EXECUTIVE COMMITTEE MEETING TO CONSIDER

HEALTH CARE REFORM

THURSDAY, OCTOBER 1, 2009

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

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


Also present: Democratic Staff: Bill Dauster, Deputy Staff Director and General Counsel; Cathy Koch, Chief Tax Counsel; Elizabeth Fowler, Senior Counsel to the Chairman and Chief Health Counsel; Kelcy Poulson, Tax Research Assistant; Bridget Mallon, Detailee; and Andrew Hu, Health Research Assistant. Republican Staff: Kolan Davis, Staff Director and Chief Counsel; Mark Hayes, Republican Health Policy Director and Chief Health Counsel; James Lyons, Tax Counsel; Chris Condeluci, Tax Benefits Counsel; Theresa Pattara, Tax Counsel; Rodney Whitlock, Health Policy Advisor; and Andrew McKechnie, Health Policy Advisor.
Also present: Josh Levasseur, Deputy Chief Clerk and Historian; Athena Schritz, Archivist; Mary Baker, Detailee; Thomas Barthold, Chief of Staff of the Joint Committee on Taxation; Thomas Reeder, Senior Benefits Counselor; Yvette Fontenot, Professional Staff; David Schwartz, Professional Staff; Tony Clapsis, Professional Staff; and Shawn Bishop, Professional Staff.
The Chairman. The Committee will come to order.

Good morning, everybody. This is our seventh day of consideration of America's Healthy Future Act. It has been 15 years since we have held a markup this long.

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

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

Okay. The first amendment. Senator Grassley?

Senator Grassley. Could I make a request?

The Chairman. Sure.

Senator Grassley. Because we do not have enough
members yet here to start amending, anyway, do we?

The Chairman. No.

Senator Grassley. Okay. So then this would be sort of a unanimous consent request, but I want to take a couple minutes here just to explain why I am asking this. This is something that we have not spent much either here or in the Group of Six on, and that is, how the majority of this bill will be administered and the cost to administer it. And it is my judgment that when CBO makes an estimate of cost of what a program is going to cost, this information has to come from the executive branch of Government. So this is kind of geared towards getting this information.

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

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

The costs to implement the bill are not included in CBO or Joint Tax 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 Joint Tax-CBO scores before voting on a bill. I have a lengthy statement that I am not going to read, so that is why I ask unanimous consent to put it in the record.

The Chairman. Without objection.

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

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

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

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

But we do not receive from the administration explicit estimates of the amount of manpower that they may or may not allocate to any one new proposal.
As I know you are fully aware, the administration's current budget and the budget from last year did authorize an increase in the Internal Revenue Service budget, and from congressional scorekeeping perspectives, the Joint Committee and the Congressional Budget Office assume that, given their budget, the Internal Revenue Service will allocate it in such a way as to try and get the best outcome for the Government as possible.

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

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

The Chairman. Yes, I have.

Senator Grassley. Okay.

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

[Pause.]

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

Senator Crapo. Are you ready, Mr. Chairman.

The Chairman. Yes, Senator, proceed.

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

The Chairman. All right.

Senator Crapo. This amendment is intended to bring
the bill in line with one of President Obama's pledges to
the American people. I think that virtually everybody in
America has probably heard President Obama describe the
parameters of the health care proposal that he seeks to
have Congress adopt, and one of the core points that he
has continuously made is that he will not impose a new
tax on those in this country making—individuals making
less than $200,000 a year or families making less than
$250,000 a year.

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

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

And just one other quote that the President made
among many that he has commented on this. Again, last
year in September, in New Hampshire, the President said,
"No family making less than $250,000 will see their taxes
increase. And I can make a firm pledge: under my plan,
no family making less than $250,000 will see their taxes increase." And again, he said, "not your income taxes, not your payroll taxes, not your capital gains taxes, not any of your taxes."

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

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

In one of the amendments I brought earlier, Mr. Chairman, you will recall that I made a very strong argument that the pay-or-play provisions in the bill, the proposals that employers who do not provide health insurance to their employees have to pay a penalty, would be directly passed on to their employees, who would then pay higher taxes--or higher fees because of those taxes. I am not counting that as a direct tax. I actually believe that should count, and I believe that those kinds
of direct pass-through costs that we are passing through
to employees of small businesses, or of any businesses
who do not provide support to their--health insurance to
their employees should be counted.

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

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

Another $600 million of it will fall on those making
between $48,000 and $72,000 per year. Another $500
million of it will fall on those making between $72,000
and $96,000 per year. And another $300 million will fall
on those making between $96,000 and $120,000 a year. For 71 percent of that tax that will be imposed falling on those making less than $120,000 per year. We do not have statistics between $120,000 and $250,000, but of the remaining $800 million collected, we can assume, I think safely, that a significant amount of that would be paid by people making less than $250,000 per year.

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

And then, finally, in the Chairman's modification, the floor on deductions for medical expenses is raised to 10 percent from its current level of 7.5 percent. The current law tax provision allows several million Americans with very high health care costs to deduct from their income, and thereby lowering their income taxes, some of the cost for their medical goods and services.
that are not covered by insurance. And I know that—I do not think that there is any way that this cannot be acknowledged as a direct tax increase on those who now will lose that additional portion of their deduction for these medical costs.

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

These are just three of the more prominent tax increases in the measure that would place an undue burden on our middle class and violate President Obama's commitment that this health bill will not increase taxes
of any kind--his words were "of any kind"--will not increase taxes of any kind on those earning, as singles, less than $200,000 or, families, less than $250,000.

I urge my colleagues to support this amendment.

Again, it is very simple. It will remove all taxes, fees, and penalties from the bill that apply to families earning less than $250,000 per year.

The Chairman. Any discussion?

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

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

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

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

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

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

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

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

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

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

    Senator Crapo. I understand. The three examples I
used were the individual mandate to have health insurance
that would impose a tax on persons who did not comply
with the mandate. Secondly, the increase in the penalty
for health savings accounts from 10 percent to 20 percent
for those who use a portion of them for purposes of other
than qualified medical expenses. And then, finally, the
increase in the floor on deductions for medical expenses
from 7.5 percent to 10 percent in the income tax code.

The Chairman. Have you totaled what those are?

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

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

The Chairman. You are talking about the premiums.

Senator Crapo. Excuse me?

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

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

Similarly, the increase in the floor on deductions is estimated in just the year 2017 alone to raise $21 billion, and we could extrapolate for that over about 10 years to see that this could be a very significant tax
But the bottom line, Mr. Chairman—well, let me go back. That $21 billion would not all fall on those making less than $250,000; only 99.6 percent of it would. But my point is we are going to have to make some extrapolations. We do not have a score yet, but we expect that there is a pretty sizable amount of tax increases that are included in the mark.

The Chairman. Well, let me just remind everybody that this bill, this legislation before us, provides for a $40 billion net tax cut for Americans—$40 billion—by the year 2019. A net $40 billion tax cut for Americans. That is the tax credits, primarily, of an exchange. But it is a $40 billion net tax cut in one year alone and—by the year 2019. That is 1 percent of Americans—a 1-percent reduction in taxes for all Americans. And it builds up. So it is fewer dollars tax cut in the first year. By the time you get to 2019, this bill results in a $40 billion net tax cut.

I might also point out that it would result in wage increases for those employees who find their wages increased on account of the high excise premium tax. That is CBO. That is a wage increase. So when people talk about, you know, Americans might be harmed a little bit here and there, it is also very important to look at
the whole story, and the whole story is that there is a $40 billion net tax cut provided for in this bill.

Senator Crapo. Mr. Chairman?
The Chairman. Does the Senator wish to close?
Senator Crapo. I would like to respond on that issue. I do not know that President Obama was saying that—he was talking in a net sense for the country as a whole when he said he would not increase taxes. There are going to be a lot of people whose taxes are increased by this legislation.

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

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

The clerk will call the roll--

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

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

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

Senator Crapo. Mr. Chairman?

The Chairman. The clerk will call the roll.

Senator Crapo. Could I respond?

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

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

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

But I first want to make it clear that neither I nor, to my knowledge, any of the Republicans on this Committee have proposed any kind of a tax increase on the American people. The current law that we have is
different from the mark that we are debating here.

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

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

Senator Stabenow. Would my friend yield for a question?

Senator Crapo. Yes.

Senator Stabenow. Mr. Chairman? In May of this year, there was an analysis by Families USA that the
hidden health tax on annual premiums for family health
care coverage last year was $1,017, and for health
coverage provided to single individuals, $368. So for a
family, there is a hidden tax of $1,000.

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

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

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

Senator Stabenow. There is.

Senator Crapo. It is interesting that you call it
a hidden tax. It is a cost, but there is no tax being
paid to the Federal Government in that concept that you
are talking about there. And I do not believe that when
the President said to the American people we will not
raise your taxes that he was saying, well, this is a net
deal that I am talking about where we are going to
provide you some benefits in some legislation and we may
raise your taxes for it, but if our definition of the
benefit you are getting is higher than the taxes we are
charging you, then I have not violated my tax pledge.

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

Senator Crapo. Well, I--

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

Essentially what you are saying, you want to take
away the personal responsibility. That is basically what
you are saying. And I believe that guts health care
reform. This is a killer amendment. This is an
amendment which guts and kills health reform. And that
is why I say this is a message amendment. It is really not what—the effect is not what are purportedly saying. The effect is to say no more coverage, not have universal coverage. That is the effect of the amendment. So I, therefore, would like to have a vote.

Senator Crapo. Mr. Chairman, could I respond? The Chairman. Just very briefly. Senator Hatch very briefly, then Senator Crapo very briefly, then let us vote. Senator Hatch.

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

However, this Chairman's mark is riddled with tax increases on Americans making far less than these amendments. I have enjoyed the Chairman's remarks here. He is right. You cannot do all that they want to do without increasing taxes on everybody, directly or indirectly. He is right on that. But that is not what the President said we were going to do.

To start with, it declares war on savings accounts for health care. For example, the mark would limit the amount that employees can set aside of their own money
into FSAs. In addition, over-the-counter medicine would no longer be qualified expenses for FSAs and health savings accounts unless you have a doctor's note. That is not so today.

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

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

Perhaps even worse are the indirect tax increases in the Chairman's mark. Probably the most troubling to me is an unprecedented excise tax levied on entire segments of the health care industry, including pharmaceuticals, medical devices, and health insurance. And while these fees would be paid by corporations, there is no doubt in any of our minds that they ultimately will be passed on to consumers in the form of higher prices or on to employees in the form of lower pay or even layoffs.
And for those Americans who decided to either not have health insurance or if you need a more expensive plan than is allowed, the Chairman's mark would raise taxes on you even if you do not make anywhere near $250,000 per year. This is part of the so-called individual mandate which would requires individuals to obtain health care coverage or pay an extra tax.

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

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

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

I hope that was short enough, Mr. Chairman.
The Chairman.  Okay.  Thank you very much.

Senator Crapo?

