, the
23 premium caps are allowed to grow based on the increased
24 cost of the premiums.

25 So in effect, we are linking the cap to the rising

1 cost of health care itself rather than to some other
2 index, like consumer price or something else. As a
3 result, low income individuals could face a premium that,
4 down the road, consumes from 6.5 percent to 20 percent of
5 their income just two decades from now.

6 Now, Mr. Chairman, if it is unaffordable for a low
7 income person to pay more than 12 percent of their income
8 on a health insurance premium in 2013, why is it
9 acceptable to allow a premium to consume nearly 20
10 percent of their income in 2029?

11 So this amendment would prevent the premiums from
12 consuming a growing share of income over time. It would
13 eliminate what I think is a wrongly chosen indexation and
14 allow premium contribution levels to remain at a
15 consistent percentage of income, which it seems to me is
16 the principle that we are trying to invoke here.

17 The provision in the mark was designed to limit how
18 much the Federal Government would have to pay for health
19 care for low income people and in its attempt to save
20 federal dollars, it forces low income families to pay
21 nearly one-fifth of their incomes on premiums, and that
22 does not include deductibles, co-pays or other out-of-
23 pocket expenses.

24 So I think we have got to ensure that we have
25 affordable insurance premium options to low and middle

1 income families and, by any standard, I think that
2 becomes unaffordable.

3 So it seems to me that if we do not seize this
4 moment for this historic reform to truly reform it for
5 those folks, we are all going to pay a price in the
6 failure of the system down the road and that will
7 continue to debilitate the health and the finance of
8 millions of families and our economy.

9 So I just wanted to chat about this a bit, Mr.
10 Chairman. Maybe there is a way to have a guarantee that
11 between now and the floor, we can actually get something
12 on this.

13 But what concerns me is we have been talking for a
14 month or more about the \$25,000 versus \$21,000 and we
15 have not yet landed on that. So I just want to try to
16 make certain here that we are going down the right road.

17 Do you want me to talk about the other amendment? I
18 want a commitment, Mr. Chairman, that we are going to get
19 something done between now and the floor. I do not want
20 to withdraw it if we are not prepared to actually address
21 it.

22 The Chairman. Well, you raise an issue, frankly.
23 There is a tradeoff between basically holding people
24 harmless, on one hand, and just sort of bending the cost
25 curve on the other, and the provisions in the mark, I

1 would say, significant in addressing utilization.

2 But you make a very good point that the amendment
3 you are offering will have the effect of holding
4 individuals harmless.

5 I understand that point. I think it is a very good
6 point and I think it is something that deserves very
7 strong consideration.

8 Senator Kerry. According to Gruber, who has been
9 our guide on a lot of this, it is somewhere in the
10 vicinity of an \$8 billion cost. We could not get CBO
11 actually to score this for us. But that is about the
12 cost that I think it is.

13 I have a couple of offsets. If the Chairman is
14 willing, I know we are not going to do that here tonight,
15 but I really would like to know that we are going to
16 address this in good faith between now and the floor or
17 even a melding of the bill.

18 The Chairman. You have got my pledge to address it
19 in good faith, because you raise a good point.

20 Senator Kerry. I appreciate that, Mr. Chairman.
21 And with that commitment, I know you have kept your word
22 on this otherwise. In many instances, we have been able
23 to make progress. So I will withdraw the amendment and
24 try to do that.

25 I have a second amendment, Mr. Chairman. It is an

1 issue we talked about the other day, I think yesterday.
2 I cannot remember which meeting, we have had so many.
3 And a number of our colleagues thought this was an idea
4 that --

5 The Chairman. If you would identify it, please.

6 Senator Kerry. This is Kerry amendment number 233
7 C-8.

8 The Chairman. C-8.

9 Senator Kerry. Now, Mr. Chairman and my
10 colleagues, in Massachusetts, which has been the subject,
11 happily, of a lot of discussion about some of the things
12 we have been able to make happen, our health insurance
13 exchange is not just an open market of choices.

14 It provides consumers with a variety of plans that
15 have been chosen because of their value and their
16 competitive features. States, in my judgment, ought to
17 have the ability to be able to be prudent purchasers. I
18 think we want states to be able to leverage the best
19 plans and the best prices and the best options that they
20 can according to the standards of those states.

21 Allowing exchanges to simply offer every licensed
22 health plan is only going to lead to consumer confusion
23 and I think it is going to lead to wasteful spending on
24 inefficient plans.

25 Now, I appreciate that the changes reflected in the

1 modification, the mark, creates a rating system based on
2 quality and price, and that is a fair, good first step. I
3 accept that.

4 But what we are really talking about here is getting
5 value out of the health care system. And if we are going
6 to set up a new health care marketplace, we ought to give
7 consumers the benefit of offering a high value-added
8 plan, a high value plan for those people to choose
9 between.

10 In Massachusetts, Mr. Chairman, the Connector is
11 able to negotiate with plans for lower bids in
12 Commonwealth Care. In other words, someone wants to
13 offer health care, they come into the Connector, and that
14 is not the end of it. They do not just give you the plan
15 and say, "Here, take it or leave it."

16 The Connector has the ability to come back and say,
17 "Well, we think you can do better here." It is like any
18 bidding, like any kind of contract.

19 And the result is we save 6 percent off the cost of
20 premiums; 6 percent is an enormous amount when translated
21 to the billions of dollars for the American taxpayer.
22 And the Connector works with plans in order to find cost-
23 effective savings, including limited networks, wellness
24 programs, participation discounts, and favored enrollment
25 rules.

1 We had the vote earlier that passed on Senator
2 Ensign's amendment, and I voted for it in the end to
3 improve wellness programs. And the Connector's ability
4 to negotiate contracts for Commonwealth Care, Mr.
5 Chairman, has placed an appropriate level of pressure on
6 carriers to keep the rate increases low.

7 We had a very spirited debate here about public
8 plans. Many of us feel very strongly, and I think we
9 will pick this fight up on the floor, obviously, that you
10 need something in order to compete with the companies and
11 pressure them to change outdated, outmoded, simple, easy,
12 status quo practices.

13 Over the three years of our program, the average
14 premium increases in our state have been only 4.7 percent
15 compared to 8 percent average premium increases for
16 private insurance.

17 Medicaid managed care organizations have also been
18 shown to be cost-effective, save money and they produce
19 good outcomes. I think we need to develop policies to
20 encourage the participation of Medicaid managed care
21 organizations that are comparable in quality and the
22 networks to other plans.

23 In Massachusetts, Commonwealth Care started with
24 exactly such plans, local, nonprofit Medicaid managed
25 care organizations, which enjoy a 10 to 20 percent

1 premium advantage over the local broad network nonprofit
2 commercial plans, which, in turn, enjoy a 10 to 20
3 percent premium advantage over national for-profit health
4 plans.

5 That is how you offer people an opportunity to have
6 a choice with a low premium and affordable plan. Most of
7 the savings from Medicaid managed care organizations are
8 due to negotiating low provider payment rates, as well as
9 their own low administrative overhead.

10 They pay Medicaid Plus rates to get provider deals
11 and they retain about 8 percent for administration and 2
12 percent for the margin.

13 So the savings realized from using MCOs would be
14 used to improve affordability, and that is a smart
15 policy. It saves money for both the taxpayer and for the
16 consumer.

17 Taxpayer dollars are used for subsidies and MCOs
18 would reduce the dollar amount necessary for each
19 subsidy. So you win on both sides of the equation.

20 Mr. Chairman, the Commonwealth Health Connector, in
21 other words, is much more than just a portal for allowing
22 information about insurance options.

23 It performs a variety of functions, bidding and
24 contract negotiation, enrollment, premium billing,
25 management of subsidized and unsubsidized insurance

1 plans, and customer service support.

2 And that is how we have been able to get to only 2.6
3 percent of our population that today does not have any
4 insurance at all.

5 Mr. Chairman, this amendment would simply allow
6 state exchanges to engage in prudent purchasing with no
7 federal intrusion. The Federal Government does not do
8 this. There is no federal takeover. There is no
9 Washington decision.

10 We simply allow states exchanges to engage in
11 prudent and selective purchasing of insurance and that
12 would empower exchanges to be good stewards of taxpayer
13 dollars. It would encourage states to allow Medicaid
14 managed care organizations or comparable plans to provide
15 coverage to enrollees.

16 If you allow plans to compete to participate in the
17 exchange, that is exactly what large employers already do
18 to vet their health plan options for their employees,
19 including, I might add, the Federal Employees Health
20 Benefits Plan.

21 I believe we ought to allow the average American to
22 do what we in Congress get the benefit of. At least we
23 are not giving the same plan, but why not give them the
24 same right to have their state negotiate for the better
25 benefits that lower the prices and give them a better

1 option.

2 Regrettably, I am still waiting for CBO, as we wait
3 often here right now, for them to score this amendment,
4 but I am convinced it will generate savings. It is hard
5 to understand how this amendment would not generate
6 savings and the question for us is how much.

7 We are struggling with this question of the \$21,000
8 versus \$23,000 versus \$25,000 and this is an ideal
9 opportunity to be able to raise that threshold and
10 provide capacity to have competitive bidding.

11 Mr. Chairman, in your mark, you had proposed a
12 policy for competitive bidding for Medicare Advantage.
13 The implementation of that policy is supposed to weed out
14 inefficient plans and ensure that federal Medicare
15 dollars are being spent to reward value.

16 Why would we not want the same principle to apply
17 across the board here? The Federal Government is
18 devoting \$463 billion in subsidies to provide coverage to
19 people with low and moderate income.

20 Why do we not want the taxpayer paying for their
21 subsidies to be able to get the best deal that they can
22 get?

23 So my amendment would ensure that the Federal
24 Government is not simply writing a blank check to
25 insurance companies and it would only subsidize plans

1 that are cost-effective and efficient. And I would ask
2 that we think about this and pass it.

3 The Chairman. I see it is being met with a
4 deafening silence. I appreciate that, Senator. I have
5 been conducting other business. You would like what,
6 now?

7 Senator Kerry. Well, I would like you to pass it.
8 I would like you to accept it.

9 The Chairman. I know you would, which we,
10 obviously, cannot do.

11 Senator Kerry. Well, I would like to know why we
12 should not.

13 The Chairman. Is there a score?

14 Senator Kerry. As I said, we do not have the score
15 from CBO yet, but we are guaranteed savings. If you
16 negotiate a plan for less than it is offered at bid, you
17 save, and we save taxpayer dollars.

18 Can I tell you exactly how much we save today? No,
19 but we saved 6 percent in Massachusetts. So the question
20 is: is 6 percent worth it and is it worth it to give
21 people a better buy for their dollar? I would think
22 everybody would vote for this. I mean, this is free
23 enterprise. This is competitive bidding.

24 The Chairman. Every state is unique, including
25 Massachusetts. So it is unclear exactly how this is

1 operated nationwide.

2 Senator Kerry. Mr. Chairman, it just gives the
3 state, the State of Montana would have the right in its
4 exchange to not just collect plans, but to actually allow
5 the person collecting the plans to go back to the person
6 who gave it to them and say, "I think you can shave off
7 of this. I think you could provide this service for less
8 money."

9 The Chairman. It raises, again, the basic question
10 that you raised earlier on public option. It also gets a
11 little bit into what Senator Cantwell is doing.

12 Senator Kerry. With a zero public component to it.

13 The Chairman. It also raises the question of cost.
14 This is something that is certainly meritorious, but I do
15 not think we can work it out at this late time tonight.

16 I think it is very important to look at ways to
17 enhance negotiation. I think that is important. But I
18 do not know that -- this has come up very late. There
19 has been a lot of discussion about exchanges, what they
20 do and do not do, are they a clearinghouse, are they a
21 gatekeeper.

22 I think it behooves us to have thought this through
23 a lot more before we can consider it tonight. But you
24 raise a good point about negotiation, the importance of
25 negotiation.

1 Senator Conrad. Mr. Chairman?

2 The Chairman. Senator Conrad?

3 Senator Conrad. Mr. Chairman, I have heard Senator
4 Kerry on this point now two or three times and the more I
5 listen to him carefully, the more convinced I am that he
6 has got something here that has value.

7 I try to put myself in your shoes and the
8 difficulty, of course, is we do not have a score, as we
9 have experienced on other amendments, including two of
10 mine that I am not offering here because I cannot get a
11 score, and I know other colleagues are in this spot, too.

12 I am not being critical of CBO. I know that they
13 are swamped and this is extraordinarily difficult to
14 respond to the hundreds of amendments that all of us have
15 put on the table.

16 But it does create an awkward situation for the
17 Chairman when we do not have a score; I know that, as
18 well.

19 I wonder, Mr. Chairman, if there is not some way to
20 say to the Senator that between now and combining the
21 bills, that there will be a -- hopefully, there would be
22 a score by then, which would make a considerable
23 difference, and if the score reflects what Senator Kerry
24 believes it will, there would be savings here that could
25 be applied to other needs, and that at least the

1 assurance could be given him and others of us who are
2 interested in the concept that you would bend your best
3 efforts to get a score and then to seriously consider the
4 merits of it before the bills are combined.

5 The Chairman. That is a good idea.

6 Senator Kerry. Mr. Chairman, first of all, I thank
7 the Senator from North Dakota enormously and I know that
8 he has been thinking about this a lot.

9 There is no hidden whammy in this thing. This is, I
10 think, good policy and I think, on reflection, as we look
11 at it, other Senators are going to come to see it as
12 something they would want.

13 If you are a state's rights supporter, if you are
14 somebody who likes your home state to be able to make its
15 own choices, boy, this is right up your alley. This
16 empowers states and it also saves money and we have
17 proven that.

18 So I know we do not have the OMB score tonight. Is
19 it an amendment we have had filed the whole time. What I
20 would ask you is a twofold thing, Mr. Chairman. Number
21 one, I accept that you are willing to work with me in the
22 next days. I would like to have the number from OMB.

23 The Chairman. How about CBO?

24 Senator Kerry. CBO, excuse me. But second, I
25 would also like to ask that if we get that number back,

1 given my strong feelings about raising that \$21,000
2 threshold level up to hopefully -- I have asked for
3 \$25,000, but I recognize we are dealing with difficulties
4 here.

5 But if we get a decent savings here, I would like to
6 think about applying it to that effort.

7 The Chairman. I do not know if I can make that
8 commitment. I can make the first, but I do not know
9 about the second. There are a lot of other Senators'
10 interest, which you, I am sure, would agree with, in
11 addition to what you mentioned just now.

12 I do not want to commit to how savings are
13 allocated. Money is fungible anyway.

14 Senator Kerry. Well, what I am asking you to
15 commit to is the --

16 The Chairman. I understand the issue and I am very
17 sympathetic with raising those threshold levels. I am
18 thinking right now the Senator from Michigan, she is very
19 interested in raising those threshold levels.

20 Senator Kerry. Well, we have been working together
21 on it.

22 The Chairman. So there are certain allies there.

23 Senator Kerry. We have been working together on
24 it.

25 The Chairman. So we will work to get those

1 thresholds up.

2 Senator Kerry. Fair enough. With that stated, I
3 would ask unanimous consent to withdraw the amendment.

4 The Chairman. The amendment is withdrawn. Senator
5 Rockefeller is recognized for amendment.

6 Senator Rockefeller. This is amendment C-1 and I
7 will not ask for a vote on this tonight, because we have
8 kind of agreed that we are going to work this out,
9 because there is not that much difference between us.

10 And it has to do with this very unusual situation
11 where the self-insured, which is mostly the larger
12 companies, very big, semi-big, et cetera, are under
13 federal insurance jurisdiction, so that DOL does not do
14 that. So that they really do not have -- their insurance
15 does not have any controls at all.

16 The Chairman's mark goes a considerably way to
17 change that. I add on some more individual facts of -- I
18 will just use lifetime caps or that kind of thing. It
19 would not necessarily be that, but it would be like that.

20 I guess maybe some of my colleagues may argue that
21 many self-insured plans already follow many of the
22 reforms, but companies are different and they do not all
23 do it, and my idea is that it should be equal.

24 Those that are self-insured and larger and those
25 that are not self-insured and subject to state

1 regulations should have the same kind of constraints upon
2 insurance.

3 I have talked with the Chairman and I am incredibly
4 grateful to him for indicating that we will work on this.
5 We will not have a vote on it now and we will come to
6 agreement either before the vote or before the merging.

7 The Chairman. I appreciate that, Senator, and I
8 especially appreciate your raising awareness that the
9 provisions in the bill with respect to insurance market
10 reform, the individual market and the small group market,
11 namely, bans and prohibiting a company from denying
12 coverage based upon preexisting condition or health care
13 status. In addition to that, the reform will need to
14 state rating bands.

15 Those provisions basically, at least the first one
16 does not help insurance market reform, do not apply to
17 your large companies, do not apply to self-insured, do
18 not apply to ERISA plans, and that is a very important
19 point to make.

20 The second logical very important point is maybe
21 they should. Maybe they should apply. So that Americans
22 are better assured that they will have quality health
23 insurance, whether it is individual market, small group
24 market or large group market.

25 In the legislation, in the mark, so far, currently,

1 employer plans may not discriminate on health status,
2 medical condition, claims experience, and there are two
3 others. But your amendment would also require that
4 effective January 1, 2013, all self-insured will be
5 required to apply these requirements to all new plans;
6 that is, prohibition from applying preexisting condition
7 exclusions, prohibition on rescissions, guaranteed issue,
8 and guaranteed renewability.

9 Those are all very worthwhile goals and I, frankly,
10 think that they and perhaps a couple others may be, a
11 couple other provisions, the guarantees should be looked
12 at very seriously, very closely.

13 As the bills emerged and as we go through the
14 process, I would like to very much increase the
15 protections for Americans with respect to ERISA plans and
16 self-insured plans. You have got a good idea here.

17 Senator Rockefeller. Thank you.

18 The Chairman. Thank you. All right.

19 [Pause.]

20 The Chairman. We are pausing temporarily here to
21 work out some agreements. We are very close. Let me
22 list the amendments outstanding and somewhat in order,
23 somewhat.

24 First is a Schumer amendment, which he offered
25 earlier and withdrew. Next would be the Kyl amendment.

1 Senator Schumer. Mr. Chairman?

2 The Chairman. Yes?

3 Senator Schumer. It is now a Schumer-Snowe
4 amendment.

5 The Chairman. A Schumer-Snowe amendment. Oh, are
6 you not good. Are you sure it is not Snowe-Schumer?

7 Senator Schumer. It could be.

8 The Chairman. Well, I am not going to get into
9 that one. Anyway, it is the Schumer-Snowe amendment;
10 then Kyl F-3 on medical device fees; and then probably
11 Rockefeller with respect to CHIP; then Rockefeller,
12 Medicaid; Wyden, free choice; and, we might have a
13 cleanup amendment to fix a couple of minor points. That
14 is it.

15 Senator Bingaman?

16 Senator Bingaman. Mr. Chairman, the amendment that
17 I earlier talked about, I think, two days ago related to
18 two items. One was trying to streamline enrollment in
19 the exchanges and then the other part, the offset was
20 related to state mandates.

21 There has been some concern about the offset and it
22 was my hope that the part related to streamlining
23 enrollment could still be adopted as part of our markup
24 and I hope that is still possible.

25 The Chairman. I think it is.

1 Senator Bingaman. Well, I would like to be sure
2 that is somewhere on your list, if that is possible. I
3 have spoken to Senator Rockefeller and he is a strong
4 supporter of that effort, as well as I am a strong
5 supporter of his CHIP amendment.

6 The Chairman. But that further complicates
7 matters, because we have got to find revenue. I think
8 yours, as I recall, cost about \$4 billion to \$5 billion.

9 Senator Bingaman. \$4.4 billion. And we have
10 advised staff about possible ways that it could be paid
11 for and they are looking into that.

12 Senator Ensign. Mr. Chairman, please do not agree
13 to the amendment without that discussion, because we had
14 some problems with the streamlining.

15 The Chairman. All right.

16 Senator Bingaman. This is C-1, I believe, was the
17 amendment.

18 Senator Ensign. Did we not talk about this and
19 then it got put aside for a while?

20 The Chairman. Yes.

21 Senator Ensign. This is the one.

22 Senator Bingaman. I think the only part that I had
23 heard concerns about was the offset.

24 Senator Ensign. Well, just we did not discuss it,
25 because we put it off because we had some problems with

1 the streamlining.

2 Senator Bingaman. Really?

3 Senator Ensign. Yes, because it can make it
4 possible -- with some of the streamlining processes, it
5 could open it up to people who are here illegally because
6 it could make it too easy for them to apply.

7 That is one of the things I wanted to look into with
8 it.

9 Senator Bingaman. Well, I will be glad to debate
10 that with the Senator whenever the time is right.

11 The Chairman. Well, maybe we ought to do that
12 right now. We do not know what the offset is, but maybe
13 we could debate the merits of the administrative
14 streamlining and get that out of the way.

15 Senator Bingaman. Should I go ahead and describe
16 that part of the amendment?

17 The Chairman. I suggest that. Maybe have a debate
18 on the streamlining.

19 Senator Bingaman. Well, we had earlier passed it
20 out, it is C-1, and we can pass it out again. C-1, as
21 modified, and that is what we had passed out is C-1, as
22 modified.

23 The Chairman. They should be given a copy.

24 Senator Bingaman. Let me go ahead and describe
25 this while it is being passed out. The portion of the

1 amendment we are talking about now, which is the
2 streamlining, would direct the Secretary of Health and
3 Human Services, working in conjunction with the Secretary
4 of the Treasury, to establish a system of application,
5 enrollment and retention for Medicaid, CHIP and tax
6 credits that meet a series of requirements.

7 There are eight requirements listed and they are
8 requirements that we developed with the help of experts
9 who had looked at this.

10 The purpose, of course, is to facilitate people
11 signing up for the benefits that they are eligible to
12 receive, either in Medicaid or in CHIP or through this
13 new tax credit system that would be established in this
14 legislation.

15 The Secretary could promulgate model agreements,
16 enter into interagency agreements concerning data
17 sharing, consistent with the safeguards of privacy and
18 data integrity.

19 We have made it very clear that all of the
20 protections that otherwise exist in the law against
21 anyone fraudulently obtaining credits or obtaining access
22 to these benefits, all of those protections would remain
23 in place.

24 The only issue is whether a person has to go to
25 three or four offices to try to figure out what they are

1 qualified for or whether they could go to the exchange
2 and have that determination made and verified and sign up
3 at that point.

4 Senator Ensign. If the Senator would yield for a
5 question.

6 Senator Bingaman. Certainly.

7 Senator Ensign. What I thought earlier, and maybe
8 I am reading this wrong and maybe staff can even clarify
9 this if the Senator cannot, it says this form can be
10 filed online, in person, by mail or by telephone.

11 How do you know that that is who this person is if
12 they can do it by online, in person, by mail or
13 telephone? And what kind of protections are put in
14 place?

15 Senator Bingaman. Let me ask staff to respond to
16 that and ask if this is a procedure that is not currently
17 possible in these programs otherwise.

18 Mr. Schwartz. We may give a joint response here.
19 But at least as it relates to Medicaid, I think a number
20 of states have tried to already undertake some of these
21 efforts, as you indicated, Senator Bingaman, especially
22 in recognition of the situation that that population
23 finds itself in, and we have talked a lot about that in
24 the past couple weeks, the difficulty of going in person
25 to an office when you have an hourly job that would

1 require you to take off during working hours.

2 Senator Ensign. Could you describe to me, while
3 you are describing that, kind of give an example and tell
4 me how we know that it is you, that you are here legally,
5 that there is not some kind of monkey business going on
6 or whatever, and that we also know that it is you?

7 Is there a fingerprint? How do we know, if you are
8 on the telephone and you are filling out this form on the
9 telephone?

10 Mr. Schwartz. Well, obviously, Senator Ensign,
11 there is no fingerprint if you are not in person, but I
12 am not aware of any fingerprint requirements for
13 Medicaid.

14 But there are documentation requirements that were
15 added in the Deficit Reduction Act to the Medicaid
16 program. We have talked about them, as well. So that
17 goes to your question about your status as a citizen or a
18 legal permanent resident. There is a list of documents.

19 A number of them do also confirm your identity,
20 because things like a passport or a driver's license
21 would have a photo. So those sort of kill two birds with
22 one stone.

23 Senator Ensign. Except that if you do not see the
24 person, how do you know the photo is correct? Let me
25 give you an example. I remember watching *60 Minutes* -- I

1 do not want to give credit to any programs out there, but
2 birth certificates and death certificates are not cross-
3 referenced in states.

4 So let us just say, for instance, somebody dies, and
5 we have all had these cases in our offices where
6 somebody's Social Security benefit gets cut off or
7 whatever. We call them our Lazarus cases, where we have
8 to raise them from the dead, because they really did not
9 die.

10 There are all kinds of things like this that go on
11 because they do not coordinate the death certificate and
12 birth certificate.

13 So let us say that somebody wrongly has a birth
14 certificate. They read the obituaries. They got
15 somebody's birth certificate. They fill it out. How do
16 they know that this is not being done? They have got a
17 valid birth certificate.

18 Mr. Schwartz. Obviously, we have talked about this
19 before, as well, that there are ways around the system.
20 Of course, that is illegal. So if you apply for federal
21 benefits -- I am unfamiliar with all of the statues, but
22 certainly it is like a False Claims Act violation,
23 because you are misrepresenting the truth.

24 Senator Ensign. But you are already here
25 illegally. By definition, if you are here illegally, you

1 have broken the law already. You are an illegal alien.
2 You are now applying with somebody else's birth
3 certificate that you have obtained.

4 How do we know it is you? He said that there are
5 protections built in. I do not see the protections.

6 Senator Bingaman. Let me just clarify that the
7 concerns that you are raising relate to the Chairman's
8 mark. They do not relate to my amendment.

9 Senator Ensign. Well, it says that the form can be
10 filed online, in person, by mail or telephone.

11 Senator Bingaman. But that is true with Medicaid,
12 as I understand it. Is that wrong?

13 Mr. Schwartz. That is true under current law and
14 how the program operates.

15 Senator Bingaman. Yes. That is current law you
16 are concerned about.

17 Senator Ensign. Yes. I have been concerned about
18 that for some time.

19 Senator Bingaman. Right. So it is not a concern
20 about my amendment. It is a concern about current law.
21 I just wanted to make it clear that I am not changing the
22 requirements that people have to meet in order to sign
23 up.

24 I am not changing the eligibility and I am not
25 changing the verification requirements that they have to

1 meet.

2 Senator Kyl. Senator Bingaman, would you yield for
3 a question on that point? I know this language is not
4 legislative language, but line two says the form can be
5 filled online, in person, by mail or by telephone.

6 It is hard to see how you could do that and maintain
7 the same verification requirements that are in the
8 legislation.