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

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

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

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

I think it is very interesting, though, that the Chairman argues that this would gut the bill. Again, all this amendment does is say what the President said will be a fail-safe position for the bill. And if we cannot
do health care reform without taxing people in the middle class and the lower-income categories, then we have got the wrong plan in front of us. I believe we can do major and very helpful reforms that will increase access, that will reduce costs, and help us to dramatically improve our health care situation and our health care economy in the United States without imposing these taxes.

The Chairman. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. Pass.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

The Chairman. Pass.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

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

The Clerk.  Mr. Nelson?

The Chairman.  No by proxy.

The Clerk.  Mr. Menendez?

The Chairman.  No by proxy.

The Clerk.  Mr. Carper?

The Chairman.  No by proxy.

The Clerk.  Mr. Grassley?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Hatch?

Senator Hatch.  Aye.

The Clerk.  Ms. Snowe?

Senator Snowe.  Aye.

The Clerk.  Mr. Kyl?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Bunning?

Senator Bunning.  Aye.

The Clerk.  Mr. Crapo?

Senator Crapo.  Aye.

The Clerk.  Mr. Roberts?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Ensign?

Senator Ensign.  Aye.

The Clerk.  Mr. Enzi?

Senator Hatch.  Aye by proxy.
The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

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

The Clerk. Mrs. Lincoln?

Senator Lincoln. Yes.

The Chairman. Senator Wyden? Has Senator Wyden voted?

The Clerk. Mr. Wyden?

Senator Wyden. No.

The Chairman. The clerk will tally the vote.

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

The Chairman. The amendment does not pass.

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

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

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

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

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

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

My amendment to the budget resolution, I know my colleague Senator Conrad will recall, stated, "It shall not be in order in the Senate to consider any bill, resolution, amendment between Houses, motion, or
conference report that includes a Federal tax increase which would have widespread applicability on middle-income taxpayers." That provision was adopted by a recorded vote of 98-0. And it is a shame that, unfortunately, that provision was dropped in conference.

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

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

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

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

brunt of 70 percent of this tax increase. So 70 percent 
of the tax increase will be on people making less than 

$120,000 a year because they combine the last 30 percent 

and anybody above 120, we do not have the breakout 

effectively what it is on people making less than $200,000 a 

year. The bottom line is, though, 70 percent of the 

burden is being paid by people who make less than 

$120,000 a year.

When I first offered my budget resolution amendment, 

I talked then about the danger of tax increases caused by 

climate legislation that was being considered, and I 

noted then how President Obama had said under his plan of 

cap-and-trade system, electricity rates would necessarily 

skyrocket. Well, he could very well have said the same 

thing about how under Democrat health care legislation 

taxes and costs will necessarily skyrocket. We have seen 

that in many tax provisions in this bill.

There is an interesting common thread here. Under 

both proposals, Democrats have incorporated enormous 

taxes on America, including middle-income families. Both 

involve very definite and immediate high costs in the 

early years, and both promise savings and benefits 

sometime in a vague way in the indefinite future. Both 

proposals involve the creation of entirely new and
complex structures that have never been tested and are described in ridiculously long and complex bills. Yet in both cases, Democrats are so confident that people and markets will react exactly as they predict to bring about benefits someday.

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

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

The Chairman. All right. This is, again, a message amendment because it just does not have sufficient definition. And I might remind everybody that the effect of this amendment really is that no one earning less than $200,000 a year should buy health insurance. That is basically what the amendment says. Nobody earning less than $200,000 a year should buy health insurance. We are trying to have a shared responsibility here where all Americans are
participating. And I do believe that those Americans earning under $200,000 should buy health insurance.

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

Senator Cornyn, very briefly.

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

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

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

Senator Cornyn. And can you tell me--I know that in the stimulus bill there was a making-work-pay refundable tax credit. There is an earned income tax
credit. Could you tell me, if this bill passes with tax
credits up to 300 percent of the Federal poverty level,
what other refundable tax credits would an individual or
a family of four be entitled to?

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

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

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

If you would like, I can ask some of my colleagues
to work out some of the values for different income
levels, if you would like it for sort of a prototypical family of four at different income levels.

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

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

Senator Stabenow. Would my colleague yield?

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

Senator Stabenow. Would my colleague yield?
Since, Mr. Chairman, this is message day, let me just indicate again, we have had six amendments from the Republican side that would reduce tax credits for middle-income people. And I do not consider somebody with two children making $60,000 a year a wealthy person.

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

So, Mr. Chairman, I know this is message day, and I understand what this is all about. But just for the record, what we are talking about--and I am looking forward to the floor when we will have opportunities to decide whose side we are on in this debate, whether it is the middle class or the privileged few who have benefited so greatly by past tax policy. But at the moment, I guess we are just going to have a series of message amendments to try to hurt the President and score points. And I--
Senator Cornyn. If I could reclaim the floor just briefly to make the point--

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

Senator Cornyn. She asked if I would yield.

The Chairman. I am sorry. Okay.

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

The Chairman. Senator Cornyn has the floor.

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

That is why I appreciate Joint Tax providing us their best estimate because I think we ought to make our
decisions based on those facts rather than based on rhetoric.

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

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

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

Today was the day that we were supposed to bring amendments relating to the financing portions of the bill, or we would have had some of these messages or amendments on other days. And is there a message in this
debate? Yes, there is. But that does not mean that these are not very serious, substantive issues. The taxes that we are talking about here are real. They are in the bill, and they are going to hit squarely on the middle class.

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

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

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

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

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

Well, this is the effect. We are changing tax
policy here, and the penalties are up to 1 year in jail and a $25,000 penalty for not paying these taxes.

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

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

The Chairman. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. Pass.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

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?
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?
Senator Ensign.  Aye.
The Clerk.  Mr. Enzi?
Senator Grassley.  Enzi, aye by proxy.
The Clerk.  Mr. Cornyn?
Senator Cornyn.  Aye.
The Clerk.  Mr. Chairman?
The Chairman.  No.
The Clerk.  Mrs. Lincoln?
Senator Lincoln.  Aye.
The Clerk.  Mr. Chairman, the final tally is 11 ayes, 12 nays.
The Chairman.  The amendment does not carry.
I understand, Senator Grassley and Senator Snowe, you are ready to bring back--oh, it is Snowe-Lincoln, excuse me. Your amendment?
Senator Snowe.  The F9 as modified?
The Chairman.  Sorry.
Senator Snowe.  Yes, the F9 amendment that we discussed yesterday, I brought it up yesterday. Now it is pending for a vote.
The Chairman.  On the maintenance--
Senator Snowe.  No.
Senator Grassley.  No, the other.
The Chairman.  Which one is that?
Senator Grassley.  Ours was the maintenance of
effort, and F9 was Snowe-Lincoln.

Senator Snowe. Snowe-Lincoln-Bingaman.

The Chairman. Oh, the medical indemnity.


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

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

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

These indemnity insurance policies are very important because for a number of individuals, as we well know, they end up filing for bankruptcy due to medical
expenses. In fact, one of the biggest reasons for bankruptcy today is medical debt. In fact, more than 62 percent of personal bankruptcies were medical, an increase from just 8 percent of bankruptcies that occurred in 1981. And among those who filed for bankruptcy, 75 percent reported having some type of medical insurance.

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

In addition, Senator Bingaman has two additional components to this legislation--one which includes community health centers. The first of these addresses the fact that those who are Medicare beneficiaries, regardless of the services performed, are capped in the amount that they receive for reimbursement. Last year, for example, a rural health center was paid a maximum of $100.06, regardless of the amount of services provided. I think this is an arbitrary and unfair system that costs the health centers $85,000 in lost reimbursement on an annual basis, and we know the role that community health centers play today in our communities and will play even
more so in the years ahead, and most especially in rural communities. So more and more Medicare beneficiaries are relying on community health centers for their medical treatment, and this inequity threatens the viability of these centers. So we ought to be able to reimburse them for the services actually performed and/or received.

Senator Bingaman also has another amendment that will allow Medicare beneficiaries with HIV and AIDS to obtain vital medications, have those contributions credited towards their Part D out-of-pocket expenditures. Given the fact that the Chairman's mark includes provisions to credit seniors who receive help in purchasing drugs in the doughnut hole coverage gap, we should not treat those obtaining assistance obtaining HIV medications any differently.

Finally, there is an amendment that would allow—Senator Lincoln's provision in this legislation that would allow seasonal employees and employers to offer health insurance to those employees and not be disqualified because in the summer months, they have a dozen of employees, and our States rely on tourism as a crucial part of our economy. In fact, it is predominant in our State. And so we should allow those employers who have seasonal employees to be able to be eligible for health insurance and not to be disqualified because they
are seasonal employees because they hire, you know, more employees during the summer than they, of course, throughout the entire year.

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

The Chairman. Is there further discussion?

[No response].

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

All those in favor of the amendment, say aye.

[A Chorus of Ayes].

The Chairman. Those opposed, no.

[No response].

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

Thank you, Senators.

Senator Hatch. Mr. Chairman?

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

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

This would provide a process for the courts promptly to consider any constitutional challenge to this
legislation. I chose the same language that we put into the bipartisan Campaign Reform Act. Like that legislation, this is a very important bill that raises very real constitutional questions. The Chairman opposed my earlier amendment because he said it was unconstitutional. I hope he and others on that side will be at least that sensitive to the very real constitutional concerns raised by the Chairman's mark.

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

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

The provision requiring individuals to buy health insurance, or the individual mandate, raises at least two more constitutional questions. The only conceivable
constitutional basis for Congress requiring that
Americans purchase a particular good or service is the
power to regulate interstate commerce.

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

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

    I did not pursue the point then because I had not
read the report. I have now read it, and with respect,
it says nothing of the kind. In fact, the CRS report did
not review the specific provisions in the Chairman's mark
at all. The CRS report, however, is definite about one
thing. Let me quote from the report: "This is a novel
issue, whether Congress can use its commerce clause
authority to require a person to buy a good or a service,
and whether this type of required participation can be
Now, I urge my colleagues to read this report. The Chairman's mark would have Congress boldly go where we have never gone before, at least as far as I can see, in the history of our country. If we have the power simply to order Americans to buy certain products, why did we need a Cash for Clunkers program or the upcoming program providing rebates for purchasing energy-efficient appliances? We can simply require Americans to buy certain cars, dishwashers, or refrigerators.

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

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

The second constitutional problem with the individual mandate arises because the penalty for failing to purchase health insurance is, in fact, not the excise
tax that the Chairman's mark calls it. An excise tax is a tax on the manufacturer and sales of goods or services. The gasoline tax would be a good example. The tax imposed upon people who failed to purchase health insurance, however, is the exact opposite. It occurs not when there has been the sale of something, but when there has been no sale of anything at all.

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

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

The Chairman. Without objection.

[The information appears at the end of the transcript.]
Senator Hatch. Now, here is its conclusion:
"Accordingly, unless Congress wishes to develop a mechanism to apportion the tax in a constitutionally acceptable way, a different funding mechanism would be developed or a constitutional challenge could be successfully brought."

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

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

I think it is a reasonable approach to this problem. I would hope that my colleagues on the other side would
see that this is a reasonable approach and that, since it does involve at least these three constitutional questions, we really, in due conscience, ought to do everything we can to make sure that we have a mechanism in place in this bill to be able to get to the bottom of that as quickly as possible and determine whether or not there are unconstitutionality aspects of this bill.

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

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

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

The Chairman. The Clerk will call the roll on the motion to overrule the Chair.
The Clerk. Mr. Rockefeller?
Senator Rockefeller. No.
The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Bingaman?
Senator Bingaman. No.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. No.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No.
The Clerk. Mr. Chairman, the final tally is 7 ayes, 9 nays.

Senator Hatch. Mr. Chairman?
The Chairman. Two-thirds of those present not having voted in the affirmative, the ruling of the Chair is sustained.

Senator Hatch. Mr. Chairman?
The Chairman. Senator Bunning, I think you are next.

Senator Hatch. Well, if I could just make a request, please.
The Chairman. Senator Hatch would like to be recognized.

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

The Chairman. We will make that request to CRS.
Senator Hatch. That would be great. Thank you.

The Chairman. Senator Bunning?

Senator Bunning. Thank you, Mr. Chairman.

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

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

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

Now, let us take a look at the laundry list of tax
increases that increase costs for consumers. Buried on page 167 of the Chairman's mark, there is a tax on health plans to fund patient-centered outcome reach. Next, there is a tax on the uninsured. Americans will now have to pay a hefty penalty for the privilege of being uninsured, backed up by the threat of jail time if they refuse to pay the tax.

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

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

How is this making health care more affordable? How does this tax increase allow people to keep the health care coverage they like when it forces plans to change by restricting benefits or increasing cost? Now that the
high-cost plans will increase out-of-pocket costs for consumers, the Chairman's mark pours salt on the wounds by drastically restricting something that makes out-of-pocket health care costs more affordable: flexible spending accounts.

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

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

Tax increases on over-the-counter medicines will actually drive up health spending by causing more unnecessary visits to physicians. It certainly does not allow people who like the coverage they have to keep it. There is also a tax increase on employers who offer prescription drug coverage to their retirees.
We used to be concerned about employers dropping retired health coverage, but apparently this is no longer a concern. The Joint Committee on Taxation tells us that the annual tax on insurers will be passed along to consumers in the form of higher premiums.

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

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

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

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

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

[No response].

The Chairman. I think we should vote on this right away, too. Basically, I think it is irresponsible to cut off, frankly, the revenue for health care reform after 10 years while spending continues. That would certainly have an effect on the cost curve in the second 10 years and it would skyrocket as a consequence of this
amendment, which would not help us with the CBO score. So, consequently, I think we should just summarily vote on this amendment and go on to the next amendment. Senator Bunning. Mr. Chairman, just in response. The Chairman. Senator Bunning? Senator Bunning. I have given three other options that future Congresses could address if you think I am trying to cut it off after 10 years. The Chairman. Well, right now this bill is before us right now. You want to cut off, after 10 years, all the funding, yet all the spending continues. I think that is not responsible.

The Clerk will call the roll.
The Clerk. Mr. Bingaman? The Chairman. No by proxy.
The Clerk. Mr. Kerry? The Chairman. No by proxy.
The Clerk. Mr. Schumer?

The Chairman. Pass.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

The Chairman. No by proxy.

The Clerk. Mr. Carper?

Senator Carper. No.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. No.

The Clerk. Mr. Kyl?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.

The Clerk. Mr. Roberts?
Senator Grassley. Aye by proxy.

The Clerk. Mr. Ensign?

Senator Ensign. Aye.

The Clerk. Mr. Enzi?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

Senator Schumer votes no by proxy.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

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

The Chairman. The amendment is not agreed to.

Senator Bunning, do you have another amendment?

Senator Bunning. Yes.

The Chairman. You are recognized.

Senator Bunning. I would like to call up amendment F-3, as modified.

The Chairman. F-3, modified.

Senator Bunning. Slider 3.

The Chairman. All right. Slider. All right. But
I do not want a slider, I want a fast ball.

Senator Bunning. Well, sorry. Too late.

[Laughter].

The Chairman. All right.

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

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

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

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

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

But it does not just affect seniors. Others who take this deduction may be people who have to spend an enormous amount of money coping with a disability. Many others have a disabling condition, such as cancer, diabetes, Parkinson's, chronic heart failure, multiple sclerosis, Alzheimer's, or COPD. Others may be parents of a child with cancer or other heart-breaking conditions. Very few of these people are wealthy.
According to the Joint Committee on Taxation, 99.6 percent of taxpayers affected by this tax increase in 2017 will have incomes of less than $200,000, as has been stated many times before.

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

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

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

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

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

I wish we could protect every American from this devastating tax increase, but surely both sides of the aisle can agree that we should protect the most vulnerable Americans from losing this critical safety net. My amendment exempts seniors, people with a disability, people with debilitating chronic conditions, and people with a terminal illness from the tax increases on catastrophic health care costs. The amendment is
offset by a corresponding reduction in insurance subsidies under the exchange, starting with the highest-income people.

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

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

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

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

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

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

Senator Bunning. I am willing to work. But I want you to remember that those people are already covered for
catastrophic health care costs.

   The Chairman. I am sorry, who is?

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

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

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

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

   Senator Bunning. I think we should vote it.

   The Chairman. Sorry?

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

   The Chairman. If you wish. All right.

   Senator Stabenow. Mr. Chairman?

   The Chairman. I am constrained to oppose this amendment because it is not right to take money out of
middle income Americans to pay for a sympathetic population. There are other ways to raise revenue to help accommodate this population.

Senator Stabenow?

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

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

The Chairman. The Clerk will call the roll.

The Clerk. Mr. Rockefeller?

The Chairman. No by proxy.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?
Senator Bingaman. No.
The Clerk. Mr. Kerry?
The Chairman. No by proxy.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
The Chairman. No by proxy.
The Clerk. Mr. Schumer?
The Chairman. No by proxy.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Nelson?
Senator Nelson. No.
The Clerk. Mr. Menendez?
The Chairman. No by proxy.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. No.
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?
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?
21 The Chairman. The Clerk will tally the vote.
22 The Clerk. Mr. Chairman, the final tally is 9 ayes, 14 nays.
23 The Chairman. The amendment does not pass.
24 Senator Cornyn, I believe you have an amendment.
You cannot get away.

[Laughter].

Senator Cornyn. Thank you, Mr. Chairman.

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

The Chairman. All right. F-5.

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

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

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

It would seem to me to make a lot of sense that, before implementing the mark, to have Treasury step back and take a look at the bill and certify that it will not
increase costs for small businesses. I am afraid, as currently proposed, that the mark, because it includes things like higher taxes and pay-or-play mandates and the like, that small businesses will indeed see their costs go up. We know from CBO that the new taxes contained in the mark will be passed down to health care consumers and will be reflected in not lower insurance premiums, but higher insurance premiums.

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

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

The cost of paperwork has risen $7,646 per employee per year, according to the Small Business
Administration's Office of Advocacy. I am concerned that the mark would only serve to increase the costs and complexity for America's small businesses.

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

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

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

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

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

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

The Chairman. You mean, with the infinite
knowledge at Joint Tax, we do not have that at our fingertips right now?

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

[Laughter].

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

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

[Laughter].

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

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

If there is no free rider penalty for employers and if they are not providing health insurance, then I think this basically just kills the bill because it says, prior to implementation. That means nothing else is going to
occur. That means that no health insurance inform, market reforms. That means no rating rule changes. Nothing else in this bill could go into effect because of a certification by Treasury that there is no free rider penalty, for example, on those firms who do not provide health insurance. So I just do not think it is right to kill the bill. It is not my goal, anyway, to kill it. So I think this is a very easy vote: we should vote "no".

Senator Cornyn. May I respond, briefly?

The Chairman. Absolutely.

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

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

So while the Chairman says this amendment could kill the bill as presently written, I do not believe it would irreparably damage or fatally damage the cause of health care reform because I do think there is a core consensus
of where we could go. But I would respectfully suggest that what the Chairman has suggested is that there will be additional costs on small businesses, but that the Chairman believes that those are necessary in order to accomplish the purposes of the bill.

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

Senator Stabenow. Mr. Chairman?

The Chairman. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman. Mr. Chairman, I want to thank you for what is in the bill for small business. Small business really is the engine. We all say that. But more and more people are losing their jobs, becoming entrepreneurs, setting up their own small business and finding themselves with no ability to get health insurance. So, I appreciate the fact that this bill will help businesses from day one, starting right away. Businesses with less than 25 employees will receive a tax credit to help them provide health insurance for their workers, day one.
Once we have the insurance exchange, small businesses will be able to purchase health insurance for their employees at much more affordable rates, which is so critical to small businesses in Michigan, and all across the country. The exchange will give small businesses the same power that big companies have when purchasing insurance to get them a better rate. Finally, once the exchange is in place, the bill would provide the same small businesses a permanent tax credit to help them purchase insurance for their employees.

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

The Chairman. All right.

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

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

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

The Clerk. Mr. Rockefeller?

The Chairman. No by proxy.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.
The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?

Senator Wyden. No.

The Clerk. Mr. Schumer?

The Chairman. No by proxy.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

The Chairman. No by proxy.

The Clerk. Mr. Menendez?

The Chairman. No by proxy.

The Clerk. Mr. Carper?

Senator Carper. No.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?
Senator Hatch. Aye by proxy.
The Clerk. Mr. Bunning?
Senator Hatch. Aye by proxy.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Roberts?
Senator Hatch. Aye by proxy.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Hatch. Aye by proxy.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No.
The Clerk. Mr. Chairman, the final tally is 10 ayes, 13 nays.
The Chairman. The amendment does not pass.
I am told—I do not know the source. My ace, crack staff just got me the figure—that small firms with fewer than 500 employees represent 99.7 percent of the 25.8 million businesses. So, it is 99 percent. That is firms with 500 or fewer employees. Now, we have carved out small business with 50 or fewer employees, so that figure is maybe not totally accurate. But anyway, under 500,
about 99 percent firms have 500 or fewer employees.

Senator Ensign?

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

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

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

Now, they also sent me a letter today, and let me
quote from the letter. It says, "An insurer offering a
family health plan that exceeds the excise tax threshold and is subject to the excise tax faces an increase in the cost of offering that health coverage. Generally, we expect the insurer to pass along the cost of the excise tax to consumers by increasing the price of health coverage."

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

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

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

I mean, if we had gone back 20 years and had this amendment in effect, almost all plans in America today would be captured. Well, eventually all plans in America
will be captured as Cadillac plans simply because -- I mean, we are not seeing a dramatic drop in the medical CPI under this bill, according to the estimates from the Joint Committee on Taxation and CBO.

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

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

Thank you, Mr. Chairman.

Senator Cornyn. Mr. Chairman?

The Chairman. Senator Cornyn is recognized.