9 Senator Bingaman. I think that is just what the
10 staff just advised is current law, that each of those is
11 possible under current law. I do not mind crossing out
12 line two, if you do not like line two.

13 But we are not changing current law with regard to
14 what process you follow. All we are saying is let us all
15 do it in a coordinated way so that you do not have to go
16 to one office to get signed up for CHIP and a different
17 office to get signed up for Medicaid and a different
18 office to get the exchange.

19 Senator Kyl. Current law, though, there are no tax
20 credits in current law. So we are creating a new product
21 here.

22 Senator Bingaman. No. We are creating --

23 Senator Kyl. Is staff telling me that for
24 Medicaid, you can sign up by telephone?

25 Mr. Schwartz. I do not know for sure about

1 telephone, but I do know that you can do things online
2 and by mail.

3 Senator Kyl. I really suggest that the Senator
4 think carefully about this, because this is one of those
5 ones that is just made to order for the talk shows, I am
6 afraid, and would strongly suggest that you consider
7 modifying that.

8 People are already concerned that we are going too
9 easy on eligibility and, obviously, there is a lot of
10 money involved here.

11 If we are worried about waste, fraud and abuse, and
12 the President at least has said he is, then we should do
13 everything we can to ensure that people cannot skirt what
14 would make good practices in eligibility verification.
15 Thank you.

16 Senator Bingaman. Could I ask staff to confirm or
17 contradict what I am trying to convey to my colleagues
18 here, that nothing in this amendment changes the law with
19 regard to how a person's identity is verified? Is that
20 right?

21 Mr. Schwartz. I think that is correct, Senator, in
22 terms of the Medicaid program. I think the question that
23 Senator Kyl asked specifically was what states do today,
24 and I honestly do not know if states allow telephone
25 applications.

1 They do vary and so there may be some that I am
2 unaware of. They certainly do in person, mail or online
3 parts of the process.

4 And if I understand your point correctly, you are
5 saying that you would leave that untouched, the state
6 flexibility, and that the goal of your amendment is to
7 better coordinate among these three programs, the tax
8 credits, CHIP and Medicaid. And the way that I read your
9 amendment, you are not changing the current law for CHIP
10 or Medicaid.

11 Senator Grassley. I think somebody ought to tell
12 us exactly how citizenship will be checked. The
13 Senator's good faith says you are not changing anything,
14 but we are down to a basis of how do you do it.

15 If there is an Internet application or phone
16 application, how do you know -- how do you check
17 citizenship under those circumstances?

18 Mr. Schwartz. Senator Grassley, for Medicaid and
19 CHIP, there are two basic ways. There is the list of
20 documents that were included in the Deficit Reduction Act
21 and then, more recently, earlier this year, in the
22 Children's Health Insurance Program reauthorization, we
23 created what we have come to refer to as the Social
24 Security option, which involves submitting the
25 applicants.

1 Senator Grassley. All right. But what if it is
2 done over the phone, how are you going to show those
3 documents?

4 Mr. Schwartz. Again, I do not actually know if the
5 phone works. I do not know if it is an option in the
6 states right now.

7 Senator Grassley. Through the Internet then, let
8 us say, through online application.

9 Mr. Schwartz. If you do an online application, it
10 is theoretically two ways. If it is a passport, you
11 could certainly be required to give your passport number,
12 or you could be required to mail in, I guess, a copy of
13 the front page -- I have to admit that I have not applied
14 for benefits in these programs, so I do not know.

15 Senator Bingaman. Mr. Chairman, let me just point
16 out here for my colleagues. It says here the form can be
17 filed online, in person, by mail or by telephone. So
18 this is not saying that all the verification is done that
19 way. It is saying that is a way that you can file your
20 application.

21 Senator Ensign. Senator Bingaman, how do you file
22 it by telephone, though, was my question?

23 Senator Bingaman. You can fax it.

24 Senator Ensign. You could fax it if that is --

25 Senator Bingaman. Or you can call up and you can

1 say, "Here is all my information" and they can fill it
2 out while you give it to them over the phone.

3 Senator Ensign. Could you put a line in that
4 actually says that the verification has to take place in
5 person with a photo ID?

6 Senator Bingaman. That is not current law. You
7 have lost that amendment.

8 Senator Ensign. Could we not make it better?

9 Senator Bingaman. You have lost that amendment.

10 Senator Ensign. Since you will not go for photo
11 ID, can we at least say that it should be verified in
12 person?

13 Senator Menendez. Senator Bingaman, will you
14 yield?

15 Senator Bingaman. Yes.

16 Senator Menendez. This is largely the debate we
17 had the other night and there was a vote and the vote was
18 pretty decisive, same issue.

19 It is an attempt to move a birth certificate or a
20 naturalization certificate as proof of citizenship to a
21 photo ID, a government-issued photo ID.

22 But I have to be honest with you, there are plenty
23 of government-issued photo IDs for which you do not have
24 to show your citizenship. You only have to show your
25 place of residency in a county and that will get you a

1 government ID.

2 Are you familiar, Mr. Schwartz, at all with the GAO
3 report that reviewed six state Medicaid programs in 2007
4 and found that verification rules had cost the Federal
5 Government an additional \$8 million and they caught only
6 eight undocumented immigrants?

7 So in other words, according to the GAO report, the
8 Federal Government spent \$8 million to save \$11,000. For
9 each dollar the Federal Government saved, we had to spend
10 \$755. Are you familiar with that GAO report?

11 Mr. Schwartz. I am. I believe it was a review of
12 the list of requirements for citizenship that the Deficit
13 Reduction Act added.

14 Senator Menendez. \$8 million spent to catch eight
15 undocumented immigrants, saving \$11,000; to spend \$8
16 million to save \$11,000, that is really cost-efficient.

17 Senator Bingaman. Let me ask staff to just briefly
18 review when an application is made for these tax credits
19 in the exchange, how that process will work.

20 As I understand it, people would apply for the tax
21 credits. It would be verified with the IRS. Could you
22 go through that very briefly?

23 Mr. Klouda. Certainly, Senator. The way the mark
24 reads, everyone who has an SSN, their name, date of birth
25 and SSN will be verified with the SSA, Social Security

1 Administration.

2 If that person attests to be a U.S. citizen, that
3 attestation will be checked against SSA's records, as
4 well. If they claim they are not a U.S. citizen, they
5 are also required to supply their A number or their I-94
6 number and that information will be checked with DHS to
7 see if they are lawfully present in the United States.

8 We also require that people submit their income
9 information, which we verify with the IRS.

10 Senator Bingaman. So all of that is in the
11 Chairman's mark.

12 Mr. Klouda. That is correct.

13 Senator Bingaman. And all of that would continue
14 to be there under my amendment.

15 Mr. Klouda. That is my understanding of your
16 amendment.

17 Senator Bingaman. We lost our Chairman, but that
18 is about all the explanation I can think of to give you.

19 Senator Ensign. Are those required in everything;
20 in other words, not just the tax credit? Are they
21 required for the other portions of the bill, the other
22 government programs in the bill, the Medicaid expansion?

23 Mr. Schwartz. I am sorry, we got confused. Could
24 I ask your indulgence? Could you repeat your question?

25 Senator Ensign. Yes. The requirements that Mr.

1 Klouda -- we are learning how to pronounce names around
2 here. Those requirements that you just read off, are
3 those requirements for all of the new programs in the
4 bill, required for all the new government -- some kind of
5 subsidies, whatever new programs that their citizens are
6 signing up for?

7 Mr. Schwartz. If I understand correctly, to get
8 the tax credits, you need to have a Social Security
9 number or a taxpayer ID number. That is not a
10 requirement for Medicaid or CHIP. If you have that, it
11 is one way that we can verify, but it is not a
12 requirement.

13 Senator Ensign. Let us just give an example. If
14 somebody has an I-10, taxpayer identification number,
15 that person was here legally, now that person has
16 overstayed their visa and still has an I-10 number, are
17 we going to know that? Are we going to find that out
18 through any of these?

19 If you are going through Medicaid, the expansion of
20 Medicaid right now, are you going to be able to find that
21 out?

22 Mr. Klouda. Well, if the person was a non-citizen,
23 they would have an A number or an I-94 number and that
24 would be checked with the DHS data.

25 Senator Ensign. That is what I just said, but he

1 just said that that was only applied for the tax credits.
2 I am saying is it applied for all of the programs in the
3 Chairman's mark?

4 Mr. Klouda. For the access to the exchange.

5 Senator Ensign. Yes, for the access to the
6 exchange. For expansion of Medicaid?

7 Mr. Schwartz. So I misspoke and I apologize. We
8 would catch them under the same mechanism, because you do
9 actually have to submit a Social Security number for
10 Medicaid. So I misspoke. I apologize.

11 You have to submit your Social Security number when
12 you apply for Medicaid.

13 Senator Ensign. And is that checked against if
14 somebody has overstayed a visa? You get a valid Social
15 Security number when you have a work visa in this
16 country.

17 Mr. Schwartz. So when you apply for Medicaid, if
18 you are not claiming to be a citizen, but you are
19 claiming to be here legally, then that would --

20 Senator Ensign. And you started legally, but now
21 you overstayed your visa. From what I understand, there
22 are several million in this country that have overstayed
23 their visas.

24 I do not know the exact numbers, but would those
25 people be found out?

1 Mr. Schwartz. The system would work the same,
2 because if you are not claiming citizenship, then it is
3 DHS, as Mr. Klouda said.

4 Senator Ensign. For all of the programs in the
5 bill. Not Medicaid expansion, from what I understand.

6 Mr. Schwartz. But it is current law.

7 Senator Bingaman. I think if my amendment is
8 adopted, the problem that the Senator is identifying or
9 thinking he might be identifying is solved.

10 As I understand it, when a person comes into the
11 exchange, if we are going to have these benefits provided
12 through an exchange --

13 Senator Ensign. By the way, I am not trying to
14 like be argumentative. I want to just make sure that it
15 is. Do you understand what I am saying?

16 Senator Bingaman. But I am telling you I think --

17 Senator Ensign. We want to have all these
18 precautions in place. I am just trying to make sure they
19 are.

20 Senator Bingaman. The chance of these precautions
21 being place is enhanced very substantially by my
22 amendment, because everybody comes into the exchange,
23 everybody's identity is verified, everyone demonstrates
24 what their income situation is and then if they are
25 eligible for Medicaid, they can be referred at that point

1 to Medicaid.

2 But they will already have been identified and
3 verified through IRS or through the Department of
4 Homeland Security.

5 Senator Ensign. Does the staff agree with the
6 statement?

7 Mr. Schwartz. I was actually conferring with
8 people smarter than I am to try to be better able to
9 answer your question. And when I said that for current
10 law, for Medicaid, they are required to verify, that is
11 in Section 1137 of the Social Security Act.

12 So we do not have to specifically apply it to the
13 Medicaid expansion, because it is current law in Medicaid
14 and what we do in the expansion is increase the mandatory
15 minimums for income eligibility levels. But we do not
16 specifically reapply all of the rules, because we are
17 just adding new people to the program as it exists.

18 Senator Ensign. My concern, actually, is his
19 amendment would strengthen and it would actually require
20 all of the things that Mr. Klouda said would be applied
21 across the board to everything in the bill now. Is that
22 correct?

23 Mr. Klouda. My understanding is that the
24 procedures that are in the Chairman's mark for verifying
25 eligibility very similar to some of the procedures that

1 we are using in Medicaid. So I think the statement is
2 essentially correct.

3 Senator Ensign. He said it strengthens. Does it
4 strengthen or keep it the same?

5 Mr. Klouda. I am sorry. I missed his point on how
6 it strengthens.

7 Senator Ensign. Would you mind repeating it,
8 Senator Bingaman?

9 Senator Bingaman. Well, what I was trying to say
10 was that having a coordinated system for identifying
11 folks when they come in and routing them to the right
12 place would, I thought, help solve the concern that I
13 think the Senator from Nevada is trying to raise here,
14 which is that someone is going to sneak through the
15 cracks and not be properly identified or verified for
16 eligibility before they get their benefits.

17 It seemed to me that having it done in a coordinated
18 way, which is what my amendment tries to do, would help
19 solve that.

20 Mr. Klouda. I think to the extent that there is
21 sort of one gateway into the system and the same
22 verification is occurring, yes, it probably would be a
23 more efficient and strengthened system.

24 Senator Ensign. Where in statute does a state have
25 to cross-check with DHS? Where in statute? You

1 mentioned current law. In statute, they have to cross-
2 check with DHS if they are a non-citizen.

3 Mr. Schwartz. Also, in Section 1137 of the Social
4 Security Act, I do not have the exact cite, I can get
5 that for you, but it says if such an individual is not a
6 citizen or national of the United States, there must be
7 presented either, and then there is an A or a B, alien
8 registration documentation or other proof of immigration
9 registration from INS.

10 Skipping some words, "or such other documents as the
11 state determines constitutes reasonable evidence
12 indicating a satisfactory immigration status."

13 Senator Ensign. So if the state determines that it
14 does not want to, it does not have to check with DHS,
15 because you said A or B.

16 Mr. Schwartz. A or B relate to the documentation
17 you have to present. So then the verification of those,
18 because this is for a non-citizen, is done through DHS.

19 Senator Ensign. And it has to be done with DHS.

20 Mr. Schwartz. Well, states are charged generally
21 under 1137 with verification of these things. So that is
22 my understanding. That is the federal agency that does
23 the verification.

24 Senator Ensign. Mr. Chairman, could I just make
25 one final point on this? Senator Bingaman, staff here

1 was talking about the almost futile effort of the
2 Internal Revenue Service, which has now spent billions of
3 dollars to coordinate all of its computer activity.

4 I am also aware of the FBI -- Senator Grassley is
5 aware of the FBI's attempts, as well, spending I do not
6 know how many billions of dollars to try to computerize
7 their operation. They have been at it for, what, 10 or
8 12 years or so and still do not have it done.

9 The intention here is, at least I think, laudable,
10 but I suspect that there is no idea of how much it might
11 cost or how long it might take to coordinate all of this
12 among all the different agencies where it would have to
13 be done.

14 This is meant as a constructive suggestion. Rather
15 than mandating this in the law, would it not make sense
16 to say that there should be a study with a recommendation
17 back to Congress to determine how long it would take, how
18 to do it and how much it would cost, and any
19 recommendations or something along those lines?

20 Senator Bingaman. Mr. Chairman, if this
21 legislation becomes law, we are putting place a system
22 that will have about a four-year time period before it
23 goes into effect and, to me, it would be foolhardy for us
24 to miss the opportunity to direct that this be done in a
25 coordinated fashion.

1 For us to say we ought to study whether it makes
2 sense to do it in a coordinated fashion would be crazy.

3 Senator Ensign. I agree. How to do it in a
4 coordinated fashion?

5 Senator Bingaman. Clearly, they are going to have
6 to come back and figure it out, but they have got four
7 years to do it. We may have to have some oversight
8 hearings down the road to find out whether they have done
9 it properly.

10 But in this legislation, we are trying to say here
11 is what we are directing you, the Executive Branch of
12 government, to go do and, clearly, it makes sense to
13 direct them to go do it right, not to study it.

14 Mr. Schwartz. Senator Bingaman and Senator Ensign,
15 if I could just actually complete an answer I should have
16 given before? I apologize.

17 It is 1137(d)(2), that list of documents that I said
18 for non-citizens. And if I had continued reading down
19 the page, I would have seen (d)(3) specifically does
20 reference the state's obligation once those documents are
21 presented.

22 It says, "The state shall utilize the individual's
23 alien file or alien admission number to verify with the
24 INS the individual's immigration status through an
25 automated or other system."

1 So there is actually a statutory reference for the
2 state to verify for a non-citizen.

3 Senator Bingaman. I do not think that the Chairman
4 intended for us to vote at this point. I think we were
5 still waiting to be sure we could find the offset that
6 was necessary to pay for this. So maybe there is other
7 business to transact.

8 Thank you, Mr. Chairman.

9 The Chairman. Senator Rockefeller is recognized.

10 Senator Rockefeller. Thank you, Mr. Chairman.
11 This is about Medicaid. That is not a surprise perhaps
12 to some of you, but it is necessary for a lot of people.

13 You always hear a lot of talk --

14 Senator Bunning. Do you have a number, Senator?

15 Senator Rockefeller. Yes. I have somebody who
16 will give it to me.

17 Senator Bunning. Thank you.

18 Senator Rockefeller. C-21. Fair question.

19 Senator Bunning. Thank you.

20 Mr. Schwartz. I believe it is C-14 and 15.

21 Senator Rockefeller. Merged.

22 Mr. Schwartz. Right.

23 Senator Rockefeller. And one scores 20 positive
24 and the other 20 negative. So it is neutral. I have
25 heard a lot of talk about protecting the needs of the

1 vulnerable populations, children, pregnant women, the
2 disabled, seniors, et cetera, and very little talk about
3 the vulnerable. That is sort of the nature of our
4 American society.

5 Medicaid is a reflection -- if I could have the
6 attention of my colleagues.

7 Senator Grassley. Can I ask the Senator, is this
8 C-21, the CHIP bill?

9 Senator Rockefeller. No, it is not. It is the two
10 Medicaid bills, 14 and 15, joined together.

11 Medicaid is a reflection, to me, of the nature and
12 the tradition of community and mutual obligation that we
13 share as a country. It is unique. We care about our
14 poor and we care about our underprivileged;
15 insufficiently, but we do and we have programs for it.
16 Lyndon Baines Johnson signed in not just Medicare, but
17 Medicaid, and that was significant.

18 It is an extension of the guiding principle of our
19 nation's foundation. I care about Medicaid not only
20 because I care about the people who are on Medicaid, but
21 it is also the type of social contract that America has
22 made as a commitment that does not involve Republicans or
23 Democrats. It is bipartisan commitment. It is a moral
24 obligation.

25 I have to say that because Medicaid so often gets

1 painted as a Democratic program, and it is not. It is an
2 American program and it is worth improving and it is
3 worth protecting, and that is what my amendment is about.

4 I know the Chairman agrees. When he issued his
5 health reform whitepaper several months ago, he included
6 significant improvements of the Medicaid program.

7 As is often the case during intensive negotiations,
8 many of the provisions were, however, lost and the final
9 mark actually includes provisions that will harm the
10 people who depend on Medicaid for health care, which is
11 what we are here for.

12 I believe -- if I could have the attention of my
13 colleagues. I believe that people who like the Medicaid
14 and the CHIP coverage they have today should be allowed
15 to keep it.

16 This bill does not achieve that goal, this mark. It
17 forces vulnerable populations into private coverage,
18 mandates them into private coverage, and reduces benefits
19 for new Medicaid enrollees.

20 It is for this reason that I am offering an
21 amendment tonight to allow Medicaid populations to remain
22 in Medicaid and to eliminate the Deficit Reduction Act
23 language requiring states to reduce Medicaid benefits for
24 people who need them.

25 Now, we did that some years back, DRA. There was

1 not a single Democrat who voted for it, I think, in
2 either the Senate or the House. It was a unanimous -- on
3 our side, a unanimous no, everybody no on DRA. But it is
4 the law, and that is why I am trying to change it.

5 Before we proceed to vote on my amendment, I have a
6 few questions I would like to ask the staff.

7 Mr. David Schwartz?

8 Mr. Schwartz. Yes, sir.

9 Senator Rockefeller. Last week, you and I
10 discussed the fact that some Medicaid eligible
11 beneficiaries will be forced to enroll in private
12 coverage, forced into private coverage instead of staying
13 in Medicaid. I would like to talk a bit more about that
14 today.

15 The mark includes a provision that gives non-
16 elderly, non-pregnant adults between 100 percent and 133
17 percent of poverty a, quote, "choice," closed quote,
18 between Medicaid and private coverage.

19 So my question, number one, Mr. Schwartz, is how did
20 CBO score this provision? Does it cost the Federal
21 Government money or does it save the Federal Government
22 money?

23 Mr. Schwartz. Senator, according to CBO, that
24 costs the Federal Government money.

25 Senator Rockefeller. And is it not the case that

1 the increased cost is largely because private insurance
2 is much more costly, approximately 25 percent more costly
3 than Medicaid coverage?

4 Mr. Schwartz. I cannot swear to the 25 percent,
5 but your basic premise is correct that private coverage
6 is more expensive than Medicaid.

7 Senator Rockefeller. Additional follow-up. So let
8 me get this straight. In addition to the \$463 billion
9 that we are giving private insurers in premium subsidies,
10 we are also giving them \$20 billion in Medicaid funding
11 for vulnerable populations, despite the fact that we know
12 that Medicaid is more efficient and provides better
13 coverage. In fact, it provides better coverage than
14 Medicare.

15 Mr. Schwartz. That is correct.

16 Senator Rockefeller. Question number two. Mr.
17 Schwartz, the Medicaid overpayments to private insurers
18 that would be allowable under this bill are eerily
19 similar to the Medicare Advantage overpayments. That is
20 my judgment.

21 Some have made an argument for privatization of
22 Medicaid, not so much recently, but it has been big, and
23 Medicare, at all cost. And it seems that the Chairman's
24 mark also includes some elements of Medicaid
25 privatization. That is me talking.

1 My question: Isn't it true, Mr. Schwartz, that
2 states can already contract with private insurers to
3 enroll Medicaid eligible populations in private managed
4 care plans?

5 Mr. Schwartz. It is absolutely true, Senator.

6 Senator Rockefeller. How do the consumer
7 protections under Medicaid managed care compare to the
8 beneficiary protections that would be required of private
9 plans in the exchange?

10 Mr. Schwartz. The protections available in Title
11 19 for Medicaid managed care do not apply in the exchange
12 and I think it is probably fair to say that the
13 protections available within Title 19 for Medicaid
14 beneficiaries are more protective, particularly as
15 relates to cost sharing and an extended benefit package,
16 depending on the population within Medicaid that you are
17 talking about.

18 Senator Rockefeller. Medicaid is the best coverage
19 you can get. You do not have to answer that.

20 A follow-on. Would private fee-for-service plans,
21 the most inefficient and expensive private plans in the
22 market, be able to enroll vulnerable Medicaid
23 populations?

24 Mr. Schwartz. Senator, to the extent that a
25 private fee-for-service plan could operate in the

1 exchange, then, theoretically, yes, they could. If a
2 beneficiary opted to use this Medicaid bridge, as we call
3 it, and leave Medicaid for the exchange, then it is
4 theoretically possible that they would enroll in any of
5 the exchange plans.

6 Senator Rockefeller. And would lust for that
7 opportunity. You do not have to answer that.

8 Mr. Schwartz, question number three. Except for
9 children, are there any requirements that private
10 insurers have to provide the same benefit and cost-
11 sharing protections as Medicaid in order to receive the
12 \$20 billion in extra payments?

13 Mr. Schwartz. No, Senator. Adults that go over
14 the bridge into the exchange get what is available in the
15 exchange and do not bring Medicaid provisions or
16 protections with them.

17 Senator Rockefeller. So how does the 90 percent of
18 FEHPB compare to the value of the benefits offered under
19 Medicaid? As I understand from CRS, Medicaid is the
20 standard in terms of benefits, particularly for children,
21 and FEHPB actually provides less benefits than Medicaid.
22 Am I right?

23 Mr. Schwartz. I think you are correct. I think,
24 on average, actuarial values are lower everywhere
25 compared to Medicaid, because they approach 100 percent.

1 Senator Rockefeller. So, Mr. Schwartz, let us
2 recap everything we have just discussed. Under the mark,
3 Congress would effectively be paying private insurers an
4 extra \$20 billion to provide fewer benefits and fewer
5 consumer protections than what states currently provide
6 under Medicaid; is that correct?

7 Mr. Schwartz. I believe so, sir.

8 Senator Rockefeller. Finally, the final question.
9 Mr. Schwartz, on the first day of this markup, you and I
10 had an exchange about the so-called benefit flexibility
11 language that ha always caught my attention, from the
12 Deficit Reduction Act, included in this mark, which I am
13 trying to get rid of.

14 First, I want to point out that flexibility in this
15 context means cut. The DRA gives states the option of
16 reducing benefits or cutting people off all together.
17 This is me talking.

18 I would state for the record once again that no
19 Democrat in Congress supported the Deficit Reduction Act.
20 Furthermore, it should be noted that the language
21 included in the Chairman's mark, with all due respect, is
22 far worse than the language in the DRA.

23 The DRA gives states the option of implementing
24 flexible benefit packages. The language here makes
25 Medicaid benefit reductions mandatory in the mark,

1 mandatory. That is me talking.

2 Mr. Schwartz, can you explain the characteristics of
3 the newly eligible parents and childless adults included
4 in the Medicaid expansion, are these individuals
5 healthier than the current Medicaid population?

6 Mr. Schwartz. Senator, I think they are very
7 similar to the current Medicaid population. They are low
8 income, obviously, below 133 percent of the federal
9 poverty level. They are sicker than their higher income
10 counterparts, on average. And some parents are already
11 covered in the Medicaid programs and they tend to be very
12 low levels, in some states, as low as 11 or 12 percent of
13 poverty.

14 So we would be adding people like that up to 133
15 percent of the poverty level.

16 Senator Rockefeller. In closing, Mr. Chairman, I
17 want to close this debate by appealing to all of my
18 colleagues on this dais and I want to say that we can do
19 better than this.

20 It is our job to help American families and provide
21 policies that work for them in this bill, not to take
22 those solutions away.

23 Some of you know -- no. None of you know, when I
24 was governor, I worked very hard to provide health care
25 for the people of West Virginia to make a difference,

1 with very limited resources. I had to fire 10,000
2 highway workers at one point.

3 I saw firsthand what Medicaid meant to the poorest
4 families and the hardest hit workers struggling all
5 across West Virginia, just holding on. When nothing else
6 was certain, they could count on Medicaid. It was rock
7 solid protection from the worst.

8 So when I came to Washington, I made these issues
9 central. That is my close. I hope that this amendment
10 passes.

11 The Chairman. Senator, when I stepped out, this
12 amendment came up. I did not realize this was going to
13 come up at this time. I very much appreciate the
14 amendment you are offering.

15 In order to expedite our business tonight, I would
16 ask that this amendment be temporarily laid aside so we
17 can take up the Schumer-Snowe amendment. Then we can
18 come back to this later this evening.

19 Senator Rockefeller. But this evening.

20 The Chairman. This evening, yes. That is right.
21 Senator Schumer?

22 Senator Grassley. Mr. Chairman, while we are
23 waiting.

24 The Chairman. Senator Grassley?

25 Senator Grassley. Members on my side want to know

1 what the plan is for tonight. It seems like we are
2 bringing out a lot of amendments we never thought a
3 little while ago that we even had. So my members would
4 like to know where we are and what you have planned.

5 The Chairman. Frankly, it is kind of like the last
6 inch of darkness. It is the dark just before the dawn.
7 We are close. We are working out some issues. They can
8 be worked out without a lot of difficulty and we do not
9 have very many yet to work out.

10 Once we take up and dispose of the Schumer-Snowe
11 amendment, then the Kyl amendment to medical devices, we
12 have then yet to do the Rockefeller amendment that was
13 set aside, and then we have the CHIP and then Wyden free
14 choice, and that is it.

15 We are getting there and I just think it is worth
16 the effort, it may take a couple hours, to get this done
17 tonight.

18 So I now recognize Senator Schumer.

19 Senator Schumer. Thank you, Mr. Chairman. I offer
20 this amendment on behalf of Senator Snowe and myself. It
21 is similar to the amendment we discussed before, with a
22 few changes.

23 Just to go over the thrust of the amendment, it is
24 to take the affordability waiver down from 10 percent to
25 8 percent. The idea, same as before, is, first, to give

1 middle class families in a difficult situation relief
2 from a proposal that would say you have to spend 12
3 percent of your income for insurance.

4 It would say if no plan is offered at 8 percent of
5 your income, you are waived from the mandate. There are
6 many, many families in my state and every other state
7 making 60, 70, 80,000. They may have two kids in
8 college. The small business that they run may have run
9 into trouble. And it would be just wrong to put such a
10 burden on them for the good of having insurance.

11 Most people want insurance. They want to be able to
12 pay for insurance. Families will stretch and scrounge to
13 do it to help their loved ones.

14 But some of them cannot and this gives much more
15 flexibility to those families by moving the affordability
16 waiver down from 10 percent to 8 percent. I had
17 originally asked for seven. Eight is where the consensus
18 came about and that is where we are and we will see if
19 that will go further on the floor.

20 The second benefit, it will get insurance companies
21 to offer low cost insurance, not just Cadillac plans or
22 gold plans or even silver plans. There are many families
23 who would want a lesser plan they would not have been
24 offered without this amendment. Now, it will be and that
25 is good.

1 And then, third, of course, the third benefit is
2 that we are using the savings that come here to reduce
3 the penalty. We have modified that. I am going to call
4 on Senator Snowe or let Senator Snowe explain that,
5 because it was her suggestions that we adopted here.

6 I think there is a broad consensus on both sides of
7 the aisle that the penalties should be reduced. They
8 were originally \$3,000 for a family of four. The
9 Chairman, in his wisdom and in the mark, moved them down
10 to \$1,900, and here there will be a further reduction or
11 phase-in, more accurately, over a period of time.

12 We have taken Senator Ensign's second suggestion,
13 which we very much appreciate, and not only removed the
14 criminal penalties, but the more extreme civil penalties,
15 such as wage garnishment, that Senator Ensign was
16 concerned about.

17 So if you do not pay, there will be some kinds of
18 penalties. You will not get your refund back, they will
19 put that towards it, but not the kind of things that
20 Senator Ensign was correctly worried about, and I thank
21 him for his help.

22 This is the major amendment on affordability. I
23 want to say that I would agree with Senator Bingaman,
24 Senator Menendez and so many others, Senator Stabenow,
25 Senator Rockefeller, Senator Kerry, so many others who

1 have talked about we should make the insurance more
2 affordable by increasing the subsidy. That was not
3 fiscally possible to stay within the constraints that we
4 have in this committee.

5 Hopefully, we can make them better as we move
6 forward in the process. But if we cannot do that, it is
7 unfair to put the entire onus on the middle class
8 individual family, and this removes it.

9 CBO has scored the entire amendment as generating
10 modest savings, about two million people, same as four,
11 will not be on the rolls in 2019 who would have been
12 without the amendment, but there are people who could not
13 really afford it and of middle income, because if you
14 have a high income, you will never get a plan. All plans
15 will be at your income level. So you will be all right.

16 With that, let me call on my colleague, Senator
17 Snowe, who will discuss the penalty stretch-out and
18 waiver and the GAO report that was added at her request.

19 Senator Snowe.

20 Senator Snowe. Thank you, Mr. Chairman. I thank my
21 colleague Senator Schumer for working on some
22 modifications to the individual mandate and the penalties
23 that were contained from the Chairman's mark. And I know
24 the Chairman's mark was modified further from the
25 original proposal, and I think that this represents a

1 very strong step forward. I still have concerns about
2 the overall individual mandate, and I hope we can work on
3 it even further on the floor of the Senate because I do
4 that, first and foremost, we have an obligation to ensure
5 that we have achieved and accomplished the goal of
6 affordability, which is what this legislation is all
7 about.

8 So I happen to think that these penalties are even--
9 you know, we have reduced them. In fact, in 2013 there
10 will be no penalties. It was delayed for a year. And
11 then thereafter they increase by \$200 increments from
12 \$200 in 2014 to \$400 in 2015, \$600 in 2016, \$750 for
13 2017.

14 I would prefer to have no penalties, frankly. I
15 understand the rationale that we need to get everybody
16 into the system, but, frankly, we are creating a whole
17 system that would require a national plan. And I think
18 until we have been able to demonstrate that we have
19 accomplished the goal of achieving the level of
20 affordability for average Americans, we should withhold
21 the idea of penalties. It is one thing to suggest an
22 individual mandate. It is quite another on the penalty.

23 So I think that this is a first step in this
24 process, and I appreciate working with Senator Schumer so
25 that we could reduce the penalties, defer them for a

1 year, and incorporating Senator Ensign's suggestions
2 about having no civil penalties, interest, or fees or
3 assessments that would be levied by the Internal Revenue
4 Service. I mean, after all, this is not about, as I said
5 earlier, punishing people. It is about making sure that
6 we can create an affordable health care system in this
7 country, which is, after all, long overdue.

8 The amendment also will include a Government
9 Accountability, GAO, report to undertake a study of the
10 affordability of coverage so that we can have the ability
11 to measure whether or not we are successful in our
12 efforts, including the impact of the provisions on small
13 businesses and individual tax credits, maintaining and
14 expanding coverage, the availability of affordable plans,
15 the ability of Americans to meet the personal
16 responsibility requirements. So we will have the ability
17 to have GAO review what has been achieved to that date.

18 In the first year that the exchange is up and
19 running, the tax credits for small businesses will
20 already have kicked in for 2 years prior to the exchange.

21 The individual tax credits will have been operable for a
22 year. So we will have the ability to really learn a lot
23 in that year as to whether or not we are achieving the
24 goals and the targets that are established in this
25 legislation to expanding affordable coverage for all

1 Americans.

2 And then this report will be made available to the
3 committees of jurisdiction no later than February 2014,
4 and then the committees will have to report the
5 legislation to the full bodies, the House and the Senate,
6 by April of 2014 on the implementation and assessment of
7 this particular provision on an expedited consideration
8 within the Congress.

9 So that gives us the ability to review it and to
10 take action based on that report, and also, we can also
11 revise the penalties, if necessary.

12 I think it is important to mention here, Mr.
13 Chairman, as well, in looking back and even reviewing the
14 experience in Massachusetts, their rate reforms had been
15 underway for almost a decade before the implementation of
16 an individual mandate and the penalties that were
17 incorporated in Massachusetts.

18 We are doing a phase-in, a rating reform phase-in,
19 of 5 years in the Chairman's mark. So at the time when
20 the exchange and the rate reforms begin in 2013, we will
21 have--it will not be fully implemented. In fact, it
22 would be the first year of rate reforms. And as I said,
23 they will be phased in over 5 years.

24 So I think that it is important to make sure that we
25 have a system that is working, and, therefore, we should

1 not punish people before, you know, the rate reforms have
2 fully kicked in, that we have an ability to evaluate the
3 plans that will be offered on the exchange to ensure that
4 they are affordable to average Americans. That is what
5 we are hoping for through the tax credits and the
6 subsidies and from the competitiveness of the exchange
7 that will drive down the pricing of plans.

8 So, hopefully, all that would be accomplished. But
9 we do not know, and because we do not have that
10 assurance, I think it is all the more crucial that we
11 defer and, frankly, in my opinion, eliminate penalties
12 that are imposed on individuals through this individual
13 mandate requirement until we have a better opportunity to
14 evaluate the impact of all that we are trying to achieve
15 in this legislation.

16 And as I said, rate reforms will be phased in over 5
17 years, so that is 2018. Therefore, I think it is
18 premature to impose any penalties on individuals as we
19 are trying to make the major changes in this legislation
20 to achieve the affordable standard that we hope to
21 accomplish as a result of our efforts.

22 So, Mr. Chairman, I appreciate your patience in all
23 of this. Hopefully we can even do more on this
24 particular provision on the floor of the Senate because,
25 frankly, I think we should defer the penalties. I do not

1 want to see Congress imposing penalties on average
2 Americans who are struggling, and I certainly do not want
3 to impose penalties for which they have zero to show for
4 it. So if we are asking people to pay penalties on their
5 inability to get health insurance for whatever reasons,
6 but we ought to certainly give a reasonable period of
7 time to see whether or not we have achieved the
8 objectives and the goals of this legislation through
9 affordable health insurance.

10 Senator Schumer. Mr. Chairman?

11 Senator Kyl. Mr. Chairman?

12 The Chairman. Let me say, first of all, I thank
13 you both, Senator Schumer and Senator Snowe, and other
14 Senators who have been working on this, because this is
15 one of the key issues, frankly, in the coverage part--
16 that is, making sure that the insurance that is required
17 is affordable. And it gets to the affordability issue,
18 and it gets to the penalties. It gets to the basic point
19 of whether people can afford the insurance that we are
20 asking them to get. So I thank you very, very much. And
21 I think we probably do need more work on this down the
22 road.

23 Senator Schumer. Mr. Chairman, just briefly.

24 The Chairman. Very briefly because others--

25 Senator Schumer. Yes, just briefly, I want to

1 thank Senator Snowe. I agree with her it will be--I will
2 work with her to try and reduce the penalties further,
3 particularly none in the first 2 years, as we move to the
4 floor.

5 Senator Kyl. Mr. Chairman, 10 seconds?

6 The Chairman. Senator Kyl.

7 Senator Kyl. Mr. Chairman, I think we have got a
8 problem with this last paragraph, the paragraph that
9 outlines a procedure for committees of the Senate to
10 report legislation within certain time frames, the Senate
11 to act on it within a certain number of hours and so on.

12 It seems to me that there are several things that
13 preclude us from doing this.

14 First of all, one Congress, I do not think, can bind
15 another with the kind of procedure that is established
16 here. Certainly this Committee does not have
17 jurisdiction to require another committee to report
18 legislation, as is required here. This seems like sort
19 of a reconciliation-like kind of procedure that I do not
20 think we have the ability to do in legislation in this
21 Committee.

22 I am not sure whether the Rules Committee would have
23 jurisdiction to do this or whether it would have to be
24 done on the Senate floor as an amendment to the Senate
25 rules. But I would strongly suggest that this paragraph

1 not be included in the amendment.

2 The Chairman. Is there further debate?

3 Senator Ensign. Mr. Chairman, just 30 seconds?

4 Senator Bingaman. Mr. Chairman?

5 The Chairman. Senator Bingaman.

6 Senator Bingaman. Mr. Chairman, let me--did you
7 want to respond on that before I commented?

8 The Chairman. I do not know if anybody does.

9 Senator Snowe, did you wish to comment, or Senator
10 Schumer? I do not want to--

11 Senator Snowe. On the expedited procedure?

12 The Chairman. On the provisions--

13 Senator Schumer. On the reporting.

14 The Chairman. The question raised by Senator Kyl.

15 Senator Snowe. It is similar to--the language is
16 similar to the language we included in the Medicare
17 Commission. I mean, it is an expedited procedure. So I
18 do not see--

19 Senator Schumer. I think we have rules, you know,
20 in statute that bind us to reports in future Congresses
21 all the time.

22 Senator Kyl. Mr. Chairman, I--

23 Senator Snowe. This is standard language.

24 Senator Schumer. Could I make a suggestion to
25 Senator Kyl? Because I know he is trying to improve it.

1 I am Chairman of the Rules Committee that has some
2 jurisdiction over this. Could we work on the floor--this
3 is Senator Snowe's provision. She has put a lot of
4 effort into it. Could we work on the floor, and if it
5 violates the rules, we will modify it to stay within the
6 spirit of what Senator Snowed asked, but at the same time
7 make sure we stay within the Senate Rules? Would that be
8 all right?

9 Senator Kyl. Well, Mr. Chairman--

10 The Chairman. Senator Kyl.

11 Senator Kyl. If I ask counsel for a ruling, then
12 you could base your decision based on that. You know, we
13 tried to do Medicare--excuse me, medical malpractice
14 reform and were told it was outside the jurisdiction of
15 the Committee and, therefore, we could not even talk
16 about. So we dropped all of our amendments.

17 I am not trying to be pernicious here, but I do
18 think this goes beyond the jurisdiction of this
19 Committee. And maybe counsel could speak to the issue.

20 The Chairman. I might just--that is an interesting
21 question. But, on the other hand, this Congress has
22 passed expedited decisionmaking, for example, the trade
23 bill, the Trade Act, the fast-track provisions, that is
24 all expedited, and it is in the statute. It is in this
25 Committee's jurisdiction when this Committee passed that

1 act. Then the modernization act, as Senator Snowed
2 refers to, that had a 45-percent trigger.

3 I think in the spirit of working together here, the
4 suggestion offered by the Senator from New York is a good
5 one, that is, he is Chairman of the Rules Committee, and
6 let us see what is proper here. But this Congress has
7 passed legislation requiring expedited procedures, and I
8 do not see why this is any different in terms of the
9 power and ability of our Committee to do so.

10 Senator Ensign. Mr. Chairman?

11 The Chairman. Senator Ensign.

12 Senator Ensign. Just 30 seconds. I want to
13 compliment both the Senators for the amendment,
14 especially on the individual mandate. I want to
15 appreciate you including the language.

16 But I also want to recognize Mr. Barthold. He is
17 the one who brought the issue to our attention, as we
18 talked about, and because of that work, because of
19 professional staff, you know, we actually improved things
20 around here. And I think that because of his comments
21 and the note that he wrote to me, we were able to include
22 this and to protect people from really some pretty harsh
23 penalties in the future. So I wanted to recognize him
24 and also thank both the Senators.

25 Thank you, Mr. Chairman.

1 The Chairman. Well, thank you, Senator. I think
2 we are ready to voice vote this.

3 Senator Bingaman. Mr. Chairman, could I just--

4 The Chairman. Senator Bingaman?

5 Senator Bingaman. I just wanted to be clear. In
6 that second paragraph where you are saying that
7 individuals--where the cost of lowest-cost coverage
8 exceeds 8 percent of income, the individual would be
9 exempt from the personal responsibility assessments, you
10 are also--that implies that they are also exempt from any
11 obligation to purchase insurance. Is that correct?

12 Senator Schumer. Yes.

13 Senator Bingaman. I just wanted to be sure. That
14 is the part that I objected to. The rest of it, I think,
15 is a very constructive set of changes.

16 The Chairman. All in favor--

17 Senator Snowe. Mr. Chairman, just to that point,
18 they would be eligible for the Young Invincible plan.

19 The Chairman. Senator Kerry?

20 Senator Kerry. Mr. Chairman, I am in favor of the
21 basic concept. I just want to clarify one thing, if
22 either the sponsors or the staff could clarify it. This
23 does not affect any cost to the bill itself because these
24 fines were going to go the Treasury. Is that correct?

25 Senator Schumer. No, as I understand it, we save

1 money on the first part. We spend a little money on the
2 second part. But overall there is a net savings.

3 Senator Kerry. And we do not have that figure?

4 The Chairman. Well, CBO has confirmed that it will
5 generate modest savings. CBO could not determine the
6 exact amount.

7 Senator Schumer. They said there is modest
8 savings.

9 The Chairman. That is correct. Okay, all--

10 Senator Ensign. Mr. Chairman, just real quickly,
11 Senator Snowe and Senator Schumer, I just wanted to
12 clarify, because staff raised it back here. On the
13 individual mandate, this applies not just to the people
14 who are under the 8 percent; it applies across the board--
15 -I just wanted to make sure it was on the record.

16 Senator Snowe. Yes.

17 The Chairman. Okay. All in favor, signify by
18 saying aye?

19 Senator Kyl. Mr. Chairman, could we have a roll
20 call vote here, please, Mr. Chairman?

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

23 The Clerk. Mr. Rockefeller?

24 Senator Rockefeller. Aye.

25 The Clerk. Mr. Conrad?

1 The Chairman. Aye by proxy.
2 The Clerk. Mr. Bingaman?
3 Senator Bingaman. Aye.
4 The Clerk. Mr. Kerry?
5 Senator Kerry. Aye.
6 The Clerk. Mrs. Lincoln?
7 The Chairman. Aye by proxy.
8 The Clerk. Mr. Wyden?
9 Senator Wyden. Aye.
10 The Clerk. Mr. Schumer?
11 Senator Schumer. Aye.
12 The Clerk. Ms. Stabenow?
13 Senator Stabenow. Aye.
14 The Clerk. Ms. Cantwell?
15 Senator Cantwell. Aye.
16 The Clerk. Mr. Nelson?
17 Senator Nelson. Aye.
18 The Clerk. Mr. Menendez?
19 Senator Menendez. Aye.
20 The Clerk. Mr. Carper?
21 The Chairman. Aye by proxy.
22 The Clerk. Mr. Grassley?
23 Senator Grassley. Aye.
24 The Clerk. Mr. Hatch?
25 Senator Grassley. Aye by proxy.

1 The Clerk. Ms. Snowe?
2 Senator Snowe. Aye.
3 The Clerk. Mr. Kyl?
4 Senator Kyl. No.
5 The Clerk. Mr. Bunning?
6 Senator Grassley. Aye by proxy.
7 The Clerk. Mr. Crapo?
8 Senator Crapo. Aye.
9 The Clerk. Mr. Roberts?
10 Senator Grassley. Aye by proxy.
11 The Clerk. Mr. Ensign?
12 Senator Ensign. Aye.
13 The Clerk. Mr. Enzi?
14 Senator Grassley. Aye by proxy.
15 The Clerk. Mr. Cornyn?
16 Senator Grassley. Aye by proxy.
17 The Clerk. Mr. Chairman?
18 The Chairman. Aye.
19 The Clerk. Mr. Conrad?
20 Senator Conrad. Aye.
21 The Chairman. The clerk will tally the vote.
22 The Clerk. Mr. Chairman, the final tally is 22
23 ayes and 1 nay.
24 The Chairman. The amendment passes.
25 Senator Wyden?

1 Senator Wyden. To offer an amendment?

2 The Chairman. Which one is it?

3 Senator Wyden. D10. It is the--

4 The Chairman. Just hold on a second, please.

5 [Pause.]

6 The Chairman. Senator Wyden, why don't you
7 proceed? Thanks for waiting.

8 Senator Wyden. Thank you, Mr. Chairman.

9 Mr. Chairman, this amendment combines two areas that
10 I think represent state-of-the-art medicine. Both of
11 them, Senator Carper and I have teamed up on. One is to
12 promote independence at home. It is a piece of
13 legislation sponsored by a large number of Senators on
14 both sides of the aisle--Senator Burr, for example,
15 Senator Isakson, Senator Chambliss on that side of the
16 aisle; many Democrats as well.

17 It is based on something that I think responds to a
18 concern Senator Conrad has talked to us often about over
19 the years, and that is, somewhere in the vicinity of 10
20 percent of Medicare beneficiaries, particularly those
21 that have multiple chronic conditions, account for nearly
22 two-thirds of Medicare spending. These are individuals
23 with diabetes, heart disease, Alzheimer's, a host of
24 problems.

25 And what happens, Mr. Chairman and colleagues, is

1 when these individuals get ill, very often they go to a
2 hospital, an emergency room in an ambulance after calling
3 911. They have what physicians usually call a "million-
4 dollar work-up." And what we seek to do is, in effect,
5 through Medicare, start a program to use primary care
6 providers to make house calls. And they would be out in
7 the community working with individuals, and we believe
8 that the modest cost of this legislation can be paid for
9 as part of this package through a reduction in clinical
10 laboratory fees.

11 The second part of the package, Mr. Chairman and
12 colleagues, involves an area you and I have talked about,
13 and that is, the promising field of personalized
14 medicine. What we have learned over the years is that a
15 particular drug will not necessarily affect Sally and
16 Mary in exactly the same way, and innovative molecular
17 diagnostic tests provide the foundation for the
18 application of personalized medicine for individuals
19 suffering from a host of life-threatening diseases.

20 Unfortunately, present law presents a barrier to the
21 use and development of personalized medicine. This is
22 because of a Medicare rule that stipulates if a test is
23 ordered less than 14 days after a beneficiary leaves a
24 hospital, the laboratory is barred from billing for that
25 particular laboratory service.

1 The policy that Senator Carper and I propose tonight
2 would allow these laboratories to bill Medicare directly
3 for a 2-year period. It would stipulate that the policy
4 would only apply to the molecular diagnostic tests that
5 we think are going to be essential to promote this
6 exciting field. It is going to be widely known in a few
7 years as the field of personalized medicine.

8 I hope that colleagues will accept it. Both of
9 these proposals have had widespread support in the last
10 several years. It is time to promote them, and we ought
11 to pay for it through a cut in the clinical laboratory
12 fee schedule because innovative clinical labs would
13 benefit from these particular policies.

14 Mr. Chairman, thank you.

15 The Chairman. Thank you, Senator.

16 Is there further discussion on the Wyden amendment?

17 Senator Carper. Mr. Chairman?

18 The Chairman. Yes, Senator Carper?

19 Senator Carper. Could I be recognized? A couple
20 years ago, I remember reading about a request for FDA
21 approval of an oncology drug that had been developed I
22 believe by AstraZeneca. And as the drug went through the
23 FDA approval process in this country, it was found, as I
24 recall, to have modest benefit but not great.

25 Later on, the same drug was tested in Japan, in

1 Asia, with Asian populations, and it had a much better
2 effect, a much more positive outcome on those who took
3 the same medicine.

4 And I thought that was peculiar, and later on I
5 started learning a little bit about how mapping the human
6 genome maybe opened up an opportunity for us to figure
7 and better understand why certain drugs worked for some
8 of us and the same drug for the same condition does not
9 work for somebody else.

10 It is one thing, you know, we are getting to be
11 smart enough now to figure out how to make drugs
12 available to people, to enable them to acquire them and
13 pay for them, have access to them. We one part of this
14 amendment, we are trying to make sure that when folks are
15 supposed to be taking certain medicines, they are more
16 likely to do that, because we are going to coordinate the
17 delivery of care, including taking pharmaceuticals.

18 But wouldn't it be great if--we will just use those
19 of us who serve on this Committee, 23 of us, if we all
20 had the same condition--maybe we do--but if there were a
21 particular medicine that would help four of us but there
22 is no way it is going to help the other 19. And what we
23 have here is a potential of figuring that out and making
24 sure that the four people who are going to be helped by
25 that particular medicine take it, and the 19 of us who

1 are not going to be helped, we are not going to be
2 spending the money, and neither will anybody else, for us
3 to take a medicine that, frankly, is not going to have
4 any kind of positive effect.

5 I think this is a very bright and promising
6 prospect, and I hope that we can find a way clear to
7 support this. And I am very pleased to support both
8 amendments which have been pieced together. I think they
9 are nice package. They are paid for in a way that makes
10 sense, and I am pleased to join Senator Wyden in
11 supporting them.

12 The Chairman. Thank you, Senator, and thank you,
13 Senator Wyden.

14 I understand, Senator Wyden, you spent some time
15 working on this and, frankly worked it out with the
16 groups most directly concerned--that is, it provides for
17 a medical home--for homebound patients and high-cost
18 patients, but also provides access to critical--what is
19 the second part, lab tests?

20 Senator Wyden. It is called "personalized
21 medicine," in effect to promote innovative molecular
22 diagnostic tests.

23 The Chairman. Okay. And very, very slight cost,
24 and the slight cost is paid for with reductions to
25 clinical labs. My understanding is the lab industry

1 supports this amendment because--

2 Senator Wyden. That is largely correct.

3 The Chairman. --what they lose on the one hand
4 they make up on the other.

5 Senator Kyl. Mr. Chairman, might I ask Senator
6 Wyden a question?

7 The Chairman. Senator Kyl.

8 Senator Kyl. Since DRGs, there is one or more DRGs
9 that cover this when it is billed through a hospital.
10 How is the billing then going to be done for this? I
11 mean, it is a different--it is a breakout from within a
12 DRG, so how is that going to work?

13 Senator Wyden. It is a direct billing, Senator
14 Kyl. Essentially, the problem occurs because there is a
15 Medicare rule that stipulates that you cannot really have
16 that kind of direct billing. So it is a direct billing
17 approach.

18 Senator Kyl. So at least for Medicare, there would
19 have to be a new fee schedule or reimbursement schedule
20 developed then?

21 Senator Wyden. I think it is fair to say they
22 would develop a direct billing, but the industry most
23 directly affected, which has a long history of telling
24 the United States Congress--I know firsthand about rules
25 that are bureaucratic or intrusive--they have said that

1 this direct billing approach makes sense.

2 The Chairman. Is there further discussion?

3 [No response.]

4 The Chairman. All in favor of the amendment, say
5 aye?

6 [A chorus of ayes.]

7 The Chairman. Opposed, no?

8 [No response.]

9 The Chairman. The ayes have it. The amendment is
10 agreed to.

11 Senator Kyl. Mr. Chairman?

12 The Chairman. Senator Kyl.

13 Senator Kyl. This amendment is amendment F3. It
14 is an amendment that I had previously begun to discuss
15 but deferred. It would strike the tax on medical
16 devices. Since I think we are all pretty familiar with
17 what this tax is, let me simply summarize.

18

19 The tax is annually \$4 billion--over 10 years, \$40
20 billion--on medical device manufacturers, on Class III
21 and certain Class II devices, beginning in 2010. It
22 applies to manufacturers or importers of devices. It
23 would include both domestic and foreign.

24 CBO has specifically written that this particular
25 type of fee or tax would increase costs for affected

1 firms, which would be passed on to purchasers and would
2 ultimately raise insurance premiums by a corresponding
3 amount.

4 So the reason for striking the tax is that the
5 premium holders, the people who buy insurance, are going
6 to end up paying the tax. This means that a \$40 billion
7 savings for the people who we are trying to help could be
8 achieved if my amendment is adopted.

9 Mr. Chairman, some of our colleagues--Senators
10 Klobuchar, Bayh, Lugar, and Franken--have written to you,
11 Mr. Chairman. You perhaps remember their letter. I will
12 quote part of it.