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

Is it true that the insurance provider fee or tax
carves out those who self-insure, the excise tax?

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

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

Mr. Barthold. No.

Senator Cornyn. That is different? All right.

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

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

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

Senator Cornyn. But from the fee?

Mr. Barthold. From that separate fee.

Senator Cornyn. The $60 billion fee?

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

Senator Cornyn. So who in the business community self-insures? Is it typically larger employers?
Mr. Barthold. Self-insurance is very prevalent among firms with 1,000 or more employees, large employees. There is also self-insurance at smaller levels, but businesses tend to go to, in the purchase market, below 1,000, much more so even below 500 employees.

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

Mr. Barthold. That is correct, sir.

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

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

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

Mr. Barthold. Yes, sir.

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

Mr. Barthold. Well, let me give a slightly longer answer than just yes/no. As Dr. Elmendorf explained earlier, we do think that basic economics is that that
fee will be reflected in higher-premium costs, whether 100 percent or less is less clear. So that would affect prices in the purchased market, and that will also affect decisions to self-insure versus go with purchased insurance.

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

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

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

Mr. Barthold. Just the fee. Remember, the basic structure of the Chairman's mark is an excise tax that is imposed on the insurer in the case of purchased insurance or the administerer of health care benefits -- in the case of someone who self-insurers, they often contract out with an insurance company or an administrator to run their health plans. So the 40 percent excise tax on high-cost health plans in the Chairman's modified mark
applies across all employer-provided health benefits.

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

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

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

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

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

Senator Cornyn. So just to sum up, and tell me if I am right or wrong, the $60 billion fee that will be
imposed against insurance companies that will ultimately
be passed down in terms of higher costs to the insured,
higher premiums, that will hit smaller businesses that
are not self-insured because self-insured businesses are
carved out from paying that fee. Is that an accurate
statement?

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

Senator Cornyn. Would you say yes, but?

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

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

Mr. Barthold. That is correct, Senator.

Senator Cornyn. Thank you.
Senator Wyden. Mr. Chairman?

Senator Lincoln. Mr. Chairman?

The Chairman. Senator Wyden?

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

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

Mr. Barthold. Well, as I mentioned a little bit in my answer to Senator Cornyn, to the extent that we think that the fee is reflected in higher premium costs, it makes the purchase on behalf of employees of purchased group insurance somewhat more expensive. If a business
is deciding, what is the best way for me to provide a health benefit to my employees as part of their compensation, they will weigh, what is the cost of purchasing from a third-party provider as opposed to, well, perhaps I could self-insure. That means I bear certain risks that I may or may not want to bear, and certain administrative costs.

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

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

I am concerned as we have gotten into this, particularly as it relates to the annual fee, not necessarily the excise tax, where we may end
up--and Mr. Barthold said it was only a slight disadvantage--I want to run those numbers down and then perhaps talk to you more about it in the future.

The Chairman. Sure.

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

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

The Chairman. Correct. Right.

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

The Chairman. Correct.

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

The Chairman. I am sorry. How many?

Mr. Barthold. $19.5.

The Chairman. 19?

Mr. Barthold. Yes. 19.5.

The Chairman. All right. Billion?


The Chairman. Yes. Right.

What effect will that have on the second 10 years?

Mr. Barthold. Well, to go back to the point that the members had discussed earlier, by having more --
The Chairman. With respect to the cost curve.

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

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

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

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

The Chairman. All right. Therefore, there would be about a $19 billion reduction in spending in the bill. I do not know. What is the offset here? What is the offset? So in effect, this would be taking and asking
lower income and middle income people to pay for this, effectively. That is what this does.

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

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

By potentially making certain types of health benefits more expensive, it changes the calculus both for what the employer might offer the employee and what employees would demand of employers. So, a basic part of our analysis is that people, employees and employers, will say we are changing the mix to more cash
compensation, and more cash compensation brings with it revenue into the analysis because that means you are taking an inclusion that is subject to income tax and payroll tax. Currently, employer-provided health benefits are excludable from both of those tax bases. So, I guess that is a long answer to a simple "yes" to your statement.

The Chairman. Right. Right.

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

Senator Cornyn. I do.

The Chairman. Senator Ensign.

Senator Lincoln. May I ask a question?

The Chairman. Senator Lincoln?

Senator Lincoln. May I also ask Mr. Barthold, down in the description at the bottom below this chart it says, "The proposal is estimated as a stand-alone proposal." Does that mean that you are making an assumption that no one will move to a more reasonable priced plan to get below the excise tax?
Mr. Barthold. Not at all, Senator Lincoln. What that meant was as a reminder to readers of the chart, that this is one proposal, part of a big package, that is doing a lot of different things in the industry. As I know I noted last week, as you change the proposal for the high-premium excise tax, that by affecting what people do in the insurance market, that affects the number of employers that may offer different types of plans or plans at all, which means that there are more people in the exchange or not in the exchange, on the small business side, more businesses that may be claiming the small business credit, so that there are a number of other moving pieces. This particular analysis was saying, let us just look at that one piece and we are not looking at the revenue effects in the exchange subsidy or from the individual mandate, or from the small business --

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

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

Thank you.

The Chairman. All right.

Senator Ensign?

Senator Ensign. Thank you, Mr. Chairman. Let us
be very clear and fair. You said that low- and middle-income people are going to be paying for this. Low- and middle-income people pay 87 percent of this excise tax. According to the official estimates from Joint Committee on Taxation, 87 percent of the returns that will pay this are less than $200,000 a year, families that make less than $200,000 a year. And by the way, this is a 40 percent excise tax.

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

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

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

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

The Clerk will call the roll.

The Clerk. Mr. Rockefeller?

The Chairman. No by proxy.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
The Chairman. No by proxy.
The Clerk. Mr. Schumer?
The Chairman. No by proxy.
The Clerk. Ms. Stabenow?
The Chairman. Pass.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Nelson?
Senator Nelson. No.
The Clerk. Mr. Menendez?
The Chairman. No by proxy.
The Clerk. Mr. Carper?
The Chairman. No by proxy.
The Clerk. Mr. Grassley?
Senator Hatch. Aye by proxy.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Hatch. Aye by proxy.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk.   Mr. Crapo?

Senator Crapo.   Aye.

The Clerk.   Mr. Roberts?

Senator Hatch.   Aye by proxy.

The Clerk.   Mr. Ensign?

Senator Ensign.   Aye.

The Clerk.   Mr. Enzi?

Senator Hatch.   Aye by proxy.

The Clerk.   Mr. Cornyn?

Senator Hatch.   Aye by proxy.

The Clerk.   Mr. Chairman?

The Chairman.   No.

The Clerk.   Ms. Stabenow?

Senator Stabenow.   Aye.

The Chairman.   The Clerk will tally the vote.

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

The Chairman.   The amendment does not pass.

The committee will stand in recess until 3:00.

[Whereupon, at 1:00 p.m. the meeting was recessed.]
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
Speaker Frank Chopp’s office in helping us with the drafting of this legislative.

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

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

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

In the state of Washington we have been able to provide a basic health plan and have been doing so for
the last 20 years. This proposal is modeled on the results that we have achieved in actually getting between 35 and 40 percent savings for those individuals.

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

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

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

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

Now, in the state of Washington, as I said, we have been able to be successful in driving down costs for individuals enrolled in this plan. And the savings for us have been quite significant. Not just for the
juxtapose to the individual, but also for everybody who benefits from having cost effective health care models in their state.

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

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

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

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

So this proposal, Mr. Chairman, I think improves the
underlying mark in helping us with affordability of health care and putting a competitive model in place. I think it will be the first time we have allowed for that type of negotiation on behalf of a population outside of the exchange. But really the first time we have allowed true negotiation with insurers to make sure we are going to drive down the cost of health care.

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

Senator Bingaman. Mr. Chairman.

The Chairman. Senator Bingaman.

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

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

First, that the financial cost to individuals and families is no greater than it would be if the state had not pursued the basic health plan option. And second, that the scope and the level of benefits are at the same
level or better than they would otherwise be able to access. It is my understanding that those are -- that is a condition that does not cause you problems and you would be willing to agree to those provisions; is that accurate or not?

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

Senator Bingaman. Thank you very much.

The Chairman. Is there further discussion?

Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman.

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

I think it is also important in debating the fact that Medicaid rates for doctors are well below what they should be and interfering with access to care. The fact that they have been able to do this in Washington state and bring up the reimbursement rates so we have more physicians, more providers that are able to cover people.
This is really a very important piece of how we put it together in terms of covering all Americans with affordable health care. It is done at the state level. I think it meets a lot of the issues that people have talked about. And I just want to congratulate Senator Cantwell, again, and I am pleased to join her in this amendment.

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

The Chairman. Without objection.

Senator Kyl?

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

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

After all of the talk that we had about choices
during the debate over the public option, this is going in the other direction. If a state decides to take advantage of this provision, then the amendment could prohibit people from choosing a plan in the exchange, requires them to enroll in the state plan and they have no option. There is only one state plan.

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

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

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

And I am also curious, and this is the second question, about how a state would decide how to create one of these state plans? Is there a requirement in the legislation or the amendment, I should say, that either the people of a state through referendum or the state legislature is the entity that decides to create the state plan?
Mr. Schwartz. Well, to go back to your first point, we are getting a little bit out of my area of expertise. But typically a higher-income population is a lower-risk population. So I think that there is some question about the effect of removing the 133 to 200 percent actually increasing the risk in the exchange.

Senator Kyl. You have a smaller risk pool.

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

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

Mr. Schwartz. Agreed.

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

Mr. Schwartz. The way that I read the amendment, it doesn’t specify. It just references that the states would be able to choose this. It does say on the second page in the paragraph right above cost savings, that first sentence says “State administrators should seek participation by multiple health plans to allow enrollees a choice between two or more plans wherever possible.”
So I thought I heard you say that it was only one plan, but the amendment reads as --

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

Mr. Schwartz. That is correct.

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

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

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

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

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

Senator Kyl. Sure. That is fine.

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

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

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

Senator Kyl. Right.

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

I think what Senator Cantwell is proposing is
slightly different in that it is a state option to pursue
that and receive a level of tax credits that would be
lower than 100 percent for doing so.
Senator Kyl. Mr. Chairman, while I am no fan of a lot of the things in the mark, it seems to me that at least the requirements that would be necessary for a state opt out provide some kind of box around the kind of practices that I am somewhat fearful that this amendment would create.

Senator Schumer. Mr. Chairman?

The Chairman. Senator Schumer.

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

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

Now, this really excellent amendment, which really gives states more choices and more options. It will help states achieve a good health care plan at a minimal cost, the lowest possible cost, if they are not very generous right now with benefits. But it also is good for a state like mine which is generous with Medicaid benefits and
give them the option of moving to another alternative that might be much better for the state budget, might produce a better kind of health care, and they will get some transition money to help them get there without forcing the state to go one way or the other.

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

The Chairman. Senator Cornyn.