13 The Chairman. I remember it well.

14 Senator Kyl. It said, and I quote: "The provision
15 would harm economic development and health care
16 innovation nationwide. Independent estimates indicate
17 that this tax could translate into an annual income tax
18 surcharge of between 10 and 30 percent on medical device
19 manufacturers. The amount of capital that these
20 companies would have available to reinvest in product
21 development and innovation would be threatened,
22 dramatically reducing both the number of jobs in the
23 industry and the types of devices available to patients.

24 I would also note that the industry spent about \$9.6
25 billion on R&D, and this would account--this tax would

1 account for about half that amount. As the letter notes,
2 we are concerned this tax would stifle technological
3 innovations that can improve patient outcomes and lower
4 health care costs.

5 Mr. Chairman, there is a Wall Street Journal
6 editorial to the same effect dated April--excuse me,
7 dated September 18, 2009, and I would ask that at the
8 conclusion of my remarks this be put in the record of the
9 Committee.

10 Senator Bingaman. Mr. Chairman?

11 Senator Kyl. Mr. Chairman, I had asked for
12 unanimous consent that an items be put in the record, and
13 I will conclude my remarks.

14 The Chairman. Without objection.

15 Senator Kyl. Thank you.

16 [The editorial appears in the appendix.]

17 The Chairman. Consider it in the record.

18 Senator Stabenow?

19 Senator Kyl. There is an argument that--

20 The Chairman. Oh, sorry. I thought you--I am
21 sorry.

22 Senator Kyl. There is an argument that we are
23 giving device manufacturers a windfall because we have
24 presumably created some new purchasers of health care;
25 people that do not have insurance today, because they are

1 going to have insurance, they might buy more of these
2 products. But it is important to understand that medical
3 device manufacturers will actually experience reductions
4 in sales and prices when Medicare imposes cuts on its
5 customers.

6 For example, hospitals are the device industry's
7 biggest customers, accounting for about 60 percent of the
8 total sales. When their hospital reimbursements are cut,
9 obviously they will reduce the medical device spending,
10 along with spending on other suppliers. And there are
11 some statistics here that demonstrate that the cuts will
12 be rather dramatic.

13 So the bottom line--and this is what the Advanced
14 Medical Technology Association, AdvaMed, concludes:
15 "Imposition, therefore, of a direct tax on medical device
16 makers, in addition to the cuts in Medicare reimbursement
17 already in the bill, amounts to double taxation.
18 Providers effectively get taxed once through cuts in
19 Medicare payment. Device and diagnostic manufacturers
20 get taxed twice through their share of the cuts to their
21 customers and again through the separate device tax."

22 So, Mr. Chairman, my amendment would simply restore
23 the status quo. There would be no tax on medical
24 devices, and this would save consumers about \$40 billion
25 over the course of the 10 years.

1 The Chairman. Thank you, Senator. Without
2 prolonging the debate too long here, I would like to ask
3 Mr. Clapsis just basically how the medical device
4 allocation was arrived at and the degree to which it is
5 or is not proportionate to other fees imposed on other
6 industries.

7 Mr. Clapsis. Sure, Senator. Thank you.

8 We looked at a number of factors, I think, when we
9 were looking at different industry contributions. One
10 clearly is size, and that is an issue that has been
11 brought up a number of times.

12 The device industry is actually larger, I think,
13 than is typically well understood. AdvaMed data suggests
14 the industry was \$130 billion as of 2006 and has been
15 growing at about 8 percent per year. So over the next 10
16 years, you are looking at an industry that can be
17 projected to have approximately \$2.5 trillion in
18 revenues. It is actually, again, bigger I think than
19 most people think.

20 The average profit margins also tend to be
21 relatively high, so I think, in our view, the \$40 billion
22 fee was roughly proportionate with some of the other
23 industry contributions that we have seen.

24 On the question of the double tax--I think that was
25 sort of brought up as well--is certainly one, I think,

1 the Committee has looked at also. This sort of--taking a
2 step back--gets to the question of hospitals and I think
3 potentially how they fare in this bill. So I think the
4 hospital contribution--you know, normally I think, given
5 negative Medicare margins, it is hard to necessarily even
6 reduce Medicare market baskets on the hospital side.
7 Hospitals I think have admirably stepped up and offered
8 their contribution, knowing that their bad debt expense
9 is going to be reduced. We think that is roughly in line
10 with the contribution that they are offering, the point
11 being it is arguable, actually, the extent to which
12 hospitals, I think, will feel reductions given, again,
13 the significant reduction in bad debt they are going to
14 see.

15 You know, the Committee has also looked at the
16 questions of pass-through. You know, specifically we
17 tried to look at some industry data that was given to us,
18 looking at sort of the 1997 to 1999 period where you saw
19 some of the most significant reductions in reimbursement
20 to providers. And the growth rate, I think, on the
21 medical device side looked fairly constant in the data
22 that we reviewed as well.

23 So we certainly looked at a number of these factors,
24 and obviously there are a lot of perspectives. But that
25 is some of the way I think the numbers came from.

1 The Chairman. I appreciate that. I might ask
2 Senator Kyl, is this the offset here, the tried and true
3 reduction in tax credits for middle- and low-income
4 people?

5 Senator Kyl. Yes, it is, although I really do not
6 like the description of it, "low-income people."

7 The Chairman. Low- and middle-income.

8 Senator Kyl. Well, if we want to have a debate on
9 that, which I do not think would be productive at this
10 point, I could refer to the fact that even between 100
11 and 150 percent of poverty, folks are still getting
12 \$16,500. So it is not as if we are reducing these
13 subsidies down to nothing.

14 I would like to ask staff a question, though. I was
15 not exactly sure what the import of everything you said
16 was, but I gather, notwithstanding what you said, you do
17 not disagree with the CBO analysis that I quoted earlier
18 with regard to the corresponding pass-through to
19 consumers of both the other taxes and fees that I talked
20 to and including this. I guess this is called a fee.

21 I quoted the CBO relative to the fees that would
22 increase the cost of these affected firms be passed on
23 and ultimately raise insurance premiums by a
24 corresponding amount. So you are not disagreeing with
25 that CBO assessment.

1 Mr. Hughes. Well, to repeat the--

2 The Chairman. Speak into your microphone, please,

3 Mr. Hughes. Thank you.

4 Mr. Hughes. To repeat the discussion we had
5 recently regarding the insurance fee, they are structured
6 in a similar manner. And as the Chairman described, the
7 fee is a lump-sum amount that is determined on an annual
8 basis, and it is allocated on a market share approach
9 among the companies in the industry, with the intent to
10 separate the tax which would be applied at the entity
11 level from the underlying product.

12 So it has been designed in a manner to make it more
13 difficult to pass through as opposed to, say, an excise
14 tax that could have just been applied to the cost of the
15 product directly.

16 Senator Kyl. Well, but there is nothing to prevent
17 it from simply being put into the cost of the product. I
18 mean, the firm is going to know--even in advance, it is
19 going to know roughly its place in the marketplace, and
20 it is going to have to count on paying this tax every
21 year.

22 You are not saying that they would not build into
23 the cost, either prospectively or retrospectively, the
24 cost of business that this imposes on them, are you?

25 Mr. Hughes. I think it is impossible to say

1 definitively what a particular company may do. I think
2 part of the decisionmaking as to whether it is passed on
3 or not is also based upon the benefits that they will get
4 from reform with the additional business that will be
5 forthcoming.

6 Senator Kyl. Well, then you are personally
7 expressing--you are not sure that you agree with what CBO
8 has said. Is that the bottom line?

9 Mr. Hughes. I think it is very difficult to say
10 definitively what each company will do in each situation.

11 Senator Kyl. Yes, that is not contradicting what
12 CBO said.

13 Thank you, Mr. Chairman.

14 Senator Kerry. Mr. Chairman?

15 Senator Stabenow. Mr. Chairman?

16 The Chairman. Senator Stabenow.

17 Senator Stabenow. Thank you, Mr. Chairman.

18 First, I do have to say again that this is now the
19 11th time that this same offset that lowers tax benefits
20 for middle-income people is being used, although this
21 time it really is even more harmful because it is my
22 understanding it would actually take the top level for
23 middle-income people back up to the level before the
24 Chairman modified his mark and actually improved it.

25 We have made improvements in affordability in the

1 Chairman's mark, and this would take us back to where we
2 were before, which in my judgment is even worse.

3 But having said that, I do want to support the
4 concerns that are raised by my friend from Arizona,
5 because I share those concerns and would like very much
6 to work with you as we go to the floor to see if we might
7 find some other way to address this.

8 We have great medical device companies in my State
9 that are providing good-paying jobs and not being
10 outsourced and that are actually exporters of goods that
11 are made right here in America. And my concern is that
12 they will be hit twice in terms of a cut--once from the
13 hospitals who will be cut, and then once directly.

14 And so I understand the industry has expressed a
15 willingness to work on ideas that would provide direct
16 revenues, and I would hope that we could do that as this
17 moves forward to find a better way.

18 Recently Stephen MacMillan, the president and CEO of
19 Stryker, which is a very important and great company in
20 Michigan, indicated that he supported nearly all of the
21 main points the President has raised for reforming health
22 care, but he was very concerned about this fee and wants
23 to work to find another way. And I know that that is the
24 feeling of people in the industry who understand this is
25 all about everyone being a part of the solution, being

1 part of the funding of this. But I believe that this is
2 too much and is done in a way that they are going to be
3 hit twice.

4 And so I would like very much, Mr. Chairman, to work
5 with you and Senator Kyl when we go to the floor--and
6 with the industry--to see if we might find some other way
7 that would be of less concern.

8 Senator Kyl. Mr. Chairman. I am ready to have a
9 vote. There is an old saying, "Where there is a will,
10 there is a way." I guess we will see whether there is
11 really a will.

12 Senator Kerry. Mr. Chairman?

13 The Chairman. Senator Kerry.

14 Senator Kerry. Mr. Chairman, I was chairing a
15 Committee hearing earlier today when Senator Kyl raised
16 this issue, and I want to thank Senator Stabenow for
17 raising my concerns at that point in time.

18 I share Senator Kyl's concerns about the impact here
19 on the industry, and you have listened to us. We have
20 met with you, Mr. Chairman, and we have talked at length
21 with some of the leaders of the industry. But I think we
22 really have to be careful here and thoughtful as we go
23 forward.

24 You know, we completed negotiations with the
25 hospitals. We completed negotiations with the PhRMA

1 industry. We have not completed negotiations here. They
2 really just have not finished.

3 The Chairman. That is correct.

4 Senator Kerry. And so, you know, I look at how
5 this industry saves a lot of money. In some cases,
6 obviously, some new devices cost and raise prices, and it
7 depends a lot on the utilization. And I have not raised
8 this here in the course of these discussions yet. We
9 have had some discussions about it during the early
10 meetings we had, Mr. Chairman, when we talked about
11 defensive practice. And often the technologies are the
12 things that get used the most in defensive practice, and
13 there is no question in my mind that it has a certain
14 impact on driving costs.

15 But the technologies also save enormous amounts of
16 money. They treat strokes, help to diagnose stroke ahead
17 of time. We save enormous sums there. We have huge
18 savings--I think it is about \$800 million of savings to
19 the hospital--because of some of the medical devices;
20 and, obviously, life-changing impacts on people as a
21 consequence of many of these devices, which keep you out
22 of hospitals and out of intensive care.

23 So we have got to look at the savings side and what
24 it takes to get there. It takes a considerable amount of
25 investment money, innovation and time, research and

1 development.

2 So I just want to make certain that we are not
3 stifling that in this process. I would like to see the
4 industry be able to finish this negotiating process. I
5 do not support the offset in this. So I cannot support
6 going backwards in terms of that offset.

7 So I hope, Mr. Chairman, in the next days--we are
8 going to have a breathing spell here while we wait for
9 the CBO figures. We are going to have a breathing spell
10 as we know the bills. This I think is an important issue
11 to try to resolve, and I hope that we can do that, and I
12 think Senator Kyl for raising it.

13 The Chairman. I might say, Senator Kerry, you make
14 some very good points. This matter has not yet been
15 resolved, and there are efforts to resolve it. One key
16 point here is that the DRGs go to the hospital
17 procedures, which includes medical devices in many
18 respects, and there is not a separate DRG for medical
19 devices, which makes this a different animal. And we
20 want to be fair about that.

21 As I said, we are continuing to work on this issue.

22 I do not want to say much more, but I hear what you are
23 saying and am very respectful of your comments.

24 Senator Conrad. Mr. Chairman, just one sentence.

25 The Chairman. Senator Conrad.

1 Senator Conrad. I would just like to associate
2 myself with the remarks of Senator Kerry.

3 The Chairman. Thank you.

4 Senator Cantwell. Mr. Chairman, if I could echo
5 that as well.

6 The Chairman. Okay. Thank you. Thank you,
7 Senator Cantwell.

8 Senator Kyl, do you want to conclude? Or do you
9 want to vote?

10 Senator Kyl. Let us just have votes.

11 The Chairman. Okay. The clerk will call the roll.

12 The Clerk. Mr. Rockefeller?

13 Senator Rockefeller. No.

14 The Clerk. Mr. Conrad?

15 Senator Conrad. No.

16 The Clerk. Mr. Bingaman?

17 Senator Bingaman. No.

18 The Clerk. Mr. Kerry?

19 Senator Kerry. No.

20 The Clerk. Mrs. Lincoln?

21 The Chairman. No by proxy.

22 The Clerk. Mr. Wyden?

23 The Chairman. No by proxy.

24 The Clerk. Mr. Schumer?

25 The Chairman. No by proxy.

1 The Clerk. Ms. Stabenow?
2 Senator Stabenow. No.
3 The Clerk. Ms. Cantwell?
4 Senator Cantwell. No.
5 The Clerk. Mr. Nelson?
6 Senator Nelson. No.
7 The Clerk. Mr. Menendez?
8 Senator Menendez. No.
9 The Clerk. Mr. Carper?
10 Senator Carper. No.
11 The Clerk. Mr. Grassley?
12 Senator Grassley. Aye.
13 The Clerk. Mr. Hatch?
14 Senator Grassley. Aye by proxy.
15 The Clerk. Ms. Snowe?
16 Senator Snowe. Aye.
17 The Clerk. Mr. Kyl?
18 Senator Kyl. Aye.
19 The Clerk. Mr. Bunning?
20 Senator Grassley. Aye by proxy.
21 The Clerk. Mr. Crapo?
22 Senator Crapo. Aye.
23 The Clerk. Mr. Roberts?
24 Senator Grassley. Aye by proxy.
25 The Clerk. Mr. Ensign?

1 Senator Ensign. Aye.

2 The Clerk. Mr. Enzi?

3 Senator Grassley. Aye by proxy.

4 The Clerk. Mr. Cornyn?

5 Senator Grassley. Aye by proxy.

6 The Clerk. Mr. Chairman?

7 The Chairman. No. The clerk will tally the vote.

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

9 The Chairman. The amendment is not agreed to.

10 Senator Grassley?

11 Senator Grassley. Mr. Chairman, I probably should
12 have called for a roll call on the Wyden amendment, but
13 since I did not and it did pass, but I need to be
14 recorded as voting no on that amendment, so I ask
15 unanimous consent to do that.

16 The Chairman. Senator, you make a good point.
17 Frankly, I moved the vote quickly. I probably should
18 have given more notice and let it sink in a little more.

19 And I appreciate your effort to want to vote no, and I
20 also appreciate your implication that we would have taken
21 more time with that amendment.

22 Okay. I would like the Committee now to recess for
23 about 10 minutes. We will be back in 10 minutes.

24 [Recess.]

25 The Chairman. The Committee will come back to

1 order.

2 First, I thank all the Senators for this delay.
3 Sometimes you have to go step backward before you can go
4 two or three steps forward, and let us hope that the
5 delay is going to allow us to go forward.

6 I will recognize the Senator from West Virginia,
7 Senator Rockefeller.

8 Senator Rockefeller. Thank you, Mr. Chairman. I
9 want to thank you and I want to thank all Senators and I
10 want to thank staff. I made that speech the other night.

11 I want to thank you, Mr. Chairman, for working with
12 me to protect the health care needs of kids currently
13 enrolled in the Children's Health Insurance Program.
14 What would happen if we did not pass this amendment that
15 I am offering tonight is the kids would go into the
16 exchange, which is where they are in the mark, and the
17 defined--

18 The Chairman. Please talk into your microphone,
19 please.

20 Senator Rockefeller. The defined benefits that are
21 so crucial for kids, which is zero through the end of the
22 18th year, would disappear. They would disappear. And
23 the program we voted this overwhelmingly--I think it was--
24 --we got 69 votes three times, twice in the Bush
25 administration, once in the Obama administration. And it

1 was a bipartisan walk because everybody wants to do the
2 right thing by kids.

3 I do not believe that we can force vulnerable kids
4 into private coverage. That is what we would be doing.
5 They would lose that special kind of defined benefit that
6 comes under Medicaid, which is you can argue, I guess in
7 some cases, but you cannot argue it on kids, and
8 particularly young kids. You cannot do that. They have
9 requirements that you have to meet and that can only be
10 met through Medicaid, not in the exchange where they are
11 at the mercy of people that will have them for lunch.

12 So a lot of people here--Senator Hatch, Senator
13 Baucus, Senator Snowe, Senator Grassley--you know, we all
14 worked and we spent hundreds of hours actually in the
15 Finance Committee room--Senator Baucus, myself, Senator
16 Grassley, Senator Hatch, every afternoon. Was it this
17 year or last year? I cannot even remember. From 5:00 to
18 7:00 every day discussing how to work this one program
19 through. And we did, and it passed three times with 69
20 votes, something of that sort.

21 I do not think there is any reason to dismantle a
22 program that works. They are getting the protection.
23 Please be reasonable. Vulnerable people are reasonable.

24 We should do our work to reauthorize this vital program
25 for this period.

1 Again, Mr. Chairman, I want to thank you and so many
2 others for the very hard work on this bipartisan
3 amendment, and I hope that my colleagues will vote for
4 this amendment.

5 Senator Conrad. Mr. Chairman?

6 Senator Grassley. Mr. Chairman?

7 The Chairman. Senator Grassley.

8 Senator Grassley. I know that when I speak against
9 Senator Rockefeller's amendment, he will think I am
10 against everything he is for, and that is not true, but
11 it is happening over the last 2 days. So I speak in
12 opposition for this amendment. I do not think we want
13 this debate to take a long time.

14 Do you want me to wait?

15 Senator Rockefeller. Senator Grassley, can I
16 make--

17 Senator Grassley. That is okay.

18 The Chairman. Senator Rockefeller, go ahead.

19 Senator Rockefeller. Mr. Chairman, I want to
20 modify this amendment at this point to provide that any
21 savings from this amendment--and it is scored that way--
22 will go into something called the Health Improvement
23 Fund. That is the amendment. I hope it will be accepted
24 along with the amendment.

25 Senator Grassley. Mr. Chairman.

1 The Chairman. Senator Grassley is recognized.

2 Senator Grassley. This is why I think this
3 amendment is very bad. And I start with a premise that
4 for a long period of time, and of course now it is the
5 Chairman's mark and it's not a bipartisan mark, but for a
6 long period of time I can say what at least six of us are
7 working for. This is contrary to everything we've been
8 working for.

9 Number one, it moves kids from private coverage to
10 public coverage. It reduces benefits available to kids.

11 It expands public coverage beyond what the House would
12 do, and that's quite a movement. And it cost-shifts from
13 the public sector to the private sector. So that's why
14 this amendment should be defeated.

15 Senator Conrad. Mr. Chairman.

16 The Chairman. Senator Conrad.

17 Senator Conrad. Mr. Chairman, I was in the Group
18 of Six for the 61 odd meetings that we had. And I
19 understand Senator Grassley's perspective. But I also
20 understand Senator Rockefeller's passion. And I
21 understand his absolute dedication to kids all across the
22 country and his determination that those kids have a fair
23 shot. And I believe when the history of this period is
24 written that there will be a handful of people that
25 really will stand out as heroes to kids. And there are a

1 number of them on this committee.

2 None has put more of an effort, more of himself on
3 the line on kids across this country than Senator
4 Rockefeller. And I hope out of respect for that
5 commitment and for what it will mean to children that we
6 can support Senator Rockefeller's amendment tonight.

7 Senator Kerry. Mr. Chairman?

8 The Chairman. Senator Kerry.

9 Senator Kerry. Mr. Chairman, I am pleased to be a
10 cosponsor of this amendment, and I am just a deep
11 believer in it. Working with Senator Kennedy, I had the
12 privilege of introducing the initial bill back in 1996,
13 and then in 1997 Senator Kennedy, Senator Hatch, Senator
14 Rockefeller and others worked, and we brought it into law
15 subsequently. In 2005 when I returned to the Senate
16 after the campaign of 2004, the first bill I introduced
17 was children's health care, the Kids Come First Act, to
18 cover all children. We haven't done that yet. But we
19 have talked in a number of our meetings about the
20 criticality of not taking this valuable program out of
21 its current status where we guarantee a certain set in
22 standards in care and put it in the exchange where we do
23 not know what kind of care or quality it is going to be
24 and subject kids to that competition. That would be a
25 huge step backwards for us. And I will tell you, if

1 Senator Kennedy were here you would hear that booming
2 voice going about as loud as it could right now about
3 what is at stake in this amendment.

4 So I strongly support what Senator Rockefeller is
5 doing. I congratulate him for his approach in this. And
6 I thank him for his leadership on it.

7 The Chairman. Is there further discussion?

8 Senator Ensign. Mr. Chairman.

9 The Chairman. Mr. Ensign.

10 Senator Ensign. Mr. Chairman, I would like to ask
11 a few questions of the staff.

12 Mr. Schwartz, does this amendment take children who
13 are in the Chairman's mark who would get private health
14 insurance and move them into public coverage?

15 Mr. Schwartz. Yes, it does, Senator.

16 Senator Ensign. Does this amendment take children
17 who are typically healthier and cheaper to insure out of
18 the private coverage pool?

19 Mr. Schwartz. Children generally are healthier and
20 cheaper to insure, so, yes, it removes them from that
21 pool.

22 Senator Ensign. Okay. Does moving children into
23 government run coverage make the private coverage pool
24 more expensive to cover then?

25 Mr. Schwartz. I believe it does.

1 Senator Rockefeller. Will the Senator yield for a
2 question?

3 Senator Ensign. As soon as I am finished my
4 questions. Thank you.

5 Does this amendment take the Medicaid EPSDT benefit
6 away from kids who would get it under the Chairman's
7 mark?

8 Mr. Schwartz. The Chairman's mark provides EPSDT
9 to all children below 250. The amendment would provide
10 EPSDT only to those states that run their CHIP programs
11 as Medicaid extensions, so, yes, there are some children
12 that would not get that.

13 Senator Ensign. And so this amendment does extend
14 the CHIP program?

15 Mr. Schwartz. This amendment extends the CHIP
16 program.

17 Senator Ensign. And does this amendment provide
18 funding allotments equal to the current CHIP program?

19 Mr. Schwartz. This amendment as I understand it
20 leaves the current reauthorization alone, so it is good
21 for four years from yesterday. But it is silent as to
22 what happens after that. The assumption is that it moves
23 forward with allotments.

24 Senator Ensign. So is it funded or is it under-
25 funded?

1 Mr. Schwartz. The allotments after September 30 of
2 2013 are not funded in the amendment. But CBO's
3 assumption in scoring this is that current baseline will
4 continue.

5 Senator Ensign. Will states be able to cover as
6 many children as they do under current CHIP? There will
7 be fewer children covered through CHIP in 2019 than 2013;
8 is that correct?

9 Mr. Schwartz. We have not seen coverage numbers,
10 but I think that is correct, based on CBO's assumption of
11 roughly \$6 billion in the baseline for the allotments.
12 And so that is constant. So it is probably not enough to
13 provide the same level of coverage in the out years.

14 Senator Ensign. Thank you. So in summation, this
15 amendment increases the number children in government-run
16 health care at the expense of the private market. The
17 bill is trying to reform while taking away critical EPSDT
18 benefits from many children and under-funding the program
19 the amendment alleges to extend.

20 Thank you, Mr. Schwartz.

21 Mr. Schwartz. My pleasure. (laughter)

22 The Chairman. Very civil. (laughter) Okay. Is
23 there discussion? If not, the motion is on the
24 amendment. All in favor of the amendment, say aye?
25 (chorus of ayes)

1 Senator Ensign. Mr. Chairman, I think we need to
2 have a roll call vote.

3 The Chairman. Okay. Call the roll.

4 The Clerk. Mr. Rockefeller?

5 Senator Rockefeller. Aye.

6 The Clerk. Mr. Conrad?

7 Senator Conrad. Aye.

8 The Clerk. Mr. Bingaman?

9 Senator Bingaman. Aye.

10 The Clerk. Mr. Kerry?

11 Senator Kerry. Aye.

12 The Clerk. Mrs. Lincoln?

13 Senator Lincoln. Aye.

14 The Clerk. Mr. Wyden?

15 Senator Wyden. Pass.

16 The Clerk. Mr. Schumer?

17 The Chairman. Aye by proxy.

18 The Clerk. Ms. Stabenow?

19 Senator Stabenow. Aye.

20 The Clerk. Ms. Cantwell?

21 Senator Cantwell. Aye.

22 The Clerk. Mr. Nelson?

23 Senator Nelson. Aye.

24 The Clerk. Mr. Menendez?

25 Senator Menendez. Aye.

1 The Clerk. Mr. Carper?
2 Senator Carper. Aye.
3 The Clerk. Mr. Grassley?
4 Senator Grassley. No.
5 The Clerk. Mr. Hatch?
6 Senator Grassley. No by proxy.
7 The Clerk. Ms. Snowe?
8 Senator Snowe. Aye.
9 The Clerk. Mr. Kyl?
10 Senator Kyl. No.
11 The Clerk. Mr. Bunning?
12 Senator Grassley. No by proxy.
13 The Clerk. Mr. Crapo?
14 Senator Crapo. No.
15 The Clerk. Mr. Roberts?
16 Senator Grassley. No by proxy.
17 The Clerk. Mr. Ensign?
18 Senator Ensign. No.
19 The Clerk. Mr. Enzi?
20 Senator Grassley. No by proxy.
21 The Clerk. Mr. Cornyn?
22 Senator Grassley. No by proxy.
23 The Clerk. Mr. Chairman?
24 The Chairman. Aye. The clerk will tally the vote.
25 The Clerk. Mr. Chairman, the final tally is 13

1 ayes, 9 nays and one pass.

2 The Chairman. The amendment is carried.

3 Senator Rockefeller. Mr. Chairman?

4 The Chairman. Senator Rockefeller.

5 Senator Rockefeller. I just want to continue some
6 remarks while discussions are going on about Medicaid and
7 about the absolute necessity to make sure that these
8 people on Medicaid for the most part in spite of common
9 parlance, through no fault of their own, and it is where
10 they happen to be born. Some of us are wealthy. Are we
11 better? No. We were just lucky. They are unlucky.