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

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

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

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

Senator Cornyn. And for the reasons Senator Kyl mentioned, where typically we are worried about having larger pools of people to help keep the premiums down
rather than having smaller pools which will have a
tendency to jack premiums up, and this seems to me to be
moving in the wrong direction in that regard.

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

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

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

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

So states decide whether they want to do this and
then states are in charge of negotiating with providers
what the level of rate that they are willing to pay for
those beneficiaries. So the state is in the driver’s
seat. And what we have seen is when the state is in the
driver’s seat negotiating on behalf of these beneficiaries, they have been able to negotiate better discounts.

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

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

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

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

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

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

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

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

Senator Cornyn. Mr. Chairman, I am --

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

Senator Cornyn. Well, the first reaction I have is that if this is such a good deal for people making 133 percent to 200 percent of poverty, why do we not make it available to Medicaid beneficiaries up to 133 percent who are finding a lack of access to physicians? But I worry that if there is nothing to prohibit the payment of Medicaid rates under the amendment that 40 percent of
physicians would refuse to provide care to enrollees just like they do now which is a national average under Medicaid.

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

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

They actually have updated that. It is a 2009 report on 2006 data. It says that on average nationwide, 40 percent of physicians will see any Medicaid patient. An additional 30 percent of physicians will see some Medicaid patients. So the average is about 70 percent, which actually is pretty comparable to private insurance. It is a little bit lower. I think private insurance is
in the mid 70s, maybe approaching 80, and Medicare is in
about that same range. So, Medicaid is behind, but maybe
not as much as we all thought originally. And a lot of
that difference does come from managed care. So it is
hard to know based on this amendment which is focused, as
Senator Cantwell said, on managed care. How much of an
access issue there would be.

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

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

Senator Cantwell. Mr. Chairman.

The Chairman. Senator Cantwell.

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

I do not know that our populations are so different.
Maybe they are. But this is about states negotiating for local rates. As I said, we have been able to get better than Medicaid rates, Medicaid plus 30. And some for institutions like hospitals, which Senator Conrad has talked a lot about in his state, we have been able to get 50 percent. So we certainly paid better than that.

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

So this is about driving efficiency. Now, if a state does not want to do it, if a state does not want to opt in to providing more efficient care, that is the option that the state has. But if we want to drive efficiency in our marketplace and we want managed care which we know is coordinate, it is more cost effective,
it is more focused on primary care, then this is the way to help the whole nation move more towards those kinds of efficiencies.

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

The Chairman. Yes.

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

The Chairman. I do not think we have.

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

The Chairman. Right.

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

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

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

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

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

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

We are not driving enough efficiency in the system. Taking this population and saying, we are actually going to negotiate. For the first time we are going to give somebody the power to negotiate and, by God, they are going to drive down the price in the market. We actually now have the hardest-to-serve population under a plan that is leveraging that to drive down the costs. So everything is healthier in the costs that the Federal Government has to pay, in the cost that the individual
has to pay, everybody is doing better under a managed
care system in which rates are negotiated.

The Chairman. Senator Kyl.

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

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

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

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

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

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

Senator Cantwell. Mr. Chairman.

The Chairman. Senator Cantwell.

The Chairman. Who seeks recognition?

Senator Cornyn. Mr. Chairman.

The Chairman. Senator Cornyn.

Senator Cornyn. Senator Kyl yielded for a question.

May I ask a question?

The Chairman. All right. Go ahead.

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

The Chairman. Go ahead.

Senator Cornyn. Senator Kyl, I am advised that during a recent budget crisis in the state of Washington that the state legislature cut funding for basic health by 43 percent and that administrators were forced to
increase premiums from $36 a month to nearly $62 a month, almost double. Would that be the kind of issue that you would be interested in exploring before we accept an amendment like this with perhaps unintended consequences?

Senator Kyl. Well, Mr. Chairman, Senator Cornyn, it is the kind of thing you would have to consider if this is the only choice -- well, it is not even a choice. If this is what the people of any particular state would have to have, if the state decides to do it this way. You do not know what kind of circumstances may affect that and certainly a situation like the budget crisis you mentioned could have an adverse effect.

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

Senator Cantwell. Mr. Chairman.

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

Senator Cantwell? Senator Cantwell. Will Senator Stabenow --
The Chairman. Or Senator Stabenow.

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

The Chairman. Wait, I was --

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

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

The Chairman. All right. Senator Bunning.

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

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

Senator Bunning. Therefore, if I would make an amendment --
The Chairman. Senator, I have the floor.

Senator Bunning. Oh, okay.

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

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

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

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

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

Senator Bunning. Well, there is no — we do not know that.

The Chairman. Well, I have got to use my best judgment. And if you read the amendment — a fair reading of the amendment would compel one to realize it will raise revenue. It will raise money. It will save money.
Senator Ensign. Mr. Chairman.

The Chairman. I have so ruled.

Senator Ensign. Mr. Chairman, can I --

The Chairman. Before I --

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

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

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

And I think it does not take a rocket scientist when looking at an amendment to determine, even though there is not yet a score, whether it saves or whether it loses. And it is at the Chair’s discretion exercising, being reasonable, fair, and honest, a fair reading, that the earlier amendment offered by the Senator from Texas actually would have lost money. And this clearly saves money and that is why I ruled the amendment to be
Senator Cornyn. Mr. Chairman, may I ask whether you considered what impact the movement of people --

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

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

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

Senator Grassley. Can I ask a question?

The Chairman. Senator Stabenow?
Excuse me, Senator Grassley.

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

The Chairman. That is a good assumption.

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

The Chairman. Yes.

Senator Grassley. That you draw that conclusion.

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

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

Senator Grassley. No, I did not say “score.”

The Chairman. I am sorry.

Senator Grassley. I did not say “score.” Just have CBO look at the language, because they are God and they are independent and they can say, yeah, this will save money without saying it will save X number of
dollars. And would that not be a little more credible way of convincing everybody that it is in order?

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

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

Senator Stabenow.

The Chairman. Senator Cantwell, would you close?

Senator Cantwell. I am happy to close.

The Chairman. I might say if we --

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

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

Senator Cantwell. Thank you, Mr. Chairman.

Senator Cantwell. And as Senator Schumer mentioned earlier, you have been dogged at work on this amendment with mongoose tenacity of trying to find a good way to make this work. I highly compliment you for that.
But more than that, it is your emphasis on quality. You are a real leader. You are ahead of the curve. You, I think, probably more than most who are working in health care reform recognize the importance of quality and how quality not only improves quality but saves dollars. And I very, very much compliment you for that. You have quality provisions in this underlying mark and what you are striving for here is based on the belief that states who exercise this option are going to be focusing more quality, negotiations and so forth. And I compliment you. People in Washington should be very proud of you and what you are doing here.

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

And to my colleagues, the Chairman is right, the structure of this amendment is such that we are limiting to the amount of money that we are putting on the table for the tax incentives. So it cannot be any more than that, so it obviously is not more than that. The
question is, what is the efficiency in driving through negotiation the ability to negotiate rates. And to my colleagues who are worried about the fact that the exchange is somehow going to be disserviced by having a healthier population, I would ask you to consider the whole notion of the exchange and us continuing to subsidize without real competition, the ability to drive down costs, and where we are going to be with the exchange in the future.

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

But we are going to do everything we can to drive down the cost of insurance for the citizens of this
country. And at least this amendment is a start.

I thank the Chairman.

The Chairman. The clerk will call the roll?

The Clerk. Mr. Rockefeller?


The Clerk. Mr. Conrad?

The Chairman. Aye by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. Aye.

The Clerk. Mr. Kerry?

The Chairman. Aye by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. Mrs. Lincoln is no by proxy.

The Clerk. Mr. Wyden?

The Chairman. Aye by proxy.

The Clerk. Mr. Schumer?

The Chairman. Schumer must pass. I do not see

him.

The Clerk. Ms. Stabenow?

Senator Stabenow. Aye.

The Clerk. Ms. Cantwell?

Senator Cantwell. Aye.

The Clerk. Mr. Nelson?

The Chairman. Aye by proxy.

The Clerk. Mr. Menendez?
The Chairman.  Aye by proxy.

The Clerk.  Mr. Carper?

The Chairman.  Aye by proxy.

The Clerk.  Mr. Grassley?

Senator Grassley.  No.

The Clerk.  Mr. Hatch?

Senator Hatch.  No.

The Clerk.  Ms. Snowe?

Senator Snowe.  No.

The Clerk.  Mr. Kyl?

Senator Kyl.  No.

The Clerk.  Mr. Bunning?

Senator Bunning.  No.

The Clerk.  Mr. Crapo?

Senator Grassley.  No by proxy.

The Clerk.  Mr. Roberts?

Senator Grassley.  No.

The Clerk.  Mr. Ensign?

Senator Ensign.  No.

The Clerk.  Mr. Enzi?

Senator Grassley.  No by proxy.

The Clerk.  Mr. Cornyn?

Senator Grassley.  No by proxy.

The Clerk.  Mr. Chairman?

The Chairman.  No.  Oh, excuse me, aye.  I am for
this.

    The Clerk. Mr. Schumer?

    Senator Schumer. Aye.

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

    The Chairman. Senator, I am not sure what we had.

    We had -- this morning we had several -- excuse me, the
Clerk will tally the votes.

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

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

    Senator Grassley. Mr. Chairman?

    The Chairman. Just a second.

    [Pause.]

    Senator Grassley. Mr. Chairman.

    The Chairman. Senator Grassley.

    Senator Grassley. Senator Kyl is next, I hope.

    The Chairman. No, I might --

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

    So Senator Kyl should be called upon.
The Chairman. Senator, I appreciate your concern. This morning I think there were about nine amendments that were taken up. They were all amendments on your side. And to balance things out here a little bit, so far it is two to nine, maybe it is two to eight. In the interest of balance and fairness, I think it is only fair to have a couple more Democratic amendments so have we get back in balance again.

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

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

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

[Laughter.]

Senator Grassley. But it does not work that way.
and when somebody else thinks up an offset and steals it, it seems to me a lack aconite.

Senator Schumer. Mr. Chairman?

The Chairman. Senator from New York.

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

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

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

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

The Chairman. The Senator from New York is recognized to offer an amendment.
Senator Schumer. Thank you. And I was just told it was not the original offset that Senator Kyl offered on his medical devices. He had another one. And then when we put this amendment in, he put it in. So I do not think it is unfair to have us go with this amendment.

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

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

Now, what does this amendment do? Let us start out here, it is the major amendment today of affordability. We have an issue of affordability because of the dilemma we are in. Health care is very expensive. Middle class families need health care. We all know that. Some are lucky. They are over 65 and they get it from Medicare. Others are lucky, they are not 65, but their employer gives them good health care. And others are lucky, they have enough money to pay for a decent health care plan. But it is harder and harder for the middle class to pay for health care because it is getting so expensive.
And as we have heard before, now average families both work about one out of five days a week to pay for health care and it will go up to two and two and a half days a week in the future if we do not reduce the costs. And that is why reducing the cost is so important.