12 But they are people. And they deserve to have
13 Medicaid coverage. And that is why I think every single
14 Democrat in the entire United States Congress voted
15 against that DRA Amendment in 2005 because that would
16 have just put them into another category of coverage.

17 And that is a great loss. And I do not think I have
18 to explain the reasons why particularly. People
19 understand it.

20 Again, this is Medicaid like CHIP coverage. It is a
21 responsibility that we have. Yes, it costs. Is it a
22 government program? Yes, it is. Is it entitlement?
23 Yes, it is. If it wasn't an entitlement and they were in
24 the exchange somewhere or whatever, governors had free
25 will, Medicaid waivers and all the rest of it, they wreak

1 havoc because their states do not have money. And for a
2 couple of years they are not going to have money.

3 And I think the recession is going to begin to
4 change in about 2011 or 2012, something of that sort.
5 But it has not yet. So if we pass something that allows
6 governors to do their will, exercise their will, they
7 will do that, and they will dump Medicaid patients, they
8 will dump CHIP patients. And I can say that on
9 experience from my own state.

10 It is a bitter experience, and it is not one that
11 should be repeated elsewhere. People can say what they
12 want about Medicaid, but Social Security was not set up
13 for no reason at all. Medicaid and Medicare which passed
14 at the same time were not set up for no reason at all.

15 So it is important, and that is why I think the
16 Deficit Reduction Act is not good.

17 I am rereading my statement here, folks. This is
18 tactical. This is at the summit. This is at the summit.

19 Criticality of this moment and the pressure, the
20 psychological ramifications are stunning. So I am going
21 to read my entire Medicaid statement all over again so
22 that you will not miss a single nuance. That is
23 important to me, that is important to America, and that
24 is important to David Schwartz. (laughter)

25 The Chairman. I think that is right. It is

1 probably important to him as much as anybody. (laughter)

2 Senator Rockefeller. And so here we go. Over the

3 last two weeks -

4 Senator Nelson, do I have your full attention?

5 (laughter)

6 I have heard a lot of talk about old people,
7 disabled people, vulnerable populations, pregnant women,
8 the elderly, et cetera. But again you just do not hear
9 people talking, public officials or people, about
10 Medicaid, because it is something they had rather not
11 hear about, something they had rather not have in their
12 communities.

13 Now my experience was different because I was reborn
14 in a secular sense by becoming a VISTA volunteer when I
15 went to West Virginia, not expecting to stay, and then
16 finding after one year living with people, none of whom
17 had work, none of whom had health insurance, none of whom
18 went to school because there was no school bus. And you
19 have heard this speech before. And I could not leave.

20 And it was because I became so devoted to those
21 people and the unfairness. And I will tell you the story
22 of Eddie. The story of Eddie is an 18-year-old boy fully
23 capable and prepared to work, terrific physical, mental
24 specimen, great attitude, leader in our youth movement in
25 our VISTA community. And I lined up a job interview at

1 Union Carbide for him. And I took him with me in my Land
2 Rover, whatever it was, and we went down to Union
3 Carbide.

4 Well, that meant we had to go to Charleston. He had
5 never been to Charleston, which is only 45 minutes away,
6 and he had never crossed a street, never seen a red
7 light. So he was confused by that, but I was with him.
8 And then we went into the Union Carbide Building. It is
9 a big company, had a lot of elevators. He had never been
10 in an elevator. A lot of people get claustrophobic. He
11 got claustrophobic in the elevator. But I was with him,
12 and he was steady.

13 So we came out on the third floor and we walked into
14 the interviewer's office. He was a very nice man, but
15 the room was set up so that Eddie and I, sitting side by
16 side, were facing a big window with sunlight streaming
17 directly into our eyes, which did not bother me but made
18 Eddie understandably nervous.

19 So the plant interviewer who was sensitive to Eddie
20 said, Why don't you let the blinds down, son, and the sun
21 will not be in your eyes? (choking up) Well, it
22 happened that the blinds were Venetian blinds, two ropes
23 that do not meet on one side and one rope which does on
24 the other. There are no blinds in that district
25 community. Eddie fiddled with that for awhile, but he

1 was humiliated, embarrassed, and so what he did was he
2 reached up and took the bottom seven or eight slats on
3 the blind and he just hung his full weight on those
4 slats, which did not move. (choking up) I am sorry.

5 So then he sat down, and we proceeded with the
6 interview. (long pause) But he could not give his name.
7 He had been stripped of all self-worth. What I had done
8 to him was substantially damaging to him. And a year
9 later he was gone from Emmons, and I have no idea where
10 he is today.

11 But he had Medicaid. He had me by his side, and it
12 did not work. He had Medicaid by his side, and it did
13 work.

14 So I like to keep poor people where they have health
15 care benefits. I do not wish to see them handed over to
16 the tender mercies of a private exchange, or whatever.
17 And I think you will understand the spirit in which I
18 tell this story.

19 It is interesting. I took 500-- remember in those
20 days back in '64 and '65, the big rage was Olivetti
21 typewriters? They were slim, they were modern, they were
22 chic? You could say dude about them, they were cool?
23 And I had one of those, and every night I would sit down
24 and I would write pages and pages and pages of what went
25 on during that day, psychologically, to me when things

1 went well, when things didn't go well, to individual
2 parts of our community. There were only 356 people in
3 this whole community, but it was a huge community in
4 terms of the implications of people.

5 And I have that in my office at home. And in the 43
6 years since I have left Emmons, I have never opened that
7 diary to read it. (choking up) I can't do it. And now
8 I am embarrassed. Have I talked enough, Mr. Chairman? I
9 was trying to cover for you. This is off the request of
10 The Chairman. I just had to talk so he could work some
11 things out. (laughter) It is a little bit more painful
12 for me, and I hope not for him.

13 But actually I do not care about that because I feel
14 the way I feel, and I am who I am. Thus ends the reading
15 of the evening lecture. (laughter and applause)

16 The Chairman. The applause is a testament, as is
17 often said, of your passion. I do not know a Senator with
18 a deeper sense of purpose and conviction, a passion for
19 his state and especially for lower income people, than
20 you. And it is clearly a transformative experience when
21 you saw Eddie. And it is wonderful what you have gone
22 through, and even though Eddie may have felt at that
23 moment a bit embarrassed, I will bet Eddie very much
24 appreciated what you were trying to do. And you have
25 done so much for West Virginia at so many levels, at so

1 many capacities, first as a VISTA volunteer and then
2 working your way up until you became governor of West
3 Virginia. West Virginia is lucky and we are lucky and
4 our country is lucky to have a Senator such as you. And
5 we just deeply appreciate you. I think I can speak for
6 my colleagues.

7 Senator Rockefeller. Thank you, Mr. Chairman.

8 Now, showing that all people are not consistent at
9 all moments of the hour of the day, I withdraw my
10 Medicaid, not my CHIP amendment but my Medicaid
11 amendments for the purpose of later consideration before
12 the Floor or on the Floor.

13 I call up FFI, Rockefeller FI modified to America's
14 Healthy Future Act. This amendment makes various changes
15 to the modified Chairman's mark.

16 The Chairman. This amendment is now being
17 distributed.

18 Mr. Sullivan, could you explain this, please?
19 Sorry? Would the proper staff explain this modification?

20 I don't know who it is.

21 Mr. Sullivan, who do you want to explain this?

22 Mr. Sullivan. Mr. Dawe.

23 The Chairman. Mr. Dawe, are you there?

24 Mr. Dawe. Okay. There are various provisions in
25 this modification. Mr. Dawe, you are probably there to

1 explain at least the first part, about the Medicare
2 commission. Why do you not proceed and explain the
3 modification?

4 Mr. Sullivan, why do you not give an overview first?

5 Mr. Sullivan. Mr. Chairman, members, if I could
6 just briefly explain the overall structure of the
7 amendment? The amendment contains three major sections.
8 The first section has to do with modifications of the
9 Medicare commission and we will have Mr. Dawe and Ms.
10 Eisinger explain.

11 The second section of the bill actually will include
12 some policy initiatives that will cost money and will be
13 off-set by the savings derived in the previous CHIP
14 amendment. Those components include some changes to
15 streamlining entry into certain programs under the bill.

16 Mr. Schwartz will describe those. Those are a
17 modification of a previous Bingaman amendment.

18 In addition, it will include some changes to the
19 high cost insurance excise tax. For those portions, Mr.
20 Barthold will explain those. And it includes a provision
21 regarding a bio tax credit, modified from an amendment by
22 Mr. Menendez.

23 And then the final section includes some technical
24 changes that are necessary to make this bill conform and
25 work under CBO's analysis of the bill. And Ms. Fontenot

1 will explain those.

2 The Chairman. Mr. Dawe, proceed.

3 Mr. Dawe. The amendments with regard to the
4 Medicare Commission in Title III (E) are as follows. The
5 amendment clarifies that the commission and by extension
6 the Secretary of HHS may now propose changes to
7 beneficiary premiums under Sections 1818, 1818(A), and
8 1839 of the Social Security Act. The amendment also
9 inserts the following into the commission and the
10 Secretary's Scope of Proposals. As appropriate, the
11 commission will include recommendations to reduce
12 expenditures under parts C and D of Medicare. The
13 amendment also clarifies that in proposals to Congress
14 prior to the end of 2019 the commission may include
15 supplemental nonbinding recommendations regarding
16 providers who are not otherwise included in the scope of
17 the commission's proposals.

18 Also it clarifies the rulemaking process with regard
19 to the proposals recommended to Congress by the
20 commission. And it also sunsets Clause 6 on page 156 of
21 the mark, related to providers who will experience
22 payment reductions in excess of productivity.

23 The Chairman. Are there any questions on this
24 portion any Senators might have? Okay.

25 Why do you not proceed to the next section, Mr.

1 Schwartz?

2 Mr. Schwartz. Thank you, Mr. Chairman. The next
3 section is a modification of Senator Bingaman's C-1
4 Amendment which was discussed a couple of hours ago
5 earlier this evening. The modification is that in
6 Senator Bingaman's modified C-1 that was discussed
7 earlier, there were eight numbered paragraphs. And this
8 modification would remove what was number 7, which
9 related to the filing of Federal Income Tax returns and
10 the ability to apply for programs based on that. And of
11 course the offset that was in C-1 has been removed in
12 this modification.

13 Senator Ensign. What was that change again? What
14 was that elimination? What does that paragraph do?

15 Mr. Schwartz. Senator, that paragraph, it was
16 number 7 on the modified version that Senator Bingaman
17 distributed, and it said, "Taxpayers filing federal
18 income tax returns may use such returns to apply for tax
19 credits, Medicaid and CHIP if the taxpayer affirmatively
20 authorizes disclosure of tax return data." And that was
21 removed in the large modification you just got.

22 Senator Ensign. And everything else is the same
23 except for the offset?

24 Mr. Schwartz. Correct.

25 The Chairman. I'd like to recognize Senator

1 Rockefeller so he may further modify his amendment.

2 Senator Rockefeller. I further modify my amendment
3 to strike the paragraph on page 4 that begins "A
4 taxpayer."

5 The Chairman. If I might help clarify, that was a
6 typographical provision that was in the earlier
7 provision. The modification corrects that mistake.

8 All right. Are there any questions from the
9 Senators?

10 Senator Schumer. Mr. Chairman?

11 The Chairman. Senator Schumer.

12 Senator Schumer. Yes. I just have a question. I
13 guess it is for Mr. Barthold. In the dangerous work?

14 Mr. Barthold. Yes, Senator.

15 Senator Schumer. High risk work category,
16 construction work is one of those. So would lineman for
17 a phone company be in that category, and line women, line
18 people?

19 Mr. Barthold. I was not questioning the thinking
20 about the gender choice. As we conceived of it for
21 trying to estimate the proposal on behalf of the
22 sponsors, we looked at general industry definitions, and
23 the building trades my understanding is generally do not
24 include linemen who would be an indication --

25 Senator Schumer. I know. But many of us are

1 hearing from that particular group pretty loudly. And I
2 was wondering, Mr. Chairman, if there is a way, at least
3 in report language, that that could be considered as part
4 of the high risk area? I know that several of my
5 colleagues would be interested in that as well as me.

6 The Chairman. I see no reason why not. It sounds
7 pretty high risk to me, to be a lineman.

8 Senator Schumer. Yes.

9 Senator Ensign. Mr. Chairman? Is the logic behind
10 the high risk, it would seem to me that most of the high
11 risk health care would be covered under Workmen's Comp.
12 I mean, these are high risk jobs. They get injured on
13 the job, their health care is covered by Workmen's Comp,
14 isn't it? So I guess I am just, what was the logic going
15 behind covering high risk versus other kinds of plans?

16 The Chairman. Frankly, Workmen's Comp and health
17 insurance are two entirely separate. Workmen's Comp
18 compensates persons who are injured and they get paid
19 benefits, sometimes lifetime benefits.

20 Senator Schumer. Yes, but their health care is
21 also through Workmen's Comp.

22 The Chairman. No, no. Health care is, these are
23 generally policies that are high value policies. And
24 they work at a high risk job, you tend to have a high
25 value policy. And all kinds of things could happen to

1 you as a worker that is not directly related to work;
2 that is, injured on the job. Workmen's Comp is injury on
3 the job.

4 Senator Ensign. No, I know what it is.

5 The Chairman. And so health insurance here is
6 other insurance. It could be Medicaid. Who knows what
7 it is? It is not directly related to injury on the job.

8 They have high value policies because it is a high risk
9 profession.

10 Senator Conrad. Mr. Chairman, might I take a stab
11 at this? In the Group of Six when we were -

12 Senator Schumer. Oh, not that again.

13 (Laughter.)

14 Senator Conrad. Yes. I'm sorry. When we were
15 discussing this, one of the things that came out is that
16 a whole series of workers have higher health insurance
17 premiums because of the nature of their jobs. So our
18 police, our firefighters, other first responders, and
19 then as we broadened out in examination we found other
20 categories of people who have higher premium policies
21 because of the risk profiles of their jobs.

22 And this is an attempt to respond to that concern.

23 The Chairman. I wonder, Mr. Reeder, if you might
24 be able to comment on this?

25 Mr. Reeder. What Senator Conrad said is correct.

1 There is a higher incidence of on-the-job injury and it
2 is true, and Senator Ensign is correct that those
3 particular injuries would be addressed through Workers
4 Comp. But there is also a correlation between health
5 insurance costs and high risk occupations. It is not
6 only Workers Comp.

7 Senator Ensign. That just kind of surprised me
8 that the reason is because we heard last night about
9 discrimination, about some kinds of behavior and things
10 like that. And it is interesting that that is allowed
11 because of a high risk. But I was pretty sure about the
12 Workmen's Comp issue, by the way. I worked in the
13 private sector and had a lot of Workmen's Comp claims
14 that paid for all the health care costs and things like
15 that. So I appreciate the correction.

16 The Chairman. Are there further questions?

17 Senator Stabenow.

18 Senator Stabenow. I don't have a question but I do
19 want to respond.

20 The Chairman. Sure.

21 Senator Stabenow. And I am pleased to be cosponsor
22 of this amendment, and there are a number of very
23 important provisions in here. But I do want to
24 particularly speak to the issue of the thresholds of the
25 excise tax.

1 And thank you, Mr. Chairman, for working with me and
2 working with others to be able to address this.

3 As you know, this has been of particular concern to
4 me, and to be able to move from what was a positive step
5 in the modified mark of the Chairman moving to \$750
6 individual coverage or an additional \$2,000 for both high
7 risk or retirees. But now we have been able to do even
8 more, which is very, very important to be able to move
9 the threshold up above the \$21,000 threshold, to move it
10 to \$1,850 for an individual or to \$5,000 above the
11 \$21,000--\$5,000 for families.

12 And what this addresses is the fact of not only high
13 risk jobs have more expensive policies, but we have many
14 retirees that are of their own volition or being forced
15 to retire at much earlier ages. So we have people at age
16 55, 60 still buying insurance, not on Medicare, more
17 expensive because they use more health care because of
18 age rating and so on. So it is very important that we
19 make sure that they are not adversely affected by the
20 excise tax threshold in the bill.

21 So I think this is a critical step, and I am still
22 committed to raising the overall threshold and look
23 forward to working with you, Mr. Chairman. I think it is
24 very important overall that we are able to move from
25 \$21,000 and move that threshold up. But I think we have

1 set a standard here now of focusing on those who are most
2 at risk are retirees and those in high risk jobs.

3 And this is a critical step. We have set a new
4 threshold, and I am looking forward to being able to
5 address the broader issue as we move to the Floor. So
6 thank you, Mr. Chairman.

7 Senator Grassley. Mr. Chairman.

8 The Chairman. Senator Grassley.

9 Senator Grassley. Yes. I have questions on the
10 modification of the Rockefeller Amendment as it deals
11 with the Enzi Amendment and the Bunning Amendment. Now I
12 was here yesterday, or maybe it was two days ago, when
13 these were adopted. And they were adopted, I think just
14 accepted. Now we have these modifications that go from
15 these amendments putting a condition into place with just
16 now a report to Congress. And I remember the Chairman
17 saying yesterday that in accepting the Bunning Amendment
18 that he did not want to do anything to hurt veterans.

19 Now we have a conditional amendment with just a
20 report here. Now this, I need to know why, but besides
21 knowing why it seems to me like this is kind of a
22 situation where you can be for an amendment before you
23 are against it, or you can be for an amendment before you
24 know you are going to have a chance to modify it; and you
25 can have the best of both worlds.

1 I would think that this is a terribly intellectually
2 dishonest thing to be doing, particularly at the last
3 minute.

4 The Chairman. Senator, the whole point of this is
5 about total respect, one my very good friends. The whole
6 point of this is to fulfill a statement, a commitment we
7 made earlier, and that is to clean up some mistakes.
8 That is the Veterans Amendment. But we found out it has
9 a modest score, correct? Is the score enough? And this
10 is in recognition of that score.

11 Senator Grassley. Because it has a score, all of a
12 sudden it becomes a nonentity as far as the policy is
13 concerned, the conditions? So you just have a report
14 then?

15 The Chairman. I think somebody else can explain
16 this better than I.

17 Ms. Fontenot?

18 Ms. Fontenot. With regard to the modification to
19 the Enzi Amendment, in our conversations with the
20 Department of Labor they were uncertain that such a
21 certification could take place. And additionally, the
22 Health Committee expressed some concerns that this is
23 potentially in their jurisdiction. So we modified that
24 to be review and report by the Secretary to Congress.

25 Senator Nelson.

1 Well, I'm not sure if Senator Grassley is finished
2 or not?

3 Senator Grassley. Well, for right now, yes. I've
4 got another question.

5 The Chairman. Okay. Senator Nelson.

6 Senator Nelson. So by my addition here, the new
7 threshold for individuals will be \$9,850 for retired and
8 high risk folks, and the family new threshold will be
9 \$26,000. Is that right?

10 Mr. Barthold. Senator, that is not correct. The
11 amendment base Chairman's mark as the thresholds of
12 \$8,000 and \$21,000, and then had an additional increase
13 in the thresholds for possibly two groups, the retiree
14 group or the high risk occupation group. And in the
15 Chairman's modified mark, the increase in those
16 thresholds for those two groups would have been \$750 and
17 \$2,000.

18 The amendment before us now retains the base
19 threshold amount of \$8,000 singles, \$21,000 family; and
20 for the retiree group, high risk group, it increases the
21 additional amounts to \$1,850 for singles, \$5,000 for
22 families. So for example, in a high risk occupation the
23 family threshold would be \$26,000 under the mark.

24 Senator Nelson. Well, that is what I said.

25 Mr. Barthold. Okay. Then I misunderstood. I

1 apologize.

2 Senator Nelson. It is \$9,850 for an individual and
3 \$26,000 for families in high risk and retiree.

4 Mr. Barthold. Correct. I am sorry. I
5 misunderstood you, sir.

6 Senator Crapo. Mr. Chairman. First, could I ask a
7 question? Do we have a CBO score on this amendment?

8 The Chairman. We do in the sense that the CBO
9 scored savings of \$15 billion in Senator Rockefeller's
10 amendment. And this is essentially the allocation of
11 those funds.

12 Senator Crapo. So the offset here is tied to the
13 scoring of the previous Rockefeller Amendment?

14 The Chairman. Yes, the previous Rockefeller
15 Amendment, as I understand, approximately \$15 billion.
16 And this is allocation of those funds.

17 Senator Ensign. Mr. Chairman, do we know though
18 what the rest of the amendment, not the offset, but what
19 the rest of the amendment scores so that we know it is
20 completely offset? Has CBO scored the rest of the
21 amendment?

22 The Chairman. Well, let me just consult.

23 Let me ask --

24 Senator Ensign. And could we get like a line item
25 how much each one costs?

1 The Chairman. First Mr. Sullivan can answer and
2 then Mr. Barthold.

3 Mr. Sullivan. Mr. Chairman, there are three
4 components to this. One is scored by CBO and two scored
5 by the Joint Tax Committee. The provision regarding
6 streamlining, Mr. Schwarz has a score for that component.

7 Mr. Barthold will have the component for the high
8 insurance excise tax and the bio tax credit. So those
9 would be the three that score.

10 Mr. Schwarz. So the modification of Bingaman C-1
11 scores we believe the same way that the modified version
12 of his amendment as a standalone that he offered, and
13 that was \$4.4 billion.

14 The Chairman. That might be, but that is not quite
15 the question asked by the Senator from Nevada. He wants
16 the whole, the rest of it.

17 Mr. Sullivan. Yes. I think I we are answering his
18 question. That is one component is \$4.4. The next two
19 components are tax.

20 Mr. Barthold. The modification to the high premium
21 excise tax we have estimated as adding an additional \$5.9
22 billion. And the allocated investment tax credit to
23 biotech at about \$950 million.

24 Senator Crapo. Mr. Chairman, are we still asking
25 questions, or is it appropriate for debate on the

1 amendment at this point?

2 The Chairman. Well, you can debate, you can ask,
3 you can do whatever you want to do.

4 Senator Crapo. Then I would like to use my time to
5 make just a couple of comments --

6 The Chairman. Sure.

7 Senator Crapo. -- on the modifications to the Enzi
8 and to the Bunning Amendment.

9 First of all, I understand that neither Senator Enzi
10 nor Senator Bunning were consulted on these
11 modifications. Is that correct?

12 The Chairman. I cannot answer that question. I do
13 not know.

14 Senator Crapo. Well, I do not believe they were.
15 And the explanation that I understood the chair to give
16 for why these modifications were made is that after these
17 amendments were adopted--and by the way, the Enzi
18 Amendment was not just accepted, but it was voted on and
19 the vote was 21 to zero I understand. And the Bunning
20 Amendment I believe was accepted.

21 But my understanding is that the Chairman's
22 explanation as to why they are now being modified in this
23 amendment is that it was determined that they had some
24 kind of a score impact that would cause difficulties with
25 the bill.

1 But if you look at these amendments, what that means
2 is, in the case of the Enzi Amendment it would have
3 suspended the employer mandate if it was determined that
4 the impact of it was to reduce wages, if I understand the
5 amendment when it was presented.

6 And so I assume that what is being said now with
7 this amendment is that it has been determined that that
8 in fact will occur, that in fact wages will go down and
9 that the employer mandate would thereby be suspended and
10 that that would have a budgetary impact on the bill.

11 And with regard to the Bunning Amendment, the
12 Bunning Amendment provided that none of the fees or taxes
13 in Title VI of the mark would go into effect unless the
14 Secretary of the Department of Veterans Affairs made
15 certain certifications about the availability of services
16 to veterans and their access to medical devices.

17 Does the fact that it has been determined that this
18 amendment now is going to have a score, does that mean
19 that it has been determined that in fact veterans
20 services and access to medical devices is going to be
21 lost and that therefore the taxes and fees in the title
22 will be suspended?

23 It appears to me that two very important principles
24 were recognized by the committee in the adoption of these
25 two amendments. first, the impact on wages and, second,

1 the impact on veterans, and that the effort to amend them
2 now is an outright acknowledgement that in fact the mark
3 will have a very negative impact on veterans and on
4 wages.

5 Senator Conrad. Mr. Chairman.

6 The Chairman. Senator Conrad. Go ahead.

7 Senator Conrad. Mr. Chairman, my understanding is
8 somewhat different than Senator Crapo has described. And
9 I can understand Senator Crapo why you would be concerned
10 that your interpretation might be what has occurred here.
11 That is not my understanding.

12 My understanding is, Bureau of Labor Statistics on
13 the Enzi Amendment just said they cannot make a
14 certification. It is not that they know there will be
15 that effect; it is that they cannot make a certification
16 to the contrary.

17 Senator Crapo. So does that then therefore cause a
18 cost increase in the bill?

19 Senator Conrad. I do not know. It apparently
20 causes some effect that CBO is concerned about. So it is
21 not that they are believing there will be an effect on
22 wages. It is that they cannot make a certification given
23 the timing that it won't. My understanding, and this I
24 get secondhand to Senator Crapo but I think on pretty
25 good authority, that that is also the case in the Bunning

1 Amendment.

2 So in good faith, I voted for the Enzi Amendment,
3 and I think all of us present voting did. But it turns
4 out that when you talk to the agency that is given the
5 responsibility to make the certification, they have come
6 back and said they could not.

7 Senator Crapo. And yet we turned it into a study
8 which they can do.

9 Senator Kerry. Well, it is a study to find out
10 what can be done. It seems to me if you want to operate
11 in bad faith once they told you that it does not work,
12 you could just sit there and it will not work. I think
13 what the Chairman has done is to come back in good faith.

14 Now maybe it is late at night or early in the
15 morning actually, and so maybe all the communication
16 necessary with Senator Bunning is not here. We are.

17 Senator Crapo. Senator Enzi is not here.

18 Senator Kerry. And Senator Enzi is not here, and
19 we are. And I think this is a good faith effort by the
20 Chairman to try to keep the spirit of doing something so
21 we can find out if we can do it, and then if they come
22 back and say it is terrific, we can do it.

23 The Chairman. This may be repetitious, but we
24 adopted the amendment and there was an assumption the
25 Secretary could certify. And we found out from talking

1 to the committee of jurisdiction, basically the Health
2 Committee, that the dataset just would not work, and that
3 therefore had made the amendment unworkable.

4 So what we are trying to do here is, all right if
5 that is the case let us get a report and try to figure
6 out what the proper data is. It is like the GPCI
7 Amendment, frankly, because the data off it is
8 inaccurate. It just does not fit. And so the thought
9 here is that if we could, like you say with respect to
10 Enzi, the Secretary of Labor can report to Congress --
11 otherwise frankly it was just unworkable.

12 Senator Crapo. Mr. Chairman, could I make an
13 inquiry of the staff about the CBO scoring on these
14 portions of the amendment?

15 The Chairman. No. We have just done that already.

16 Senator Crapo. Well, the question I have though
17 is, has the staff checked with CBO on the original form
18 of these two amendments? And has CBO given them any kind
19 of preliminary indication that these amendments would
20 score?

21 The Chairman. Ms. Fontenot, you can answer that.
22 I don't know if the right person is at the table.

23 Ms. Fontenot. In terms of the Enzi Amendment?

24 Senator Crapo. Both the Enzi Amendment and the
25 Bunning Amendment.

1 Ms. Fontenot. All right. I will have to defer to
2 Mr. Reeder on the Bunning Amendment.

3 The Chairman. Mr. Barthold, perhaps you can answer
4 that question with respect to scoring.

5 Mr. Barthold. On the Bunning Amendment relating to
6 the Department of Veterans Affairs, I have communicated
7 with the Congressional Budget Office, but can't say they
8 have a determination one way or the other. I think there
9 was a concern about what certification would mean in a
10 particular sense as has been discussed, that potentially
11 prices may move in all sorts of different directions, so
12 what would the Secretary feel that he could make a
13 certification that was in any way reflective of the
14 committee's intent.

15 Senator Crapo. So CBO did not give a preliminary
16 indication that it would score?

17 Mr. Barthold. No. They did not.

18 The Chairman. We made the good faith effort, asked
19 CBO. They came back and said, We don't know.

20 Senator Crapo. Well, maybe Mr. Chairman, let me
21 ask the question of you then.

22 The Chairman. Frankly, it can't be very large
23 anyway.

24 Senator Crapo. Because I am a little confused now
25 as to what the reason was. I understood initially that

1 you had indicated the reason for these amendments was
2 that there was a concern on the impact on the score of
3 the bill that needed to be corrected. Senator Conrad
4 indicates that my understanding was incorrect there.
5 What is the reason that these two amendments need to be
6 modified?

7 The Chairman. Mr. Barthold, can you?

8 Mr. Barthold. Senator Crapo, just at a real
9 technical level, the way the provision was if the
10 Secretary can't certify then there is no provision. And
11 so if there is no provision, then there would be no
12 revenue from the provision. But I think the concern that
13 the staff is addressing is, well, what does it really
14 mean to certify? What did the Secretary think he could
15 do a certification that was in the spirit of what the
16 committee was seeking? And if he says, No, I sort of
17 cannot answer, I do not know how to answer, then there is
18 no certification. If there is no certification, then
19 there is no revenue from the provision.

20 So I think that is what the Chairman is saying about
21 there then being a score from no certification. It did
22 not necessarily mean that it is a negative finding. It
23 was saying that there is no certification itself. If the
24 report were delivered after an effective date, the report
25 had to be delivered by the effective date, it would fail.

1 Senator Crapo. Well, Mr. Chairman, I will just
2 conclude by saying, it seems to me that if they can study
3 and make a report to Congress, that they could certify
4 the results of their study and their report.

5 Senator Conrad. Mr. Chairman, might I just say
6 that this may be a circumstance late at night that there
7 is an excess of caution, but my understanding, Senator
8 Crapo is, when they checked with the agencies they were
9 supposed to make the certification. They came back and
10 said, "We do not know how to make a certification for,"
11 technical reasons I don't pretend to understand at this
12 moment.

13 I understand with the Enzi Amendment the Bureau of
14 Labor Statistics said, given the timing of when they
15 would be asked to make the certification, that did not
16 fit with their databases or the timing of the databases.

17 It is frankly a little murky to me, but my understanding
18 is that the answer came back, We could not make any such
19 certification.

20 So then we are sort of left with a nullity. If we
21 were not here at 1.00 in the morning, we could go back to
22 Senator Enzi and Senator Bunning and have them connect
23 with these certifiers and maybe come up with a different
24 answer. And maybe part of the answer here is, before we
25 get to the floor, before we get to the merger of the

1 bills, the Chairman could consult with Senator Bunning
2 and Senator Enzi and those who have told the staff that
3 they cannot make these certifications and see if they
4 cannot work out something.

5 Senator Crapo. Mr. Chairman, I was just going to
6 suggest that perhaps that would be a way to solve this
7 because on other amendments what we have done is, we have
8 instead of coming in without the authors of the amendment
9 here even, changing their amendments, we have had
10 agreements between members and you to work out the
11 details. Because if the problem is just the timing of
12 the dates of the datasets that they are working on, it
13 seems to me that those kind of issues can be worked out.

14 Senator Kerry. Mr. Chairman.

15 The Chairman. Senator Kerry.

16 Senator Kerry. I think rather than chew up a lot
17 more time, I think we should accept that concept and I'm
18 confident, Mr. Chairman, you would be willing to work in
19 these next days. It does not make sense to churn around
20 this, particularly without Senator Enzi and Senator
21 Bunning here. I think if we get the parties, we can do
22 it. I just wanted to speak very quickly, Mr. Chairman,
23 to the ---

24 The Chairman. No, that is a good point. They are
25 not here tonight and I will work with them.

1 Senator Kerry. If I could just say, Mr. Chairman,
2 there is a component of this amendment that I just want
3 to emphasize and I will be very quick. Senator Stabenow
4 was talking about how we have been working since day one
5 to try to address the perception, and I say "perception"
6 because the excise tax goes to the company and not to an
7 individual. But we are trying to make certain that
8 nobody is going to be necessarily impacted in any pass-
9 on.

10 And so I think the increase in the high risk jobs
11 and early retirees is an important and consequential step
12 forward in terms of the efforts to try to adjust that.
13 And I thank you for that and Senator Rockefeller. And
14 what I hope now, I just want to make sure the record is
15 clear, that you have made it clear to us that we are
16 going to continue to work on the lower end of those
17 thresholds over these next days.

18 The Chairman. Absolutely.

19 Senator Kerry. I thank you for that very much.

20 Senator Grassley. Mr. Chairman?

21 The Chairman. Senator Grassley.

22 Senator Grassley. Say, I have a question about the
23 commission. Does this remove the carve-out that exempted
24 hospitals from any cuts? And secondly, were any other
25 carve-outs added for any other providers?

1 The Chairman. Ms. Eisinger.

2 Ms. Eisinger. To answer the second question first,
3 there were no additional carve-outs as you called them
4 added. In terms of what you refer to as the "hospital
5 carve-out," to be clear the exemption that is provided in
6 this bill is for providers who are cut at a certain
7 level. It does not just apply to hospitals. It applies
8 to some other providers who are cut in excess of the
9 productivity adjustment in a given year. That exemption
10 and criteria remain.

11 Senator Grassley. Then another question, it may be
12 something you can comment on. This change in the
13 Medicare Commission would appear to give explicit
14 authority to reduce the federal subsidy for the Medicare
15 drug benefit. And if so, this would result in increased
16 prescription drug plan premiums on seniors and the
17 disabled in Medicare. Is that the way you see that
18 change working out?

19 Ms. Eisinger. No, sir. The clarification in the
20 modification is that the intent of this provision was to
21 apply this commission's scope of recommendations to all
22 parts of Medicare. And what this simply does is to
23 clarify that not only parts A and B are subject, but also
24 parts C and D.

25 Senator Grassley. Yes, but it refers to Part D

1 premiums.

2 Ms. Eisinger. I am going to defer to my Part D
3 colleague on how to answer the rest of that.

4 The Chairman. Ms. Bishop.

5 Senator Grassley. See, it says "Federal premium
6 subsidies to MAPD and PDP plans." So it is going to have
7 the effect of an increase in premiums.

8 Ms. Bishop. Well, so the point of the
9 clarification was to suggest that there are ways of
10 reducing the Federal spending for Medicare's part C and
11 D. It is not directing the Commission to do that, but it
12 is suggesting that there are ultimate ways of reducing
13 spending.

14 Senator Grassley. Well, if you reduce subsidies
15 you are going to increase premiums. Is not that right?

16 Ms. Bishop. If the Commission were to choose that
17 route of reducing spending in part C and D through the
18 Federal subsidies, that would be the effect. But it is
19 not directing the Commission to do that.

20 Senator Grassley. All right. And then the other
21 point and last point I want to make, the amendment waives
22 notice and comment rulemaking by the Commission and by
23 doing that you remove the requirement of publishing a
24 proposed rule that then would be open for review and
25 comment means that the Commission can now proceed to make

1 major changes in Medicare with no public comment period
2 or any notice before these changes go into effect.

3 And why would you want to hide these from public
4 discussion or public notice? I mean the public's
5 business ought to be made public. I mean, you assume
6 that in a democracy, in a representative government. I
7 mean that is what the 1946 law was passed for.

8 The Chairman. Mr. Dawe.

9 Mr. Dawe. Senator, the proposals from the
10 Commission will be made public as of January 1 of that
11 year. So these proposals will be in the public sphere
12 for much of the year. And what this provisions says is
13 that with respect to the payment changes and other
14 changes that there would be, the Secretary would have the
15 authority of using interim final rulemaking and not be
16 required, but have the authority. And my understanding
17 is that also requires public comment during that
18 rulemaking period.

19 Senator Grassley. So I read the amendment wrong?
20 It is subject to the Administrative Procedures Act?

21 Mr. Schwartz. Senator Grassley, it is not "notice
22 and comment" the way there is an NPRM or proposed
23 rulemaking and final. But there is an opportunity for
24 public comment with an interim final. Comments are still
25 solicited from the public.

1 The Chairman. Senator Snowe.

2 Senator Snowe. I just want to be clear on the
3 total cost of all these modifications. What is the total
4 number?

5 The Chairman. Mr. Sullivan, why don't you address
6 that?

7 Mr. Sullivan. Mr. Chairman, the total cost of the
8 modifications included here would be \$11.2 billion in
9 terms of the individual provisions. That would not
10 include any interaction effects. One reason we kept the
11 number below \$15 billion was because of that, the
12 possibility CBO would score interaction effects at a
13 higher number.

14 Senator Snowe. So on this total modification
15 through all these provisions ---

16 Mr. Sullivan. I am sorry, those were the three
17 that cost money. And then there is \$15 billion in
18 savings from the previous amendment that were in the
19 Health Improvement Fund that are drawn down. So the cost
20 provisions are the \$4.3 for the streamlining, the \$5.9
21 billion for the excise tax, and the nearly \$1 billion for
22 the bio tax credit, for a total of \$11.2. The offset is
23 \$15 billion from the Health Improvement Fund, which
24 reflects a savings from the previous CHIP amendment. So
25 the net effect would be to reduce the overall cost of the

1 bill by approximately \$3.8 billion, pending CBO review of
2 interaction effects.

3 Senator Snowe. I just have another question, the
4 Medicare, back to that provision?

5 The Chairman. Right. Senator Snowe.

6 Senator Snowe. It clarifies "the Commission may not
7 propose changes to beneficiary premium" under certain
8 sections, inserts the following, so it says "shall
9 include recommendations to reduce expenditures under
10 parts C and D, such as through reductions in Federal
11 premium subsidies."

12 So is that not a semi-requirement? Is that not a
13 change from the mark, in terms of benefits? That was one
14 of the issues we discussed in our Group of Six that it
15 would not be beneficiaries affected by the
16 recommendations.

17 Ms. Bishop. That is correct. The intent of this
18 clarification is not to change the substance of what was
19 included in the mark. It is to merely clarify and to
20 provide, if you will, sort of more detail of the scope of
21 what the Commission would be able to do. But the words
22 "as appropriate" here provide that the Commission does
23 not have to include recommendations for C and D.

24 But if they do, they could include such things as
25 Federal premium subsidies or changes in the bonus

1 payments to Medicare Advantage plans. But those would be
2 available because the mark had broad authority to change
3 payments to providers in the Medicare program, not to
4 change co-payments as you said, or beneficiary premiums
5 under A or B.

6 But these payments here, these Federal premiums are
7 premium subsidies to the plans, and that that would be
8 something that would be within the scope.

9 Senator Snowe. But would not that result in
10 increases as Senator Grassley asked? I mean, could not
11 that result in increased cost to the beneficiary?

12 Ms. Bishop. If the Commission chooses to reduce
13 federal premium subsidies, it could have an effect on
14 beneficiary premiums.

15 Senator Snowe. So it is a departure from what is
16 in the original mark?

17 Ms. Bishop. It is not a departure. What was
18 intended in the original mark was always that the
19 Commission would have available to it payment changes,
20 and that these payment changes are the primary effects of
21 the Commission's recommendations.

22 Senator Snowe. I do not recall, in our discussions
23 that was not the case. Thank you.

24 The Chairman. All those in favor --

25 Senator Crapo. Mr. Chairman, do not we need to

1 clarify, if we are about to vote, that the Enzi and
2 Bunning modifications are being removed from this
3 modification?

4 The Chairman. They are not being removed.

5 Senator Crapo. What was the understanding we
6 reached earlier then?

7 The Chairman. We are going to work with the two
8 Senators, but we just, for the sake of good government we
9 have got to make these changes. Then we will work with
10 the two Senators as to further clarification. But it is
11 just wrong to have the earlier provisions when the
12 relevant agencies say they cannot do it. It is just
13 wrong. We are just trying to clean it up, make it fair,
14 make it right, make it appropriate.

15 Senator Crapo. Well, my last comment then and we
16 can vote is, that from what I understand and I understand
17 more now that we've had information about this, the fix
18 is to the concerns that were raised can be much more
19 minimal than the changes that are being made to their
20 amendments.

21 The Chairman. I am sorry. Say it so I understand.

22 Senator Crapo. I think the concerns that were
23 raised can be fixed with much smaller corrections than
24 simply totally gutting their respective amendments. And
25 so I think the cure here has gone way past the problem.

1 The Chairman. I would not characterize it that
2 way, but I pledge to work very closely with both Senators
3 regarding any concerns they may have.

4 Senator Crapo. Thank you.

5 The Chairman. Thank you.

6 Senator Snow. Mr. Chairman, I just want to get
7 clear on this.

8 The Chairman. Sure.

9 Senator Snow. I want to get back to that
10 provision. In the Chairman's mark unless it has changed
11 since that time it said, "The Commission would be
12 prohibited from presenting proposals that would ration
13 care, increase revenues or otherwise change Medicare cost
14 sharing benefits or eligibility standards."

15 Senator Grassley. Pretty darned clear, is it not?

16 The Chairman. Yes, Senator. Do you have a
17 question?

18 Senator Snowe. Yes, I do.

19 The Chairman. And the question is?

20 Senator Snowe. Well, this modification changes
21 that. I want to be clear on it, because that is a
22 departure from what it was originally.

23 Senator Grassley. In other words, a little more
24 than a clarification.

25 The Chairman. Ms. Bishop. I think Senator Snowe

1 has a point. As I recall our discussions with the Group
2 of Six, this is a fairly significant point, and I think
3 it is important that this be cleared up. And if it goes
4 beyond the prohibition that was understood with the Group
5 of Six, then I think we have to address that.

6 Mr. Dawe. The prohibitions that Senator Snowe
7 refers to remain in place. The first clarification
8 states that the Commission may not propose changes to
9 beneficiary premiums. So it adds an additional
10 prohibition, premiums under Sections 1818, 1818(A) and
11 1839 of the Social Security Act. So this in no way
12 changes the prohibition on rationing care, benefits, cost
13 sharing, or eligibility.

14 The Chairman. I think the point is that
15 modification does not have to restate everything that is
16 in the modified mark either. If I understand you
17 correctly, Ms. Snowe and I don't want to put words in
18 your mouth, the prohibition is still in the modified
19 mark.

20 Mr. Dawe. Right, and this adds clarity in terms of
21 beneficiary premiums.

22 The Chairman. That is the intent. I agree with
23 you that it has loosened up compared to what we
24 discussed.

25 Senator Conrad. Can I follow up? Can the Senator

1 just yield? Can you assure us that when this language of
2 this amendment is added to the mark that the prohibitions
3 that previously applied that we had agreed to in the
4 other discussions will still be in effect?

5 Mr. Dawe. Yes.

6 Senator Snowe. All right.

7 Senator Conrad. All right.

8 The Chairman. All right? All in favor of the
9 modified amendment, say aye?

10 Senator Grassley. No, we want a recorded vote.

11 The Chairman. All right. Clerk, call the roll.

12 The Clerk. Mr. Rockefeller.

13 Senator Rockefeller. Aye.

14 The Clerk. Mr. Conrad?

15 Senator Conrad. Aye.

16 The Clerk. Mr. Bingaman?

17 Senator Bingaman. Aye.

18 The Clerk. Mr. Kerry?

19 Senator Kerry. Aye.

20 The Clerk. Mrs. Lincoln?

21 Senator Lincoln. Aye.

22 The Clerk. Mr. Wyden?

23 Senator Wyden. Aye.

24 The Clerk. Mr. Schumer?

25 Senator Schumer. Aye.

1 The Clerk. Ms. Stabenow?
2 Senator Stabenow. Aye.
3 The Clerk. Ms. Cantwell?
4 Senator Cantwell. Aye.
5 The Clerk. Mr. Nelson?
6 Senator Nelson. Aye.
7 The Clerk. Mr. Menendez?
8 Senator Menendez. Aye.
9 The Clerk. Mr. Carper?
10 Senator Carper. Aye.
11 The Clerk. Mr. Grassley?
12 Senator Grassley. No.
13 The Clerk. Mr. Hatch?
14 Senator Grassley. No.
15 The Clerk. Ms. Snowe?
16 Senator Snowe. No.
17 The Clerk. Mr. Kyl?
18 Senator Grassley. No by proxy.
19 The Clerk. Mr. Bunning?
20 Senator Grassley. No by proxy.
21 The Clerk. Mr. Crapo?
22 Senator Crapo. No.
23 The Clerk. Mr. Roberts?
24 Senator Grassley. No by proxy.
25 The Clerk. Mr. Ensign?

1 Senator Ensign. No.

2 The Clerk. Mr. Enzi?

3 Senator Grassley. No by proxy.

4 The Clerk. Mr. Cornyn?

5 Senator Grassley. No by proxy.

6 The Clerk. Mr. Chairman?

7 The Chairman. Aye. The clerk will tally the vote.

8 Mr. Chairman, the final tally is 13 ayes and 10
9 nays.

10 The Chairman. The amendment is agreed to.

11 As my understanding, there is only one potential
12 amendment remaining, and that is the amendment offered by
13 the Senator from Oregon.

14 Senator Wyden. Thank you, Mr. Chairman. Am I
15 recognized to offer C-1?

16 The Chairman. Right. You offer it.

17 Senator Wyden. Thank you, Mr. Chairman. Mr.
18 Chairman, at this late hour our committee is about to
19 deny our constituents something that we as members of
20 Congress take for granted, and that is choice of health
21 care coverage. Members of Congress have more than a
22 dozen good quality plans to choose from. Under the
23 Finance bill, more than 200 million Americans are going
24 to have no choice of health care coverage at all.

25 Now all of us have heard the President's pledge,

1 "You can keep the coverage you will have today," and
2 that's what "free choice" is all about. This amendment
3 builds on that pledge by saying that if you do not like
4 the coverage you have, if your insurance company is
5 giving you a raw deal, you are going to have something
6 else to choose from.

7 Now as we heard on Tuesday during about eight hours
8 of discussion, members of this committee on both sides of
9 the aisle understand the importance of choice in
10 competition. Choice is what generates competition, and
11 competition holds down health care costs for our people.

12 But yet we have stripped this bill, colleagues, of
13 choice and competition. A typical American who works for
14 a midsized company, if they are getting hammered by their
15 insurer, they are stuck.

16 If you are unemployed, if you are uninsured, you are
17 going to have some choices. But if you work at a typical
18 American business and you don't like the health plan you
19 are getting, you do not feel you are getting a square
20 deal and you are getting crummy service, getting
21 exploited, you have nowhere to turn.

22 I do not think that is what real health care reform
23 is all about.

24 So I want to see us put the consumer in the driver's
25 seat. Put the consumer in a position to turn the tables

1 on the insurance industry. That is what we do in every
2 other corner of the American economy. We put the
3 consumer in charge, and if the consumer makes a wise
4 investment the dollars they save go directly in their
5 pocket.

6 Here is how the free choice proposal works. If your
7 employer already offers two choices and one of them is a
8 low cost option, then the worker gets choice within the
9 employer based system. If the employer is offering only
10 one health plan, the worker can either keep the
11 employer's plan or take the same amount the employer
12 spends on the worker's coverage to go out and buy another
13 plan in the marketplace.

14 And we make sure that employers win under this
15 approach as well. If the employer wants more choices, if
16 the employer's insurer is not giving the business a good
17 deal, we say that the employer can bring the entire
18 business to the market to the exchange and get a
19 discount.

20 Economists of all philosophies, liberal,
21 conservative, all across the political spectrum, have
22 argued that giving Americans choice is the single most
23 powerful way to save money in the American health care
24 system. It is one of the reasons the President
25 identified guaranteed choice as one of the three bedrock

1 requirements for real health reform.

2 Now in the proposal that I offer tonight, the
3 Congressional Budget Office has found that the taxpayers
4 would save at least a billion dollars. But the real
5 savings go to the private sector where independent
6 experts have found that \$360 billion would be saved as
7 businesses and consumers shop for the best possible deal.

8 Small and mid-sized employers in particular like it
9 because they recognize it would not only help their
10 employees but their bottom line.

11 So with this provision, all Americans would have the
12 opportunity to benefit from health reform. That stands
13 in sharp contrast to what is in the mark, which says as
14 written today, "if you are a working family and your
15 insurance company abuses you, you are stuck. You have no
16 other options.

17 So I would like to see all Americans have some
18 choices, like we do as members of Congress. And I
19 realize that some of the most powerful interest groups in
20 this country do not want this provision in the bill, and
21 they have been out and about talking to you and saying
22 that if Americans have choice like we as members of
23 Congress pretty much Western civilization is going to
24 end.

25 It is all about control. These big interest groups

1 like the system the way it is, and frankly if legislation
2 like what we are talking about in the Finance Committee
3 passes where Americans are forced to go out and buy
4 health insurance, the insurance companies are going to be
5 able to increase their market share without having to
6 face any additional competition that would give the
7 consumer a better deal.

8 Also some big businesses like having leverage over
9 their employees. They can use this leverage to hold down
10 wages, and frankly it also keeps some workers locked into
11 their jobs. If Americans had choices and premiums went
12 down, well maybe employees might end up getting a raise.

13 We've got some Labor folks who are saying that they
14 don't want this as well. The fact is, if people get
15 choice, if people get choice in the marketplace, maybe
16 they would say, "We would rather have that kind of
17 opportunity" rather than to have labor call all the shots
18 for their future healthcare coverage.

19 And the fact is, a lot of insurers do not want to be
20 held accountable either. So I understand that these very
21 large interest groups have campaigned hard. They
22 certainly are very powerful here in the Washington, D.C.
23 area. But I think when we talk to our constituents about
24 what happened during this debate about health reform and
25 we say to them that while we have more than a dozen

1 health care choices, while we benefit every week from a
2 system that is competition-driven based on choice, they
3 are not going to have even one choice. They are going to
4 say, "What in the world were you all thinking?"

5 Now the President said at the beginning of this
6 debate that there would be well-funded efforts that
7 loudly proclaim that reform is not possible, and it is
8 going to be eager to mislead people about what real
9 reform means.

10 He certainly was right, and this amendment frankly
11 illustrates the correctness of his concern about the
12 power of special interest groups. This amendment is an
13 opportunity for us to inject real reform in the bill.
14 This is a transformational amendment because it says we
15 can find a sweet spot in between blowing up the employer-
16 based system and saying workers should have no choice at
17 all.

18 So I am very hopeful that colleagues will say that
19 what we ought to do in wrapping up the consideration of
20 this legislation is that we ought to stick to what the
21 President said when he came before us for the address to
22 the Congress. He said his guiding principles were choice
23 and competition. But I would ask colleagues as we wrap
24 this up, Where in this bill does it give consumers
25 choice? Where in this bill does it allow the typical

1 American family to have the kinds of choices that produce
2 competition that hold down health care cost? I can't
3 find it, colleagues, in this legislation. I would hope
4 that we in wrapping up this bill come to the conclusion
5 that it is not right to deny our constituents something
6 that we take for granted as elected officials.

7 Consumer choice and competition are the fundamental
8 principles that constitute real health reform. They are
9 regrettably lacking from this legislation. And I want to
10 hear from colleagues, make the case about why all
11 Americans should not have choice. And Mr. Chairman, if I
12 could yield at this time and be in a position to respond
13 to colleagues, we can wrap up in a bit.

14 The Chairman. Is there discussion?

15 Senator Bingaman. Mr. Chairman.

16 The Chairman. Senator Bingaman.

17 Senator Bingaman. Mr. Chairman, let me just say
18 that the general idea that the Senator has is one that is
19 attractive to me, the idea that employees should be able
20 to leave their employer coverage and obtain their
21 insurance elsewhere if they choose to do so.

22 However, I do think we have a circumstance today
23 where we are hopefully in the next several days or week,
24 whatever, going to pass out a bill here that requires
25 folks to obtain fairly meager coverage. And in fact, I

1 think because of the Snowe Amendment an awful lot of
2 folks can obtain coverage that has an actuarial value of
3 50 percent.

4 Now as I understand what you are suggesting is that
5 the employee who is in a plan now that is covered by
6 their company would be able to take the funds that the
7 employer is putting into that, would be able to go
8 outside and buy something cheaper, and pocket the money.

9 And I think the end results of this would be, you
10 would have an awful lot of folks, of course, with a
11 tremendous financial incentive to do that, to essentially
12 trade down in their coverage to obtain coverage that is
13 much less adequate to their health care needs, and we
14 would be contradicting what I think is one of our main
15 purposes in the legislation, which is to try to get
16 adequate coverage.

17 I do not think we want to pass legislation that
18 winds up with a whole lot of under-insured Americans out
19 there. We want to have everyone insured, and we want to
20 have them adequately insured, and I fear that as I
21 understand what you are proposing you would have a very
22 substantial financial incentive for folks to take
23 reasonably good coverage which their employers are
24 currently providing and trade that in for something
25 substantially less and pocket the difference.

1 And I think that would be unfortunate, and I think
2 it would not serve the interests of the country well.

3 Senator Wyden. If I could just respond, Mr.
4 Chairman?

5 The Chairman. Senator Wyden is recognized.

6 Senator Wyden. There are two points. How does it
7 happen that we decide what is best for the workers? We
8 envision, under this approach, one very high quality
9 plan, in effect the gold plan, and the second the bronze
10 plan with the actuarial value of 65 percent I believe.
11 But ultimately the question becomes why should not the
12 worker be in a position to make their own call? They are
13 going to have a choice of coverage. Both of these
14 choices by the way are part of the menu of health plan
15 choices that are specified in the bill.