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

But there are large numbers of families who may not be able to afford the 12 percent. And I know it is the hope of the Chairman and it is the hope of many of us that we will get that top 12 percent number down significantly as we go to the floor and go to the House. But at the moment it is still at 12 because we have to find the revenues to pay for it.

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

I had introduced amendments to make it lower. But
we also want to have as much coverage as possible and 8
percent is the balance that we seek today in this
committee. Maybe it will get a little lower as we move
forward.

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

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

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

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

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

So this amendment is a win, win, win. It is a win for middle-class families who, as much as they want health care, might not be able to afford it at above 8
percent. It is a win because it makes the cost of health care lower. And it is a win because in the offset we give families a chance to adjust to this new world and not be penalized for it.

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

Senator Conrad. We the Senator yield?

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

Senator Conrad. First of all --

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

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

I want to --

Senator Schumer. I will.

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

The Chairman. Senator Conrad.

Senator Conrad. If I could be listed as a co-
sponsor of the gentleman’s amendment.

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

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

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

Senator Schumer. Right.

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

Senator Schumer. Right.

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

Third, and this is something that we should say thanks to Senator Snowe for, and Senator Snowe is engaged in a conversation with her staff, but I do appreciate the idea that she brought to this in terms of phasing in because that is a good idea as well.
I just want to thank the gentleman from New York for putting this together in a way that I think substantially strengthens the overall proposal.

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

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

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

The Chairman. Further discussion?
Senator Bingaman.

Senator Bingaman. Mr. Chairman, let me just indicate my concerns about the amendment. And I do have some concerns. I think there are two separate concepts here that I just think it is useful to try to understand.
One is this whole issue of how do we make health care insurance more affordable for folks? And the other concept is, how do we reduce the financial burden that might be imposed on them by virtue of this bill, even if they do not get health care?

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

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

In addition to those provisions that are in the mark, Senator Snowe offered an amendment, which has been
adopted as part of the modification, which says that any
individual who would otherwise qualify for the exemption,
that is the 10 percent exemption, but now if this
amendment prevails it is the 8 percent exemption. Anyone
who would qualify for that is eligible to buy the young
invincible policy if they want to buy it.

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

Ms. Fontenot. Yes. Around 50.

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

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

Senator Schumer. Yes, two million.

Senator Bingaman. -- with this change?

Oh, yes, if you have that information.

Mr. Schwartz. Two million.

Senator Bingaman. Two million?

Senator Schumer. Over ten years it is two million.
It will be two million over the whole ten years.

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

Senator Schumer. Yes.

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

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

So I think it goes against the major thrust of legislation. Our thrust being, we want to cover as many Americans as we can. We want to provide as adequate a set of health care benefits as we can afford to. And I
fear that this amendment will take us in the wrong
direction.

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

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

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

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

Senator Schumer. Would the gentleman yield?
In this bill we exempt all criminal penalties. Everyone from any criminal penalty.

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

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

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

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

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

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

Senator Ensign. Well, he says the “criminal part”; is that part of the criminal part of the Code?

Mr. Barthold. Yes.

Senator Ensign. It is part of that criminal part?
I think that is great. I think exempting all of them is terrific. I am actually probably going to vote for your amendment. This is exactly what I was trying to do earlier today. So I am glad that we have recognized that they should not be penalized. I do not know what your incentive is going to be for making them buy insurance now if you are going to be exempting them, but I am glad you are finally joining with us. So thank you.

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

The Chairman. Senator Menendez.

Senator Menendez. Thank you, Mr. Chair.

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

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

The problem here at the end of the day is really a question of premium costs. And so if a family of four making $66,000 has to pay $661 a month, then at the end
of the day they may choose to do so. If it is important
enough to them that out of their budget that is what they
are going to take. But if they really cannot because
there are other challenging issues in their budget, then
they need relief. And that is what Senator Schumer does.
He provides relief for them so that not more than 8
percent of their total family income would exempt them
from having the penalty. And that is what it seems to me
is the big challenge here.

So we would love to have the premium costs be
reduced. And I know that there is still the floor and
there is still the conference and hopefully we can
continue to work on the premium costs at the end of the
day which is the critical issue. But in the interim we
need to give families relief -- middle-class families --
I mean, $66,000, you know, that is two people working
together, entry level, one a teacher, maybe another
working as a station manager. It is not a lot of money.
It is very middle-class. So at the end of the day as we
strive to continue to drive down the premium costs, you
need an escape valve for those middle-class working
families. That is what Senator Schumer does and that is
why I will be supporting his amendment as we continue to
work to drive down premium costs in the process.

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

I want to thank Senator Schumer for his efforts. It has been a pleasure to work with him on this and with others. Senator Menendez has been a real champion for this as well and thank you as well as Senator Conrad’s efforts as we have put this together.

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

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

My hope is that if we can get a score on that and we know that it is going to save. We do not know how much. My hope is, if we can get a score and get an exact number, we can put that back into helping with those above 200 percent, the middle class, to be able to do exactly what Senator Menendez was talking about.

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

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

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

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

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

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

Senator Schumer. Mr. Chairman.

The Chairman. Yes, Senator Schumer.

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

Senator Grassley. So what you are saying is, the left hand does not know what the right hand is doing in CBO then?
You know, we had conversations directly with the analyst. I think we ought to get settled whether we have got real figures or we do not have real figures.

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

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

I inquired of my staff, well, how do you know that? So I am trying to answer your question.

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

The Chairman. Yeah, you bet.

Senator Ensign. Mr. Chairman.

The Chairman. Senator Ensign.

Senator Ensign. Could I just clarify one other thing in the bill? Not being a lawyer and not being an IRS agent, I just wanted to get something on the record. Just to be sure, no one would be subject to any of the criminal penalties regardless. So we have established that absolutely for sure.
The second thing though is, you mentioned that they would be subject to penalties. So even though low-income people here would be subject to the garnishment of wages, potentially losing their home, potentially losing any of the rest of their assets, the IRS could go after their other assets for not paying the penalties; is that correct?

Senator Schumer. We do no eliminate the civil penalties, just the criminal penalties.

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

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

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

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

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

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


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

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

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

Senator Ensign. Garnishing wages?

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

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

Senator Ensign. It is possible. Thank you.

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

Senator Ensign. Yep.

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

Senator Ensign. I would appreciate it.

[Simultaneous conversation.]

Senator Ensign. By the time we go to the floor to
make sure that we get the language very specific. I just had somebody whisper in my ear who used to work for the IRS, and they said the mark is not specific and it needs to be when dealing with the IRS.

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

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

At 4:26 today, we received an e-mail from CBO and it is informal advice that this amendment probably is a saver. Probably. Informal advice, probably, at 4:26, that is their informal estimate. They think. I suppose some great statistician can figure out some probability analysis to apply to CBO.

Senator Schumer. Mr. Chairman.

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

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

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

Senator Schumer. We do not know how much.
The Chairman. -- CBO has sent an e-mail to us at 4:26 this afternoon, it is probably a saver.

Senator Schumer?

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

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

And there is the added benefit that it will
encourage insurance policies at lower rates aside from
the one for the kids, you know, for the whatever it is
called; the young invincibles. It applies to everybody.
It sounds like a TV soap opera. But in any case, aside
from them to give them a better policy that would have
broader coverage.

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

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

Senator Snowe. Mr. Chairman.
The Chairman. Senator Snowe.

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

We have an enormous responsibility as we are
transforming the health care system to ensure that there
is affordability. And I certainly do not want people to
be penalized at the outset of this process. Even with
the deferral of a year, to pay some very onerous
penalties, not to mention being administered by the Internal Revenue Service.

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

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

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

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

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

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

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

I just do not understand it. The burden is on us. And I dare say, in 2013, in 2014, in 2015, we might not know. And I think the Congress has a responsibility to
prove that it is done right before you start imposing penalties. I think we should have an affordability study before we impose any penalties. I think that that is right. We ought to look at it. We should do an analysis. Did we get it right? Then we come back and decide whether or not people are just choosing not to get health insurance and imposes a cost on everybody else. Then that is a different story.

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

Senator Roberts. Would the Senator yield?

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

Senator Roberts. Would the Senator yield?

Senator Snowe. Before we start talking about penalties.

Senator Roberts. Mr. Chairman? Would the Senator yield on that point?
The Chairman. Senator Snowe has the floor. Will she yield or --

Senator Snowe. Who asked?

The Chairman. Senator Roberts had a question.

Senator Roberts. Except for the word “labyrinthian” which I do not understand. That is a Senate word. I agree with everything else that she said. I would be happy to work with you and I think everybody -- most everybody -- on this side would be as well. And I would encourage you to try to -- I would be more than happy to work with you on putting that in the form of an amendment.

Senator Snowe. I appreciate that.

Senator Schumer. Would the Senator yield?

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

Senator Snowe. I will yield.

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

Senator Schumer. Yes, I am certainly willing. I just want to make one point. I agree with the Senator from Maine. I think most of us on this side do. The original bill had $3,800 for family penalties. At the
request of many of us on both sides, the mark was moved
down to 1,900. I have an amendment in there that moves
it down to 1,000. And the attempt here, of course, was
to delay it for a year or two which many of us had
discussed this morning in our Democratic meeting. So I
would be very happy to set this aside and try to work
with the Senator from Maine, the Senator from Kansas, and
everybody else. I do not think anybody likes this
concept of penalties. We have been moving in the right
direction to make them less onerous. But maybe we can
move further or figure out a better way.

I do want to come back to this amendment because I
think the first part, the affordability, is so important.
I would ask that it be the first on the affordability
waivers to be considered when we come back and consider
these things.

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

Senator Schumer. I ask that we set aside --

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

Senator Schumer. Thank you. I got the picture.

I ask unanimous consent we temporarily set this
amendment aside?
The Chairman. The amendment is set aside.

Senator Kyl. Mr. Chairman.

The Chairman. Senator Kyl.

Senator Kyl. Thank you. Mr. Chairman, I would

like to bring up my amendment F-3 as modified.

The Chairman. What is that, please?

Senator Kyl. This is the striking of the tax on

medical devices.

The Chairman. All right.

Senator Schumer. Could I ask a point of order of

my friend from Arizona? A question rather?

Senator Kyl. Sure.

Senator Schumer. Do you pay for that with the

amendment that I have introduced?

Senator Kyl. It is paid for by a part of what you

were talking about. I am a little confused now as to

which is your C-3 and C-4. But part of it is the saver

that CBO apparently said exists in your amendment.

Senator Schumer. Yes. I would ask that that

amendment be set aside as well, so we can discuss these

all as a package.

The Chairman. I think in fairness that is the only

fair thing to do, Senator. We have to be fair here. I

encourage you to set aside.

Senator Kyl. We have to be fair so that the -- so
the offset that I had for my amendment, because we are
concerned about other aspects of the Schumer amendment
would not be available to me with respect to my
amendment.

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

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

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

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

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

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

Senator Kyl. Clearly we will want to deal with
this before we conclude working on the bill?
The Chairman. I have a hunch we will deal with it.