16 And I think first it ought to be the worker's
17 judgment rather than ours as elected officials. And
18 second, I would say with respect to whether people leave
19 employer coverage or not, the Congressional Budget Office
20 found that would not be the case. That was a specific
21 finding of the Congressional Budget Office.

22 And Counsel, could you read that portion of the
23 Congressional Budget Office analysis? It is just about a
24 sentence or two, but it responds to this argument that
25 somehow there would be this doomsday spiral of people

1 leaving employer coverage and particularly young people
2 leaving. Counsel, could you just read that section from
3 the CBO analysis, making it clear that they do not see
4 this amendment as destabilizing to the employer based
5 system?

6 Ms. Fontenot. Senator, you are talking about the
7 CBO analysis of your amendment specifically?

8 Senator Wyden. Right.

9 Ms. Fontenot. I do not have that available. I
10 apologize.

11 Senator Ensign. Would the Senator yield for a
12 question?

13 Senator Wyden. Yes. Let me just see if I can put
14 my hands on the - got it? The Congressional Budget
15 Office analysis indicated that our proposal would not
16 have substantial effects on the number of people covered
17 or the source of their coverage. And I am going to find
18 the exact language.

19 Senator Ensign. Would the Senator yield?

20 Senator Wyden. Of course.

21 Senator Ensign. Let us say they did not like the
22 coverage they were getting and it was not adequate, not a
23 Cadillac plan and less than a bronze plan. It was one of
24 those kind of cheap plans. They really were not crazy
25 about it. Could they take that voucher, put a little of

1 their own money in, and then buy a plan that was more
2 expensive? Is that something they could do?

3 Senator Wyden. They could certainly in effect buy
4 up if that is what you are talking about. I think,
5 Senator Bingaman, both of you are raising questions.
6 Senator Bingaman wants to make sure that folks who
7 perhaps have modest incomes would not suddenly sacrifice
8 health care decisions. I think the minimum standards
9 that we have in this amendment, and in this bill, should
10 set a minimum floor for coverage. Given that, it is
11 really appropriate that the consumer have a choice. But
12 certainly the choice ought to extend to what you are
13 talking about as well, and that is the possibility of in
14 effect buying up and people using their own dollars for
15 purposes of purchasing a better health plan.

16 Senator Ensign. Mr. Chairman, may I be heard on
17 the amendment?

18 The Chairman. Go ahead.

19 Senator Ensign. Let me first say that Senator
20 Wyden is a new champion for freedom around here, and I am
21 glad to hear that. I know some employer groups are not
22 crazy about this thing, but I have a tendency to agree.
23 I have not completely maybe totally thought through all
24 of the consequences of the amendment, but I like the
25 idea. I like the idea of individual choice. I like the

1 idea of putting that competition in.

2 And what he said earlier is that, Do you trust the
3 individual? Are you going to put personal responsibility
4 back in health care? Can people make informed choices?

5 And I think what Senator Wyden is saying, that he
6 trusts the individual to be able to make the best choice
7 for their family if they don't feel for their family that
8 their employer is making the best choice for them.

9 So they want to go out in the marketplace in these
10 new exchanges and buy. I think that is not necessarily a
11 bad idea that Senator Wyden has come up with. I think my
12 staff is probably going crazy behind me that I am talking
13 like this, but I think he raised some really very valid
14 points today, and I think it is something we all should
15 consider.

16 The Chairman. Anybody else seek recognition?

17 Senator Kerry. Mr. Chairman.

18 The Chairman. Senator Kerry.

19 Senator Kerry. Mr. Chairman, first of all let me
20 just say that I have huge respect for Senator Wyden's
21 commitment to this issue. He has been one of the people
22 who has put a huge amount of time into it. He has been
23 very creative, he has reached across the aisle, and he's
24 had really good ideas and interesting ideas along the
25 way. There is nobody who works harder on this issue, and

1 he asked me to sort of take a look at it the other day,
2 and I told him I would.

3 And I talked to some of our employers up in
4 Massachusetts, a big company like Raytheon for instance,
5 and others. They are dead set against this. And I want
6 to remind my colleagues, last year at the Library of
7 Congress when we had a day-long session and we were
8 listening to experts from all over the country, out of
9 that day-long session came a consensus, really out of all
10 of the sessions. A consensus. Was everybody in
11 agreement? No. But there was a strong consensus that
12 one of the strengths of our health care system that we
13 need to build on is the employer based system.

14 The HELP Committee did exactly that. Senator
15 Kennedy believed in it, Senator Harkin, Senator Mikulski
16 and others have spent a lot of time on this. So we have
17 built on the notion that employers are going to deliver
18 health care.

19 Now one of the strengths that comes with that is
20 their numbers. It gives them purchasing power. It
21 allows them to negotiate, particularly a larger company,
22 lower rates across the board. And if you take a look at
23 employer-based plans (including fully insured and self-
24 insured plans) even when they go out and underwrite, they
25 offer really good quality care, lower care, and people go

1 to work at many of those companies because of the quality
2 of the care and because they like it.

3 So here is what happens. It sounds, you know it's
4 very appealing and you can understand, wow, I can choose
5 between anything. But all of a sudden the "anything"
6 gets dumbed down in the process, and you wind up with
7 healthier, younger workers who can opt for a different
8 pool because you can have different pools out there.

9 So they are going to go out and all of a sudden
10 you've got a kind of cherry-picking that begins to take
11 place in the system. You lose the strength that comes
12 from the shared responsibility of a company having all
13 kinds of different ages and people with different health
14 issues which they have built their plan specifically
15 around.

16 We have 160 million Americans who love that coverage
17 today and want that. One of the problems in this whole
18 debate has been the whole issue of the 80 percent of
19 Americans who already have coverage. And they are
20 sitting there really worried that what we are going to do
21 is somehow shift the cost to them and make it more
22 difficult for them to keep the coverage they have.

23 I am personally convinced listening to a lot of
24 different players who offer plans on which our system is
25 built--some self-insured, some large companies---but they

1 are really worried that they are going to have people
2 shifting in and out of their plans, and they are going to
3 lose the current stability they have for the purchasing
4 process and for the bargaining process, and they are
5 going to wind up not being able to offer the quality of
6 plan they have today. And that is the spiral that people
7 talk to, that the Senators appropriately talked about.

8 But I have come to believe that is real. I think
9 human behavior is such that if people can choose, and
10 you've got some universe out there of younger, well
11 people who happen to be part of a particular plan, you
12 are going to lose the strength of the shared
13 responsibility that we get from what we decided was the
14 core of the American system, which is the employer based
15 system.

16 Senator Wyden. Mr. Chairman, can I just respond to
17 that quickly?

18 The Chairman. Senator Wyden.

19 Senator Wyden. Senator Kerry has raised a couple
20 of very important issues. I do have the CBO language to
21 give my colleague that does go into the specific concern
22 that Senator Kerry is worried about CBO believes would
23 not take place. My amendment would not result in
24 destabilizing of the employer-based system.

25 Specifically, CBO found there would not be

1 substantial effects on the total number of people with
2 insurance coverage or the sources of that coverage
3 relative to the Chairman's mark. That is the finding of
4 CBO on this argument that these lobbies are advancing,
5 that there would be a destabilizing change if my
6 amendment was adopted. That is number one.

7 Number two, I would say to my colleague, let us talk
8 about the worst case analysis, that what you are saying
9 happens even though CBO says they don't believe it will
10 happen. What we have put in this mark to the Chairman's
11 credit is very robust risk adjustment and reinsurance.

12 So what that means, Senator Kerry and colleagues
13 specifically, is that if you were to have something CBO
14 believes won't happen, young people leaving in great
15 numbers, in effect periodically the exchange would make a
16 payment, for example to an employer who had the older,
17 sicker workers left at the worksite, if the young people
18 left their employer's coverage to buy their health care
19 through the exchange.

20 So CBO says they do not believe it will happen. If
21 it were to happen, we do believe with risk adjustment and
22 reinsurance, and you happen to be one of our experts I
23 know on reinsurance, that is how you adjust for risk.

24 Finally, colleagues --

25 Senator Kerry. But we are not putting enough money

1 into it.

2 Senator Wyden. Agreed. Fair enough.

3 Senator Kerry. So we are not going to do that.

4 Senator Wyden. Well, again, CBO says it is not
5 going to happen. I think we can talk about additional
6 funding. I support you on that.

7 Colleagues, the last point I would make, I think we
8 ought to wrap this up, is this is not blowing up the
9 employer-based system. This is not even close to my
10 original legislation. This is taking the chairman's mark
11 and in effect importing the concept of choice into the
12 employer-based system. As I said, colleagues, if an
13 employer offers two choices and most of them in this
14 country do not offer choice, then the worker gets choice
15 within the employer-based system.

16 It is only if there is no choice within the employer
17 system that you go to the next level through this choice
18 approach that I believe empowers the consumer through a
19 voucher in the marketplace. This amendment does not
20 raise taxes a dime, not a dime. This is about creating
21 consumer choice for the American people, for all of us
22 not just folks who are unemployed, uninsured or happen to
23 hold an election certificate here in the United States
24 Congress.

25 Senator Conrad.

1 The Chairman. Senator Conrad.

2 Senator Conrad. Mr. Chairman, first of all, I want
3 to say to my colleague Senator Wyden, I do not know of
4 anybody other than the Chairman who has made a more
5 dedicated sincere commitment to reforming the health care
6 system than the Senator from Oregon.

7 I think one of the great tensions that exists here
8 is the system that we currently have is an employer-based
9 system, and the Senator from Oregon's concept, larger
10 vision if you will apart from this amendment but going
11 back to his bill, is based on a different concept really.

12 And if we were starting from scratch, I am not at all
13 sure the Senator from Oregon does not have a better
14 concept of how to build a system if we are starting with
15 a blank page.

16 But we have a circumstance in which we have an
17 employer-based system, and the questions that Senator
18 Bingaman, who is also an extraordinary, thoughtful
19 member, and Senator Kerry have raised are in my mind -

20 Senator Kerry. I don't need any adjectives though.
21 I'm joking.

22 Senator Conrad. Yes, you are good too. Let me ask
23 the Senator this. Do the CBO scores, the CBO analysis
24 that the Senator referenced, was that a CBO score of this
25 amendment, or was that a CBO analysis of the bill?

1 Senator Wyden. It was an analysis of just this
2 amendment. And I would say to colleagues, it's an
3 analysis of this very amendment. And look, I wrote a
4 piece of legislation. I was interested in a different
5 approach, and yet what I said when the chairman chose a
6 different route is, I was going to work within that
7 framework. And I have done that. And we have had many
8 amendments. I have supported ideas from both sides of
9 the aisle, and spent a better part of 10 days here and
10 did not once mention the original bill I authored.

11 But I do believe it is possible to import choice
12 into the employer-based system. There is something in
13 between, colleagues. There's a sweet spot between
14 blowing the system up and saying we are going to tether
15 people to what they have even though it is a crummy
16 product. And that is what we are saying. We are saying
17 that even if you think you're getting lousy service and
18 it is a crummy product, we are going to tether you to it.

19 You are not going to be able to get any additional
20 choices.

21 And given what CBO said in the document I have given
22 to colleagues, that they do not believe that this
23 amendment will be destabilizing and we have this safety
24 valve of risk adjustment and reinsurance should this
25 doomsday scenario occur, it would be something that would

1 be dealt with under my amendment. That's why I think it
2 warrants colleagues saying 2009 is different than the
3 1950s. Does keeping the original employer-based system
4 make sense in 2009 when people change their jobs 11 times
5 by the time they are 40? I think we can do better. I
6 think we can do better in terms of portability and
7 choice, and that there is something in between blowing
8 the system up and saying, we cannot improve it.

9 That I what this seeks to do, and I hope my
10 colleagues will vote for choice, vote for competition,
11 vote for principles that make the American economy work
12 in every other sphere and ought to be applied to health
13 care as well.

14 Senator Kerry. Mr. Chairman.

15 The Chairman. Senator, I really appreciate your
16 work here. You have come to me many, many times,
17 probably every Senator here, many, many times, (laughing)
18 working to try to improve our health care system. I
19 remember you talked to me over a year ago, two years ago
20 if I recall correctly.

21 And I really appreciate that.

22 One thing that struck me is, we look around the
23 world at countries trying to address health care reform,
24 a lesson learned is that almost every country, although
25 tempted to institute something radical, no country that I

1 am aware of did so. Rather, every country finally
2 realized if they are going to enact health care reform
3 that works, they have to build upon their country's
4 systems, organizations, and make it work a lot better.

5 That is, it is kind of akin to the devil you know
6 versus the devil you don't know. People in different
7 countries know what they have, they know what their
8 employers do or do not do and so forth, and that has
9 generally worked in countries. It has worked in Britain
10 for them, it has worked in Switzerland for Switzerland.
11 That is the Swiss culture. It has worked in France with
12 the French system, and that has worked for them.

13 Now there are people who say, and in fact I have
14 been tempted to think along these lines too, that if we
15 in America were to do this all over again, start from
16 scratch, that we may not have an employer-based system
17 today--if we were to start all over again from scratch.

18 But back in the 1960s under wage and price controls,
19 the employer-based system starts to take form, basically
20 because of employee exclusion was not within the wage and
21 price controls with respect to employer deduction and so
22 we got going. Various organizations and unions,
23 negotiating contracts were very interested in health care
24 benefits as well as wages, and we in America just fell to
25 an employer-based system. That is what we are, that is

1 where we are as a country.

2 And to move away from an employer-based system I
3 think would be destabilizing. It would cause such
4 consternation in what we know as a country.

5 Now the fact is, CBO has not scored this amendment.

6 CBO has not analyzed this amendment. I just checked a
7 few minutes ago with CBO. And so one has to just look at
8 it and see what probably would happen.

9 Under this amendment, an employee would take the
10 voucher worth I guess the value of the plan. The
11 employee could then shop around. And who would tend to
12 do the shopping more than others who might not shop?
13 Those who would shop would probably be younger, maybe
14 healthier employees. They would shop around and they
15 could get a better deal. That's what they would probably
16 do and maybe pocket some of the voucher.

17 And then what is left? What is left is the rest of
18 the employees that work for the company. And that means
19 two things. It means the pool is diminished, which
20 causes a destabilizing strain on the company's health
21 insurance system. And second, those remaining will be
22 probably comparatively a little less healthy, which
23 further destabilizes the pool.

24 And I don't think that is something that we really
25 want to do here. Again, I just, with all respect to my

1 good friend from Oregon, CBO has not analyzed this
2 amendment. They have not scored this amendment. One has
3 to look to see what the probable consequences would be.

4 Now we should not throw the baby out with the
5 bathwater here. The effect then of this amendment would
6 be you probably cannot keep the insurance plan you have
7 if you like it because the companies are going to start
8 dropping employees. They are going to start dropping
9 them. They are going to say, hey, I got a smaller pool
10 here, I got sicker people, and I am just going to start
11 dropping.

12 And one of these persons who is left in the pool
13 initially, left with coverage by the company initially,
14 will find they do not have it anymore.

15 It is very destabilizing. I cannot think of a major
16 amendment so opposed by both business and labor, both.
17 Both.

18 Now we are trying to get more choice here in this
19 bill, and we are certainly doing it through the
20 exchanges. That is true. And we are also trying to
21 improve the market by reforming the health insurance
22 system. We are doing that too. Delivery system reform.

23 Just think of all the good things that are in this bill,
24 the underlying bill. It is transformative.

25 It is delivery system reform as well as insurance

1 market reforms.

2 But I also do think it would be transformative in
3 the wrong direction, the amendment, by causing such
4 destabilization which will diminish the pools, make the
5 pools sicker and tend to cause companies to drop
6 coverage.

7 And again, so opposed by both business and labor.
8 And there must be some wisdom there if they are both
9 opposed, and I just think you have done a lot, Senator,
10 but I do not think this amendment really is the right
11 thing to do.

12 Senator Conrad.

13 Senator Conrad. Mr. Chairman, we have checked with
14 CBO, and I think there is confusion, and here is what we
15 just got back from CBO. Yes, all we scored was giving
16 employers the option. We have not scored the voucher
17 piece.

18 The Chairman. Right. It's the employer portion,
19 not the voucher portion that is scored. That is correct.

20 Senator Conrad. Yes. So reference that the
21 Senator gave is absolutely correct with respect to giving
22 employers the option, but they have not analyzed the
23 voucher piece. And this is what I would say to my
24 friend. This is what, and I would love to find a way to
25 get that part of the Senator's amendment which has been

1 analyzed added to this mark. That is, giving employers
2 the option.

3 But the voucher piece, my analysts tell me does have
4 the risk of undermining the pool, because if you have a
5 voucher, just as the Chairman described, who is most
6 likely to take that voucher and go outside the pool?
7 They are the younger, healthier workers, and the concern
8 of employers in my state, and I have now been contacted
9 by a group of them who say if you do this we believe our
10 pool will be destabilized. And they are not talking about
11 your first part, the employer choice part. They are
12 talking about the voucher part.

13 So we are in an awkward position here at 1.30 in the
14 morning, or whatever time it is, 10 to 2.00, because
15 there is a part of your amendment I am very attracted to.

16 There is a part of it I am nervous about. Part of it we
17 have got a score to, and part of it we do not. And I do
18 not know how we resolve this.

19 Senator Wyden. Would the Senator yield?

20 Senator Conrad. Yes.

21 Senator Wyden. I think it is very important we
22 clear this up. I sent one version and one version only
23 to CBO, and it included the voucher. It is what this
24 amendment that we are discussing is all about. One
25 version, sent to CBO, and I will quote it here, "Relative

1 to the Chairman's mark the amendment as modeled would
2 reduce the net impact on Federal deficits by about \$1
3 billion over 10 years. There would not be substantial
4 effect on the total number of people with insurance
5 coverage or the sources of that coverage relative to the
6 Chairman's mark."

7 And I understand colleagues have differences of
8 opinion, but I want colleagues to know that I sent one
9 version there, the version had the voucher, and I am
10 reading verbatim what the CBO analysis was. And unless
11 CBO sends up a different version with respect to what was
12 actually submitted, I think that ought to count for
13 something.

14 Senator Conrad. Can I just respond to my colleague
15 and say, this is a note from CBO. This is a note from
16 Phil Ellis who has the responsibility of CBO. And this is
17 just moments ago.

18 "Yes, all we scored was giving employers the option.
19 We have not scored the voucher piece."

20 So I absolutely believe you that you submitted the
21 whole thing to them. For whatever reason I would say to
22 you, colleague, they are telling us we did score giving
23 the employers the option. We did not score the voucher
24 piece."

25 And that is directly from Phil Ellis.

1 Now, I do not know what to say to my friend, but I
2 absolutely believe you that you submitted the whole
3 thing. For whatever reason, they are telling us now they
4 did not score the voucher piece.

5 Senator Wyden. Mr. Chairman, could I close at this
6 point?

7 The Chairman. Yes. Unless there are other
8 comments, yes.

9 Senator Kerry. Just one comment, only.

10 The Chairman. Yes. Senator Kerry.

11 Senator Kerry. I don't want to nitpick, but I am
12 concerned about the words here where it says there would
13 not be a "substantial" effect. I do not know what their
14 definition of "substantial" is. But there are effects,
15 because they say they are not substantial.

16 And number two, it does not say anything about
17 quality. All it just says is, the number of people with
18 coverage. It does not say what that coverage should be.

19 And the whole theory of this is, the bargaining and the
20 quality of the coverage that people get. And that is
21 what we have to look at.

22 Senator Wyden. Mr. Chairman, the hour is late, and
23 I won't take but a couple of minutes to wrap up.

24 The Chairman. Briefly, Senator. I am looking
25 around and there are some pretty tired Senators here.

1 Senator Wyden. We are not going to have to bring
2 in breakfast --

3 The Chairman. All right. Thank you.

4 Senator Wyden. Mr. Chairman and colleagues, we are
5 wrapping this up. And the bottom line is millions of
6 Americans will have no choice in the health system of the
7 future. That is a fact. We can go back and forth about
8 CBO's score and we submitted the whole package. We have
9 been through that.

10 What is indisputable, however, is over 200 million
11 Americans, 200 million Americans, if they are getting
12 hammered by their insurance company, if they are getting
13 crummy coverage, if they are getting lousy service, we
14 are saying, you are stuck. You do not get to get out in
15 the marketplace like somebody who is unemployed or
16 somebody who is uninsured. I think that is indefensible.

17 I think it is especially indefensible when people are
18 going to say, Mr. or Ms. Senator, if you are taken
19 advantage of in September of 2009, January of 2010 you
20 get access to more than a dozen good choices.

21 So I understand, Mr. Chairman, where this is going.

22 I understand the power of these enormously influential
23 special interest groups. I understand that this is
24 transformational change. I think we will regret greatly
25 denying hundreds of millions of Americans consumer

1 choice. We've had a good debate. I appreciate the time,
2 Mr. Chairman, and at this point I would withdraw the
3 amendment.

4 The Chairman. The amendment is withdrawn.

5 Senator Ensign. Mr. Chairman.

6 The Chairman. Senator Ensign.

7 Senator Ensign. Mr. Chairman, I have an amendment,
8 Ensign Amendment Number F-1, as modified. It is a very
9 simple amendment. It should not take long to debate, and
10 we should be able to have a vote on it fairly quickly,
11 and I would not have had this amendment except that you
12 all were generous enough to find us some revenue that was
13 not spent tonight. So I believe very strongly in the
14 flexible --

15 The Chairman. That is the last time we will do
16 that.

17 Senator Ensign. I believe very strongly in the
18 flexible spending accounts. Folks use this, especially
19 folks with chronic conditions that have to go to the
20 doctor a lot, put braces on their kids. Having three
21 kids with braces is something I can relate to. But the
22 Chairman's mark lowered the cap down to \$2,500 for a
23 flexible spending arrangements. And what this amendment
24 would do is just take whatever the amount is that is left
25 over after CBO does its final score from the Health

1 Improvement Fund that you all set up. Whatever that is,
2 we raised the flexible spending account to that amount,
3 so it is dollar for dollar whatever that is. And so we
4 can give back to the American people something that they
5 have been having, those who have had the flexible
6 spending accounts in the past, and they can continue to
7 buy things like eyeglasses, dental care, prescription
8 drugs, various other things that they have.

9 The Chairman. Thank you, Senator. Just a very
10 brief comment and then we can vote on it. Number one I
11 think it is important to have reasonable caps, and the
12 \$2,500 I think is reasonable.

13 Second, I think it's important to keep that \$4
14 billion for adjustments because we want to make sure this
15 bill is deficit-neutral over 10. And I think it is nice
16 to have a little cushion to help make sure we can
17 accomplish that goal. So I would urge we do not adopt
18 it.

19 Can you suspend for a moment?

20 Senator Rockefeller. Mr. Chairman?

21 The Chairman. Senator Rockefeller wishes to be
22 recognized before the vote.

23 Senator Rockefeller. Just a formality. My
24 understanding is that Senator Bingaman, Kerry, Stabenow,
25 Schumer, Menendez and Nelson would like to cosponsor my

1 modified amendment. And without objection, I hope that
2 will be the case.

3 The Chairman. Without objection. Senator has a
4 question? I have a question. The question is, whether
5 you are willing to modify your amendment, to index it to
6 inflation. If so, we can accept the amendment.

7 Senator Ensign. Index the \$2,500 to inflation? Is
8 that what you are saying?

9 The Chairman. Yes.

10 Senator Ensign. And to do that, use the -

11 The Chairman. Use a portion.

12 Senator Ensign. Use whatever portion that is to
13 index it?

14 The Chairman. To accomplish that objective.

15 Senator Ensign. Index it? If we can index it to
16 medical inflation, I will agree to it.

17 The Chairman. All right. This we will do, medical
18 inflation.

19 Senator Ensign. All right. I still want to a roll
20 call, just to make sure it is in.

21 The Chairman. Well, that is what it is. And do
22 you still want a roll call? All right. Will the clerk
23 call the roll? And again, to make it clear to everybody,
24 we are just using a portion of it to pay for the
25 indexing. Otherwise, we are leaving the rest.

1 Senator Conrad. Can I just make sure that we have
2 the money to do that?

3 Mr. Barthold. Senator Conrad, we have not. We
4 have prepared some estimates of some different options
5 related to the flexible spending account caps. But
6 indexing for the CPI medical index we have not.

7 Senator Ensign. How about if we do it this way.
8 We do it for as many years as we have left in the Health
9 Improvement Fund.

10 The Chairman. No, cannot do that, because again we
11 have to use the money. We need a substantial portion to
12 help make sure this bill works. I want some surplus.

13 Senator Kerry. Mr. Chairman, can I ask a question
14 also?

15 The Chairman. Sure.

16 Senator Kerry. Are we sure we really want to index
17 it to the medical inflation, because that's -

18 Senator Ensign. Well, that is what you use this
19 for, is for medical expenses.

20 Senator Kerry. I do not think so necessarily.

21 Senator Ensign. Yes, this is what you use this
22 for. Have you ever had a flexible spending account?
23 That is what you use this for. You use it for
24 prescription drugs, you use it for braces, you use it for
25 eyeglasses, you use it if you have an autistic child that

1 needs a lot of things. You use it for wheelchair
2 repairs, all those kinds of things are allowed under a
3 flexible spending account, and it is for medical
4 expenses. That is what it is there for. So why would
5 you not do it for --

6 Senator Conrad. Well, can I just get back to the
7 point that we don't have a score on that.

8 Senator Ensign. All right. Let us just do the
9 original amendment then. I was willing to compromise,
10 but we can just do the original amendment and vote on it.

11 The original amendment just said that we will raise it
12 to whatever amount is left that was not taken up by the
13 Rockefeller amendment, whatever is left over. That is
14 what we will use it to raise to whatever, raise the cap
15 on the Flexible Spending Accounts in an amount necessary
16 to absorb the surplus funds within the Health Improvement
17 Fund.

18 We cannot vote on that?

19 Senator Conrad. That is fair. I mean it is fair to
20 have a vote. The problem is, some of us will be
21 constrained to oppose it because we have got to have some
22 room to make certain that the overall mark is not under
23 water.

24 The Chairman. That is correct. Let me ask you,
25 Senator Conrad--I don't think Senator Ensign would agree,

1 what if it is indexed to CPI, not medical inflation but
2 to CPI?

3 Senator Conrad. I just do not know.

4 The Chairman. All right. Let us vote on the
5 original amendment, not indexed. And I urge my
6 colleagues to remember that the reason why we have a cap,
7 it is a very high cap. It is not used by many. And
8 second, we do need the revenue to help make this bill
9 work.

10 Senator Schumer. Mr. Chairman.

11 The Chairman. Senator Schumer.

12 Senator Schumer. I understand the need to look at
13 this more carefully, but there will be an opportunity as
14 we move to the floor to try to deal with this.

15 The Chairman. That is a very good point.

16 Senator Nelson. Mr. Chairman. We need to hold the
17 integrity of your bill together.

18 The Chairman. Yes. That is exactly right. Call
19 the roll.

20 The Clerk. Mr. Rockefeller.

21 Senator Rockefeller. No.

22 The Clerk. Mr. Conrad?

23 Senator Conrad. No.

24 The Clerk. Mr. Bingaman?

25 Senator Bingaman. No.

1 The Clerk. Mr. Kerry?
2 Senator Kerry. No.
3 The Clerk. Mrs. Lincoln?
4 Senator Lincoln. No.
5 The Clerk. Mr. Wyden?
6 Senator Wyden. No.
7 The Clerk. Mr. Schumer?
8 Senator Schumer. No.
9 The Clerk. Ms. Stabenow?
10 Senator Stabenow. No.
11 The Clerk. Ms. Cantwell?
12 Senator Cantwell. No.
13 The Clerk. Mr. Nelson?
14 Senator Nelson. No.
15 The Clerk. Mr. Menendez?
16 Senator Menendez. No.
17 The Clerk. Mr. Carper?
18 Senator Carper. No.
19 The Clerk. Mr. Grassley?
20 Senator Grassley. Aye.
21 The Clerk. Mr. Hatch?
22 Senator Grassley. Aye by proxy.
23 The Clerk. Ms. Snowe?
24 Senator Snowe. Aye.
25 The Clerk. Mr. Kyl?

1 Senator Grassley. Aye by proxy.
2 The Clerk. Mr. Bunning?
3 Senator Grassley. Aye by proxy.
4 The Clerk. Mr. Crapo?
5 Senator Crapo. Aye.
6 The Clerk. Mr. Roberts?
7 The Chairman. Aye by proxy.
8 The Clerk. Mr. Ensign?
9 Senator Ensign. Aye.
10 The Clerk. Mr. Enzi?
11 Senator Grassley. Aye by proxy.
12 The Clerk. Mr. Cornyn?
13 Senator Grassley. Aye by proxy.
14 The Clerk. Mr. Chairman?
15 The Chairman. No.
16 The Clerk. Senator Lincoln?
17 Senator Lincoln. Aye.
18 The Chairman. The clerk will tally the vote.
19 The Clerk. Mr. Chairman, the final tally is 11
20 ayes and 12 nays.
21 The Chairman. The amendment is not agreed to.
22 Senator Grassley. Before you break up I want to
23 ask you a question.
24 The Chairman. Senator Grassley is recognized.
25 Senator Grassley. Are we done with the amendments

1 then? All right.

2 For my 11 or 10 Republican members, and I think I
3 can speak for all of them, but if I say something wrong
4 you folks over there correct me. We are done now. And
5 then next week sometime we are going to meet and vote on
6 a final product that we have had here.

7 And I hope I am expressing what you have already
8 expressed to us in colloquy that we had for a long time
9 last week. I assume that with all these amendments they
10 are going to be incorporated and you have a document that
11 you are going to vote on, CBO is going to score that.
12 And when that document is put together that we have a
13 period of time, and I hope it is 72 hours for members to
14 be able to read it.

15 The score is available either during that period of
16 time or at the end of that period of time, whenever CBO
17 gets it. Is that fair?

18 The Chairman. Essentially, but that is not quite
19 exactly what I said when we had this conversation before.

20 When we finish tonight, this is it. There are no
21 more amendments. Then we send the completed bill over to
22 CBO. CBO will then give us a preliminary score, and my
23 expectation is that will take several days--I don't know
24 maybe Tuesday, Wednesday, and so forth.

25 Then they will report back to us, and I can remember

1 the conversation I had here with Senator Snowe and
2 Senator Snowe asked, How much time will there be? And
3 some were concerned, we don't want to get this in the
4 dead of night and have to vote on it the next day. I
5 don't want to commit to 72 hours, but as I said, I will
6 in good faith make sure there is a reasonable time within
7 which Senators and staffs and the public can review the
8 score by CBO.

9 In the meantime, frankly, all these other days,
10 being between today and forward, to analyze the bill, we
11 know what the bill is. But I do think it is fair, it is
12 proper to get a CBO score, score the bill, and then it is
13 also proper that the Senators have a sufficient period of
14 time within which to examine that CBO.

15 Senator Grassley. Well, I think we can do what I
16 said and what you just said, and maybe I did not make
17 myself very clear. But you are going to have a document
18 you send over to there.

19 The Chairman. Correct. This is it, this bill,
20 yes.

21 Senator Grassley. Yes, the bill. And the
22 amendments are worked into it, and you've got a final
23 document.

24 The Chairman. That is correct.

25 Senator Grassley. Well, if we can have that

1 document at that time, we can be reading it while CBO is
2 scoring it.

3 The Chairman. Absolutely.

4 Senator Grassley. So if it is going to take CBO 72
5 hours to score it, we have got it for 72 hours. If it
6 takes them 96 hours, we've got for 96 hours.

7 The Chairman. I probably did not say it very well,
8 but that is my intention. Obviously we have the bill,
9 and make it available to everybody and examine it the
10 next couple of days while CBO is scoring it, and then we
11 will get a reasonable period of time after that after we
12 get the score before we then meet and vote on it.

13 Senator Crapo. Mr. Chairman?

14 The Chairman. Yes, Senator Crapo.

15 Senator Crapo. Can I clarify then, that once we
16 receive that document --

17 The Chairman. From CBO.

18 Senator Crapo. That you send to CBO, it will not
19 be changed or amended at all after that?

20 The Chairman. That's correct.

21 Senator Crapo. That is the end point at which it
22 cannot be modified?

23 The Chairman. No, no, no. Once we send the
24 document to CBO, it is not going to be changed before it
25 goes to CBO. But when CBO gives its score back to us, we

1 will have to see what the score is. If the bill scores,
2 then we vote on the bill, if it scores well that is, if
3 we have a surplus or it is deficit-neutral. But on the
4 other hand, if we have a problem --

5 Senator Crapo. Then the committee would reconvene.

6 The Chairman. Then indeed, we come back and have
7 to make some adjustments. That is correct.

8 Senator Snowe. Mr. Chairman.

9 The Chairman. Senator Snowe.

10 Senator Snowe. Could I inquire what you would
11 consider to be a sufficient period of time just so we
12 have some idea?

13 The Chairman. As soon as possible, Senator, we
14 will get the document to you. And then I just present
15 it, and we will have to exercise our best judgment. I am
16 not going to rush anybody, but at the same time we also
17 have to act on it.

18 Senator Grassley. A second point you have made
19 throughout all this period of time is that your mark and
20 we agree with you on this, has always been a goal of
21 bending the cost curve. And I assume that their CBO will
22 be making an assessment of that?

23 The Chairman. Well, I hope so. We are certainly
24 going to ask them to.

25 Senator Grassley. Okay.

1 The Chairman. Yes. And I imagine if they do not
2 there will be a lot of questions asked and a lot of
3 concern by a lot of Senators.

4 Senator Grassley. Okay. That takes care of it.

5 The Chairman. Well, I want to just thank all my
6 colleagues here. We have been working on health care for
7 more than a year. We are acting. Now is the time to
8 act. We have had umpteen hearings and roundtables. We
9 have a product here that accomplishes our objectives,
10 health care reform. It is fiscally responsible, and I
11 think we can all be very proud of what we have achieved
12 here. We have lowered taxes, (unclear) Americans,
13 protected Medicare benefits for seniors, expanded health
14 care coverage. It builds on the employer-based system
15 that a majority of Americans know and most can keep what
16 they have. It helps our most vulnerable. Senators, I
17 think we can be very proud of what we are doing. And I
18 want to thank my colleagues for their help. Together we
19 have worked very well together. We can be very proud
20 tonight of what we have done.

21 And I especially thank my colleagues for all your
22 efforts. As we have discussed, next week we will vote on
23 the final product after we get the score back from CBO,
24 and so together we can achieve the key goals of health
25 care reform that lowers cost, expands coverage, and is

1 very significant health insurance market reform.

2 The one point I wanted to make here too which I
3 think is particularly critical, and that is delivery
4 system reform. We are starting here in this bill to
5 finally reform our system, our delivery system, so it is
6 based much more on quality and patient focus, it is
7 coordinated care on patients, moving away ever so slowly
8 but inexorably from a fee-for-service which tends to
9 cause a lot of the waste that occurs in our system.
10 And we are not going to see the savings here, the
11 benefits for a while. This could be a few years. But
12 after four or five or six years from now, we are going to
13 see real benefits here because of delivery system reform.

14 And I see my colleague from Washington nodding her
15 head because she has been a real pioneer in pushing
16 quality in delivery system reform. And I am just very,
17 very proud of you, Senator, for your efforts there. And
18 the same can be said for every member here. We sense
19 what needs to be done, and we've made some major
20 decisions here.

21 This is also a strategic bill. It is not just a
22 piece bill, do something this year, something next year.

23 It is a strategic plan to address our health care
24 delivery system, not only the delivery system but the
25 other components I mentioned. I am just very proud of

1 our mutual efforts to accomplish what we've done here.

2 Senator Grassley. Thank you to you, Mr. Chairman.

3 Are you done?

4 The Chairman. Well, no, I am not.

5 Senator Grassley. All right. Go ahead.

6 The Chairman. I am looking at people here who are
7 about ready to drop off their chairs, who have worked so
8 hard and behind us all around.

9 [Applause]

10 One reason I want to finish tonight is so they can
11 begin the week and get some rest, which they more than
12 deserve.

13 Senator Grassley. Like he said to my staff after
14 the Medicare Modernization Act, I was supposed to give my
15 staff a long time off. So you folks can take a long time
16 off.

17 [Laughter]

18 But what I wanted to say, Mr. Chairman, is, you know
19 there is a product here that most of the people on my
20 side and maybe all of the people on my side may not vote
21 for next week when we work on it. But I do want to
22 applaud you for the fair process you had. There were
23 just a few moments of tension. But for the most part,
24 this was conducted in a very gentlemanly and ladylike
25 way, and I want to thank you for that.

1 The Chairman. Thank you very much. Thank you.

2 [Applause]

3 So the Committee will stand in recess until 10:00
4 Tuesday.

5 [Whereupon, at 2:20 a.m., the committee was
6 recessed.]

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Senator Grassley's Statement Regarding Costs of IRS Administration

Mr. Chairman, I'd like take a few minutes to talk about something we haven't spent much time on either here or in the group of six. And that is how the how the majority of this bill will be administered and the cost to administer to it. When the President did his Sunday morning talk show blitz the weekend before last, he stated that he did not intend to grow the government. Yet, I don't think we have any idea of how many more federal employees, particularly IRS employees, will be needed to enforce the provisions. The costs to implement this bill are not included in CBO's or JCT's estimates.

The reason I raise this now is that many of the amendments we are about to consider would amend the Internal Revenue Code and therefore affect the IRS. The Chairman's Mark already contains modifications to over a dozen existing tax laws. More importantly, the Mark would task the IRS with administering several new and very controversial provisions including the individual mandate, employer free-rider penalty, the premium subsidy for low income individuals, the small business tax credits, working with exchanges to verify income information and figuring how to calculate and collect five new excise taxes.

Senator Roberts said that some people joke that CMS stands for "It's a Mess". Well the same could be said of the IRS. As those of us on this Committee know all too well, the tax gap is a serious issue. The hundreds of billions of dollars that IRS isn't collecting suggest that the IRS isn't effective at executing its primary mission – the enforcement of the revenue laws. The IRS is just now starting to increase its enforcement efforts which had declined significantly after the restructuring a decade ago. But, just like many other federal agencies, it is facing a human resources crisis – more than 50% of its workforce is expected to retire in the near future. So it doesn't have people it needs to do its first job never mind a whole new one.

Mr. Chairman, in response to a question I asked last week about IRS administration of the employer free-rider penalty, you implied that the IRS may best positioned for these tasks because it has the data. It was the same argument that was put forth last year when it was determined that IRS would be responsible for issuing stimulus checks to individuals – even for those folks who otherwise had no reporting requirement.

Similarly, under the Mark, the IRS is being tasked with implementing provisions for which it actually must go out and collect new data – data that is unrelated to a taxpayer's tax liability.

The IRS would have to determine whether everyone has insurance and assess an excise tax on those who do not.

The IRS would have to determine whether employers are providing affordable coverage and assess an excise tax on those that do not.

The IRS would have to work with the new exchanges to verify whether an individual is eligible for a subsidy but we still don't know who the IRS will be sharing information with. It could be a state agency or a private entity with which a state contracts.

The IRS would have to develop new processes and procedures for insurance companies and employers to challenge and appeal the calculations of the high-cost premiums tax and the employer free rider excise tax. Both of these taxes are calculated by a third party other than the IRS or the taxpayer.

The IRS would have to develop a method for calculating the new excise taxes on medical devices and pharmaceuticals; the basis for which are unprecedented.

In light of these issues, I think it is fair to consider a couple of questions. Assuming that an individual mandate is constitutional, do we really want the IRS checking up on whether everyone has health insurance? Do we really want to facilitate the dissemination of tax information to third parties such as employers or an insurance exchange? Shouldn't we be providing more resources to the Department of Health and Human Services to ensure that it can receive and process the necessary data to implement the bill instead of the IRS?

The IRS's responsibilities for the stimulus bill are nothing compared to what it is being asked to do to implement the largest social program since Medicare. And with stimulus, we saw significant declines in both IRS customer service and enforcement.

Mr. Chairman, I'd like to ask whether you or your staff have received from the Administration, estimates of the cost to implement this bill, particularly to HHS and the IRS? If not, do you know when we can expect to receive such estimates? Since these costs should be considered as part of the overall cost of this bill, I believe receiving this information is just as important as getting JCT and CBO scores before voting on this bill.



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Tax Legislation

Baucus 'Excise' on Those Who Fail to Buy Insurance Raises Constitutional Issue

By George Clarke

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The proposed health care plan of Sen. Max Baucus (D-Mont.) includes—as a funding mechanism—a tax on individuals failing to purchase health insurance.¹

¹ Chairman's mark, America's Healthy Future Act of 2009, at 29, available at http://finance.senate.gov/sitepages/leg/LEG%202009/091609%20Americas_Healthy_Future_Act.pdf.

Although no draft statutory text has been provided, the chairman's mark characterizes the measure as an "excise" tax.

BNA reported Sept. 23 that Sen. Orrin Hatch (R-Utah) had expressed a concern that the selectivity of the tax (which would apply to individuals who choose not to buy insurance) could render it unconstitutional. Despite the wide breadth of congressional taxing power under the Constitution, Sen. Hatch has identified a significant issue. The proposed excise tax indeed is subject to constitutional challenge.

"The taxing power of Congress granted by Article I of the Constitution is exhaustive and embraces every conceivable power of taxation," the U.S. Court of Appeals for the Third Circuit wrote in *Penn Mutual Indemnity Co. v. Commissioner*.² "It is subject only to certain constitutional restrictions."³

² 277 F.2d 16, 19 (3rd Cir. 1960).

³ *Id.*

As explained by the Supreme Court well over a century ago:

[T]he power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.⁴

⁴ *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867).

Nevertheless, there are limits. For instance, the Bill of Attainder Clause⁵ prohibits extrajudicial punishment in the guise of legislative acts.⁶ In order for this limitation to apply, the act in question must, among other things:

- "fall[] within the historical meaning of legislative punishment";
- "further no nonpunitive legislative goals"; and
- "evinced[] Congressional intent to punish, as reflected in the legislative record."⁷

⁵ U.S. Constitution Article I, Section 9, Clause 3.

⁶ *United States v. Lovett*, 328 U.S. 303, 315 (1946).

⁷ *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984) (internal quotation marks and citations omitted).

Although the Baucus excise tax is still developing through the legislative process, the intent of the tax appears to be to affect citizens' behavior prospectively in a way the government finds desirable (arguably a nonpunitive legislative goal), rather than to punish members of the citizenry for their choosing to remain uninsured. Based on this prong alone, the Baucus excise tax appears unlikely to be a bill of attainder.

Although congressional taxing power is broad, a capitation tax exempted for those whose actions the government likes cannot fairly be turned into an "excise" tax on the "privileges" or "rights" of inactions it does not.

A more interesting question is whether the Baucus excise tax is a direct tax, one that is required to be apportioned to the states based on census data as required by Article I, Section 9, Clause 4 ("[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken").⁸

⁸ If it is a direct tax, in order to be constitutional the Baucus excise tax would have to be "apportioned among the several States which may be included within this Union, according to their respective Numbers which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. Art. I, Section 2, Cl. 3.

This would be unusual; "such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue," the Supreme Court wrote in 1895's *Pollock v. Farmers' Loan & Trust Co.*,⁹ (holding—in a heavily criticized decision—that a tax on income from real estate is a direct tax).

⁹ 157 U.S. 429, 557.

While the 16th Amendment removed the apportionment restriction on direct taxes that are "taxes on incomes, from whatever source derived" (applied by *Pollock*), the restriction is unabated as to direct taxes that are not "taxes on incomes." Since the Baucus excise tax is not a tax on income,¹⁰ the relevant question to determine its constitutionality is whether it is one of the rare species of "Capitation, or other direct, Tax" that is prohibited without apportionment.

¹⁰ Based on the chairman's mark, the level of the excise tax would vary based on modified adjusted gross income but the incidence of the tax itself would be imposed as "[t]he consequence for not maintaining insurance." Chairman's mark, America's Healthy Future Act of 2009, at 29. The tax does not appear to be reasonably construed as a tax on income.

Although the scope of direct taxes is itself one of the mysteries of the tax law, based on the Constitution itself and without regard to whatever else may or may not be a "direct tax," a capitation tax plainly is a direct tax and thus is subject to apportionment.¹¹

¹¹ *Hylton v. United States*, 3 U.S. (3 Dall) 171, 177 (1796) ("the principal, I will not say, the only, objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land").

The Baucus excise tax is not a capitation tax in name; it is an excise tax and Congress is specifically given the power in the Constitution to levy excise taxes (as well as duties and imposts).¹² Provided

they are not direct taxes, there is no need for apportionment. Congress has imposed non-direct excise taxes in manners too frequent and too varied to amass examples here. ¹³

¹² U.S. Const. Art. I, Section 8, Cl. 1.

¹³ See *Flint v. Stone Tracy Co.*, 220 U.S. 107, 159 n.1 (1911) (accumulating historical examples as of 1911).

Furthermore, while excise taxes are generally thought of as "taxes laid upon the manufacture, sale, or consumption of commodities within the country, [or] upon licenses to pursue certain occupations and upon corporate privileges" ¹⁴, courts have upheld the application of excise taxes on personal "privileges" such as membership in a country club. ¹⁵ In fact, given historical precedents before and at the time of the adoption of the Constitution, the Supreme Court has held that the excise taxes Congress has the power to impose "extend[] to vocations or activities pursued as of common right" and that "natural rights, so called, are as much subject to taxation as rights of less importance." ¹⁶

¹⁴ *Alexander Theatre Ticket Office Inc. v. United States*, 23 F.2d 44, 46 (2d Cir. 1927).

¹⁵ See *McCaughn v. Williams*, 23 F.2d 840, 841 (3rd Cir. 1928).

¹⁶ *Steward Machine Co. v. Davis*, 301 U.S. 548, 580-581 (1937).

Nevertheless, the Baucus excise tax is different than what has come before. It applies to anyone that does not take a certain act—purchasing health insurance. Therefore, it does not tax the exercise of a "privilege" or a "right" (personal or otherwise) unless that "privilege" or "right" is the state of mere existence. ¹⁷

¹⁷ Cf. Eric. H. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional*, 97 Colum. L. Rev. 2334, 2408 n.392 (1997) (speculating that a capitation tax itself could be considered "a tax on the privilege of existence").

A tax on a person who chooses not to act is precariously close to a tax on everyone with an exemption from the tax for those that act. Furthermore, exemptions from what would otherwise be a capitation tax should not change its character. ¹⁸

¹⁸ See generally *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937) (upholding a state poll tax with various and varied exemptions) *overruled on other grounds by Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

Although congressional taxing power is broad, a capitation tax exempted for those whose actions the government likes cannot fairly be turned into an "excise" tax on the "privileges" or "rights" of inactions it does not. As the Supreme Court has recognized:

If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property. ¹⁹

¹⁹ *Pollock*, 157 U.S. at 583.

Accordingly, unless Congress wishes to develop a mechanism to apportion the tax in a constitutionally acceptable way, a different funding mechanism should be developed or a constitutional challenge could be successfully brought.

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**Senator Grassley's Statement Regarding Amendments F7 and F8
Executive Compensation and Governance at
Charitable Organizations**

Mr. Chairman, while we are on the topic of compensation, I wanted to take the opportunity to discuss my amendments regarding executive compensation and governance of nonprofit organizations. They are Grassley amendments F7 and F8. I will not ask for a vote on these at this time. These should be nonpartisan, good governance proposals so if any of my colleagues here are interested in incorporating some version of these amendments I welcome your thoughts.

As many of you know, I have been engaged in oversight of the nonprofit sector for over eight years now. During this time, I have reviewed groups of nonprofit hospitals, university endowments, college athletic programs, media based ministries.

I have also reviewed individual organizations such as the American Red Cross, The Nature Conservancy, American University, and the Smithsonian Institution. The Chairman has joined me in some of these reviews.

I think my amendment F7 speaks for itself. It simplify clarifies that the IRS has the authority to ask what it is asking about governance and management practices revised Form 990. I hope that we could agree that this makes without too much controversy. I expect that this amendment would have a negligible revenue effect.

My other amendment relates to eliminating a safe harbor related to nonprofit executive compensation.

Section 4958 of the tax code imposes taxes on organization managers who essentially approve or who engage in excess benefit transactions, including the payment of unreasonable compensation.

The problem is that the intent of that statute was undermined by Treasury Regulations implementing this statute. The regulations create a rebuttable presumption, or a safe harbor, so that compensation will automatically be deemed reasonable if the charity does three things.

First, the compensation has to be approved in advance by an authorized body, such as a board of directors, and at arms-length so there are no conflicts of interest. Second, the authorized body must obtain and rely on data regarding comparability before making its decision.

And finally, it must document its decision making process. While these are good steps to take, this safe harbor makes it impossible for the IRS to challenge compensation.

The IRS stated as much in two recent studies it did. One study was focused on executive compensation among a variety of charities and the other was part of a larger study of nonprofit hospitals.

I personally found organizations hiding behind this safe harbor in my investigations. For example, the boards of both American University and the Smithsonian Institution used this safe harbor to rubber stamp the compensation packages of Benjamin Ladner and Larry Small.

My amendment, as filed, would adopt the Joint Committee on Taxation's proposal from 2005. This proposal was also considered by the Panel on the Nonprofit Sector – an independent coalition of charitable organizations that came to together at the request of the Baucus and me to respond to our staff's proposals for charitable reform.

Mr. Chairman, I ask unanimous consent that the Panel's recommendation on this proposal be posted in the record.

While there are three prongs to the 2005 JCT proposal, my primary focus is to eliminate the safe harbor and hold the organization's managers accountable when they have rubber stamped compensation packages which they know to be unreasonable.

In addition, I propose that charities and nonprofits subject to the excess benefits transactions tax disclose what type of comparable data they used to determine compensation for their executives.

For example, my investigations have shown that for-profit comparisons are very common. One charity under investigation has a compensation study from a reputable compensation consulting firm using comparisons to Britney Spears and Oprah Winfrey to justify a charity CEO's salary. While I am not yet proposing we prohibit charities from using for-profit comparisons, I do think the public should have some information about how compensation was determined, including the industry and title of those used for comparisons.

I do have a request into JCT but I do not have a current score. But I understand this would raise revenue or would have a negligible revenue effect.

I understand that some believe that my two amendments are beyond the scope of this bill. As you may suspect, I believe otherwise.

A significant majority of the total assets in the charitable sector sit within hospitals and their related foundations. In addition, the Chairman's Mark supports the creation of tax-exempt insurance companies through the co-op proposal and also creates at least two other tax-exempt organizations – a comparative research institute and a reinsurance entity.

More importantly, although I have not asked CBO or JCT for this analysis, I believe that eliminating the safe harbor for executive compensation would bend the health care cost curve. As evidence of that, I would like to highlight to two recent press stories.

Mr. Chairman, I ask unanimous consent that these be posted in the record.

The *Boston Herald* this past Monday ran a story on the CEO of Boston Medical Center. In addition to her almost \$1.5 million dollar salary from the Center, she also received over a \$1 million in cash and stock for serving on the boards of other organizations, some of which engaged in business with the Center. This, however, is not the most egregious part.

According to the article, in 2008, the Center paid her a \$3.5 million retirement bonus – even though she doesn't retire until January 2010. I strongly believe that individuals should be compensated for their performance. But when the Boston Medical Center executive was moonlighting for outside organizations to the tune of \$1 million, I question whether she provided \$1.5 million worth of services to the hospital.

I also question the appropriateness of \$3.5 million bonus when the hospital, which is supposed to be a charity, is so cash strapped that it decided to sue the state of Massachusetts for inadequate reimbursements for providing health care to the poor.

The other article I would like to highlight is from *The Chronicle of Philanthropy*, which released its annual survey of nonprofit executive salaries this past Monday. *The Chronicle* reports that, despite the steep economic downturn, executive salaries at nonprofit institutions continued to grow. More importantly, the survey's biggest earner was the CEO of Partners HealthCare System in Boston. He received over \$2.7 million in compensation, of which nearly \$1.3 million was deferred compensation.

Let me be clear that I am not saying these amounts are per se unreasonable. I just don't think the IRS should be hamstrung with the presumption that compensation is reasonable just because the organizations took advantage of the safe harbor. Keep in mind that for-profit organizations have no such safe harbor under section 162(m).

There was much discussion Tuesday about the motives of non-profit organizations versus for-profit organizations. Let me close by saying that all nonprofits are not tax-exempt, as my staff's recently released analysis of ACORN highlights. More importantly, tax-exempt entities can be just as profit driven as investor-owned entities. Sometimes the only difference is that investor-owned entities return profits to shareholders while tax-exempts return profits to executives. In the bill before us, there is nothing that would prevent the nonprofit co-ops from paying their executives what AIG executives made.

My amendment doesn't set limits on compensation – it would just hold tax-exempt organizations more accountable for what they pay their executives.

As I stated earlier, I am not seeking a vote on these amendments but am happy to work with those who may be interested.

Thank you, Mr. Chairman.