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

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

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

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

I am not trying to spend money so that I need money to offset that. I am not trying to spend 40 billion dollars
so I need to raise 40 billion dollars to come out even, make it budget neutral. No.

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

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

And so if there is revenue available as there would be in the Schumer amendment, I would prefer to have that revenue available than to have to raise taxes somewhere else so that we do no have to raise the medical device tax.

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

Mr. Chairman, the amendment that I would raise if you are asking me to defer this until the Schumer amendment is resolved --
The Chairman. Yes, I am asking.

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

The Chairman. F-4. All right.

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

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

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

Senator Kyl. Yes.

The Chairman. Could you tell us what this is?

Senator Kyl. This eliminates the annual non-deductible fee on the health insurance sector because in the year 2010; 6.7 billion dollars annually. Do you have it? Do I have the right number here? I think I do.

[Pause.]

Senator Kyl. Do you have it, Mr. Chairman?

The Chairman. Thank you, I have Kyl amendment F-4, modification.

Senator Kyl. Right.

The Chairman. Would you describe your amendment please, just to make sure?

Senator Kyl. Yes. This proposal -- my amendment
would eliminate the new tax or fee of 6.7 billion dollars per year on the health insurance sector beginning in the year 2012. The fee that provides to U.S. health insurance providers including nonprofits.

Are you ready for me to proceed?

The Chairman. Yes.

Senator Kyl. This so-called “fee” would be allocated by the providers’ market share in the preceding year. And an employer that self-insures its employees’ medical claims is exempt from the fee. Now, the point here is, this is a new tax. I mean, some of the taxes are called taxes. Some of the taxes are called fees. I think this one is called a fee, but it is a tax on insurance companies.

Nobody likes insurance companies, so let us just tax them, goes the logic. Well, the problem is, as everyone knows, when you put a tax on the insurance company, it does not say thank you, we will just eat that. It passes it on in premiums to its beneficiaries. According to CBO, I quote, “Those fees would increase costs for the affected firms which would be passed on to purchasers and would ultimately raise insurance premiums by a corresponding amount.” end quote.

What the CBO says, in other words, is, that if you are going to raise 6.7 billion dollars a year for ten
years through this fee, then you and I are going to pay
6.7 billion more per year in health insurance premiums.
That is what CBO means by a corresponding amount.

So, in effect, what we have decided to do here is to
tax everybody who buys health insurance by 6.7 billion
dollars per year. That is 67 billion dollars over ten
years passed on to consumers in the form of higher
premiums. Why does this make sense?

Well, it makes sense because the people who wrote
the bill came up a little short on cash because it spent
so much they needed some extra money. Who could they tax
and get away with it? Well, nobody likes insurance
companies, so let us do that. The problem, as I said,
is, we all know that it does not stop there, we end up
paying the tax and CBO has confirmed that.

When you add that to the other taxes or fees on
medical devices that I was going to talk about earlier,
branded drugs, and so on, you find that we are raising in
these taxes and fees 130 billion dollars over the ten
years, all of it passed on to consumers through higher
premiums.

So when folks tell you that we are going to reduce
your health care costs, we are going to cut your health
insurance premiums, we are going to bend the cost curve
down, they are conveniently neglecting to tell you that
they are also going to raise your taxes by 130 billion dollars. They are going to raise your premiums because that is the amount that is going to be passed on to you that was first imposed on someone else.

And, what makes it worse is, since all of these so-called “fees” go into effect immediately, that is to say, in the year 2010, next year, but the subsidies to people to help pay for all of this are not available until 2013.

The net impact of the legislation is to raise consumer premiums for individuals in 2010, 2011, and 2012 by a total of 39 billion dollars. Welcome to the kindness of the Senator Finance Committee.

Now, it is especially tough for employers of less than 500 employees. Because as I said, the ERISA plans are exempt from this. That means those are the plans that most of the larger companies have. So if you have less than 500 employees, you are likely to get hit the most because they are not going to self-insure, they are not going to be exempt. Under the proposal, employers that self-insure, as I say, are exempt, so the insurance policies sold to the small businesses will pay most of the fees. And this results in a disproportionate increase in premiums for small business employees, the workers, who are already struggling to afford health insurance today. What a gift we are giving you.
So, Mr. Chairman, I think that while we all recognize that the bill costs a lot of money and you have to raise the money some how or other to pay for it, I would submit this is not the way to do it. And you cannot -- and I do not mean to suggest this was the intention on any of the people in the committee, but whoever came up with the idea of first of all imposing it on the insurance companies so folks would not know that they are the ultimate people that pay it, I think CBO has confirmed the fact that we all will be the ones that pay it in the form of higher premiums. So let us not delude anybody into thinking that somebody else is going to pay this tax.

My amendment would eliminate the tax.

The Chairman. Any further discussion?

Senator Grassley. I want to speak.

The Chairman. Senator Grassley.

Senator Grassley. I would like to speak in favor of this amendment. And I am going to start out by referring to some answers, I think, we got from Mr. Barthold maybe a week ago now.

The Chairman. Are you addressing this amendment?

Senator Grassley. Yes.

The Chairman. This amendment?

The Chairman. Right.

Senator Grassley. I think a week ago we had Mr. Barthold tell us that the fees on insurance providers and device manufacturers would be passed through to health care consumers or in the case of insurance that would be premium people. And that this increase in premiums will take place 2010, 11, and 12, and there are 177 million -- this is my figure. I think there are approximately 177 million people that have private health insurance. So that it is either premiums go up. And, of course, this would also happen to people that are under $250,000 a year. So this would also affect low- and middle-income people.

Now, the tax credit for health insurance will not be effective until July 1st, 2013. The fees on health insurers and device manufacturers on the other hand are effective January 1st, 2010. So this means the fees will be effective three years and six months before the tax credits are effective. So I hope the members of this committee understand that this means premiums will go up as early as 2010 and that there will be no tax credit to help low- and middle-income people until 2013.

Members of this committee want to argue, on my side of the aisle, that low- and middle-income people that somehow we want low- and middle-income people to pay for
their amendments. But I ask the question, how is the Chairman’s mark paid for? I think it can be similarly argued that the mark is paid for the same way then as argued against us on the back of low- and middle-income Americans. That is at least before these people will see any relief that the mark makes. In other words, the years between 2010 and 2013, three years and a half.

And even once the tax credits are effective, Americans who are not eligible for the credit will continue to see higher premiums and with no help from the government. And the cost to the federal government will actually increase because higher premiums mean a bigger tax credit.

Now, I understand that some in the press would describe anyone who opposes the fees as I’ve seen these words, quote/unquote, “chilling for insurers and device manufacturers.” Now, make no mistake, I recognize that there have been abuses in insurance and in device manufacturing and we have to take steps to change that. And some of these steps are taken in the mark.

But I also believe that greater competition needs to be injected into the health insurance industry. And we have not really talked in this mark or in these meetings about how that can be done except just mentioning it. We have not really pursued it the way we should probably.
But I ask supporters of these fees here in Congress and the press to dig a little deeper. The opposition to fees is based on the fact that they are going to be paid by lower- and middle-income Americans. So that is why I urge the support for the Kyl amendment and I yield.

The Chairman. Senator Stabenow is seeking recognition.

Senator Stabenow. Thank you, Mr. Chairman. First, I know we will be talking later about Senator Kyl’s other amendment. I did want to express that I shared the concern about device manufacturers and would be happy to talk about that later. I know Senator Kerry has the same concern in terms of the level of cuts in the bill and look forward to working with you Mr. Chairman, and with colleagues to address that.

On this particular amendment I would just say, again, that we are going after middle income tax credits and this is now the eighth time, at least, the eighth amendment that has been offered that would cut the tax credits for middle income people while we have been hearing over and over again concern about middle class, working people, middle class. This is the eighth amendment that would, unfortunately, pay for the amendment by cutting the tax credits to middle class workers and families. So I cannot support that.
Senator Ensign. Mr. Chairman.

The Chairman. Senator Ensign.

Senator Ensign. Mr. Chairman, when I was first elected to the House of Representatives back in 1995, a person who took over for Dan Rostenkowski as far as the lead Democrat on the committee made a very interesting observation. He said that -- and I think most economists agree with this statement -- that businesses do not pay taxes, people do. When taxes are levied on businesses, whenever possible, they pass those taxes on. Whether it is a device manufacturer, in this case, they pass it on to their customers whenever possible. And I think that that is exactly what CBO and joint tax have said. These taxes are going to be passed on to the very middle class people that Senator Stabenow was just talking about.

It is not only middle-class people, it is people all up and down the line. And whether they are paying it directly for a higher price or they are paying it in higher premiums, because the whole health care system has to pay higher prices, either way, they are the ones who are going to be paying the tax. So this, quote, “pay for” is just, once again, a cost shifting to somebody else so that you can subsidize. I mean, if we are honest with it, that is what we are doing. We are taxing across the board. We are going to spread this tax across the
board for anybody who gets a device to be able to pay for people who are lower income.

If you are honest, that is exactly what is happening here. And that is why I think Senator Kyl is saying, this isn’t the way to do it. We should be just looking at things that save money that are not just passing costs and transferring costs to other people in the system. We should be looking at things that are actually bringing the costs down.

We talked about medical liability reform. The bill that was passed here 19 to 4 last night, to try to do preventative services. You know, the things that introduce competition into the marketplace, those are the things that will bring costs down. Overall that will not just shift costs from one group of people to another. And that is why I think that the Senator for Arizona is exactly right with his amendment.

The Chairman. All right.

Senator Crapo. Mr. Chairman.

The Chairman. Yes, and then let us wrap us. Just to remind you, this not the device manufacturing amendment, but this is the insurance amendment that is up right now.

Senator Crapo.

Senator Crapo. Understood. I just wanted to
follow-up because I want to be sure that as Senator Kyl
tried to do that we explain to people who are listening
exactly what this debate is all about. Because it is
constantly mentioned that Republicans have offsets in
their amendments that impact parts of the bill that are
construed by some to be reducing benefits or something.

I think the first point that needs to be made there
is, in every one of those Republican amendments there has
been an effort to try to stop either an offensive tax
that is going to raise the cost of premiums such as this
tax. My understanding is that Senator Grassley who just
mentioned the impact of this tax on premiums could have
gone further and said that one of the estimates on this
is as much as $500 a year in terms of premium increases
could be caused by this tax.

What is occurring here is that when we bring an
amendment to try to address a problem or an inequity like
this, we are required, by the rules of the Senate and the
rules of the committee under which we are operating, to
provide an offset so that the impact on the bill -- not
the impact on the status quo, not the impact on the law
the way it is today, but the impact on the bill is
neutral.

And, therefore, we are required by the rules of the
committee to simply adjust the provisions in the bill in
our amendment so that there is a neutral impact. So in this case, Senator Kyl is trying to stop what could become as much as a $500 per year for a family of four increase in their premiums and he has to, under the rules, provide some kind of an adjustment in another part of the bill. And that automatically results in a retaliatory response saying that there is an effort to try to undo some other part of the benefits in the bill.

And I just think people need to understand the nature of that debate. Because the impression I think that was started to be created that the Republicans were trying to change current law. And that is not the case.

And that is the point that Senator Kyl was trying to make.

The bill is what is going to change current law. What we are trying to do is to adjust the bill so that it has a lesser impact on people across this country in many different areas in terms of the ones I talked about this morning in the middle class and lower income categories who will be paying higher taxes. In fact, paying the heaviest load of the taxes in the bill. Or the ones that Senator Kyl is talking about right now who will be paying higher insurance premiums. And as we seek to try to adjust what we see as the harmful impacts of some of the provisions in the bill, we necessarily get pushed by the
rules into these debates about what will be the impact of our efforts to try to comply with the rules of the committee that we cannot simply take those pieces out of the bill.

I know that Senator Kyl and I -- and I believe all the other members of the committee -- would be very glad to just submit an amendment that took out this tax. But the Chairman would and in fact has on other amendments ruled that as a non-germane amendment. And then we would not be able to debate or have a vote on the amendment itself.

The Chairman. You stated the rules very fairly. I mean, if we did not have those rules, Katie, bar the door. I mean, we have to live within a budget here. I mean, all of us, your side and the Democratic side, clearly do not want to add to the budget deficit. And these rules that we are all constrained under are designed so we do not increase the budget deficit, at least under the requirement, as far as the committee --

Senator Crapo. I understand, Mr. Chairman.

The Chairman. I think you probably agree it is not a bad idea we have rules like this. Otherwise, my gosh, you could imagine all the amendments that would be offered around here and pretty soon the budget deficit would just be going through the ceiling.
Senator Crapo. I understand. I was just making the point that these rules that we are operating under impact what is in the bill --

The Chairman. Correct.

Senator Crapo. -- not what is in the current law.

The Chairman. That is right.

Senator Crapo. And I think that we were starting to get that point a little bit confused in the debate today.

The Chairman. Just to make a couple points here. We purposely designed this fee as a way to have the least effect upon consumers and individuals. Let me just give you a list of some of the other considerations here we thought of.

First, just remember, this is an annual lump sum allocated among the companies, the industry according to market share. This is a lump sum fee on the industry allocated annually according to their market share. That is what this is.

Now, there are lots of other options here. One is a per head tax on consumers. Now, that is not a good idea. So we rejected that one. Another is a percentage tax on premiums. That has also an effect that all of us are trying to get away from. Another option we looked at and discarded was a tax on the profits of insurance company’s net of administrative costs, just on their profits only.
And the concern was that that too would be passed on more likely.

Another option we took up and rejected was increase the corporate tax rates of these companies. And one can argue what happens with corporate tax rates. So the thought was, or at least the intent, with the annual lump sum allocated according to market share is a way where companies are less likely to direct or to pass on costs directly to consumers. That is a lump sum they could decide themselves what they are going to do with it. Some of it would come out of profits, some would come out of R&D, who knows out of what. And that is why it was allocated this way. It is going to minimize its effect on consumers.

And as I recall a letter from CBO on this subject is it is really hard to figure out all of these different interactions what the actual imposition of a tax would be on consumers. It is very difficult to determine. But the fact is, this is a 67 billion dollars that the Senator from Arizona wants to strike -- 67 billion dollars over ten years -- and pays for it -- we make rules, so we have to pay for things -- paid for by lowering the premium credit income caps. That is, lowering the tax credits that people receive in exchange. And so in effect, I know it sounds like a little bit
demagoguery, but it really is not. It is true. The effect is to take money away from middle- and lower-income people and give it to the insurance industry. That is what this is. That is the effect of this amendment. It is to take money away from middle- and low-income people to the tune of 67 billion dollars over ten years, and give it to the insurance industry. I do not think that is what you want to do here. And that is why I think this should be rejected.

Senator Kyl. Mr. Chairman.

The Chairman. Senator Kyl.

Senator Kyl. Since you qualified the word demagoguery I will use the same qualification. But it is demagoguery to say that the point of my amendment is taking money from people and give it to the insurance industry as you just said.

This is a tax on the insurance industry which, according to CBO, I’ll quote again, and remember CBO is the group that we all rely upon to tell us how money is going to flow in the legislation, whether we make money, whether we lose money, who bears the incidence of the taxes and so on. Quote, “Those fees would increase costs for the affected firms, insurance companies, which would be passed on to purchasers and would ultimately raise insurance premiums by a corresponding amount.” So it is
exactly the opposite. Yes, the tax is first imposed on
the insurance company, but it ultimately is paid by a
corresponding amount. In other words, the entire amount
is then paid out by consumers in the form of higher
premiums.

So it would be demagoguery to say that we are taking
from people and giving to the insurance industry. In
fact, it is quite the other way around. We are making
the people of the country who buy insurance pay an extra
67 billion dollars over ten years in premiums. That is
according to the CBO. And why do we have to do that
under the rules of the committee here?

Well, under the law today we do not have to do it.
There is not this kind of a tax. So my amendment is not
necessary under existing law. Why would it be necessary?

Because the bill that we are debating here spends almost
a trillion dollars and they have to pay for it somehow.
Now they take a big bunch of it out of Medicare which is
what has seniors all in a dither, and they should be.
But they cannot pay it all by cutting Medicare. So the
rest of it is paid for in fees and taxes. And what the
Congressional Budget Office is saying is, guess who pays
the fees and taxes? We do. The people who buy insurance
because the insurance companies pass it right on through
the form of higher premiums. That is why we have to do
this what we call here in the committee “a pay for”. We have to pay for the almost trillion dollar cost of the legislation.

I just want to close with this point. Senator Stabenow said that once again, or for the eighth time, we are quote, “going after the tax credit.” No, Senator Stabenow, you know why that pay for is in my amendment. We have to have it under the rules. We are not going after it. As Senator Crapo said, I would just as soon not go after it. I would just as soon leave it alone. But somehow or other we have to quote, “pay for” keeping the law exactly the way it is. So there is no intention to go after that. What we are trying to do is to save the people of Michigan and the people of Arizona about 500 bucks a year in extra premiums by not passing this tax.

The Chairman. I think we are prepared to vote.

Senator Stabenow. Mr. Chairman, since my name was mentioned --

The Chairman. Senator Stabenow.

Senator Stabenow. My name was invoked, I wonder if I might just take a moment, because I appreciate the frustration that we are requiring that we pay for things in this bill so that we are not adding to the deficit. But there are choices we make, and they are tough
choices. And the choice that we have seen over and over again is to lower the tax credits for middle-class families to do other things.

In this case, we have an insurance industry that will get more customers under the exchange rate. They are going to be covering more people, making more dollars. I reject the notion that we should accept their passing this on to customers.

When we look at the fact that this is an industry that saw profits of 425 percent in the last 8 years—which, by the way, Michigan would love to have that. We would take a third, a quarter, 10 percent. The reality is that they do not have to pass that on. Now, they are passing it on right now in higher premiums and copays and costs going up for families even though there has been a 425-percent profit increase.

But I guess I reject the notion that asking them to contribute to paying for this because they are going to get all these customers is an unfair thing to do, and certainly I think it is unfair when we are taking it from the help we are trying to give to make health care more affordable for middle-class families.

The Chairman. The clerk will call the roll.
The Clerk. Mr. Rockefeller?
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?
25 The Clerk. Mr. Hatch?
Senator Grassley.  Aye by proxy.

The Clerk.  Ms. Snowe?

Senator Snowe.  No.

The Clerk.  Mr. Kyl?

Senator Kyl.  Aye.

The Clerk.  Mr. Bunning?

Senator Bunning.  Aye.

The Clerk.  Mr. Crapo?

Senator Crapo.  Aye.

The Clerk.  Mr. Roberts?

Senator Roberts.  Aye.

The Clerk.  Mr. Ensign?

Senator Ensign.  Aye.

The Clerk.  Mr. Enzi?

Senator Grassley.  Aye by proxy.

The Clerk.  Mr. Cornyn?

Senator Cornyn.  Aye.

The Clerk.  Mr. Chairman?

The Chairman.  No.

The Clerk.  Mrs. Lincoln?

Senator Lincoln.  No.

The Clerk.  Ms. Cantwell?

Senator Cantwell.  No.

The Chairman.  The clerk will tally the vote.

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

The Chairman. The amendment does not carry.

Now I have been advised that the pending Grassley-Snowe amendment number C11 is ready for disposition, and I am also advised that we can adopt the amendment by a voice vote. If there is no further debate, the Committee will vote on the amendment. All those in favor, say aye?

[A chorus of ayes.]

The Chairman. Those opposed, no?

[No response.]

The Chairman. The ayes have it. The amendment is adopted.

Senator, do you wish to make a statement on this?

Senator Grassley. I guess I better, or my staff will fire me.

[Laughter.]

Senator Grassley. After negotiating with your staff and with Senator Snowe's staff, I believe that we have reached a reasonable compromise. We listened to the debate last night. There was an obvious modification that we should make to the amendment. The modification reads: "The States can only drop non-disabled, non-pregnant adult Medicaid populations if they are running deficits or are projected to run deficits."

Because the Federal Government is not providing
States additional resources to cover optional Medicaid adults, this amendment gives States facing deficits the right to take the tough choice between taxes, Medicaid, schools, roads, law enforcement, et cetera, as they are forced to balance their budgets.

I appreciate the Chairman's willingness to work with us on this amendment, and I thank you very much for its adoption.

The Chairman. Well, thank you, Senator, and I also thank you for your hard work in working this out. Thank you, Senator Snowe, too.

Okay. My intention is next to go to the amendment offered by the Senator from West Virginia, Senator Rockefeller, and we will move to that amendment very shortly.

[Pause.] The Chairman. I know we are all interested in the health of Senator Snowe. She is fine. Somebody had his foot out, and she was walking back and stumbled over the foot and fell down. But she is fine. She is just collecting herself. She is fine.

Senator Rockefeller?

Senator Rockefeller. Mr. Chairman, this is a modified America to C9 to Title I, and it has been an interesting experience the last couple days. I will just
say this and then get on to the substance of my amendment, which I think is a very important one and probably somewhat controversial.

Scoring. There is a demand for precise and accurate scoring, which actually was not much talked about by the other side before several days ago, and now it is being used, I think, as a slow-walk tactic, which is okay by me because we have got all weekend, we can go as long as we need to. But it is a matter of interest to me.

Now, my amendment, as modified, would require insurers, health insurers who cover the exchange to demonstrate a medical loss ratio of 85 percent. There is a reason that people are not happy about health insurance companies. It is not simply because they woke up and decided that they would decide they wanted to be like that.

We have done a lot of work in my office and in the Commerce Committee about the way that health insurance companies have their customers for lunch and their customers never know it until they are deep inside the whale. And this has been going on for a long time, and it is something that hurts my people in West Virginia very much and everybody's people all around this table and around the Congress. Again, the people are not that particularly aware of it because it is a shark that...
glides underneath the waters.

But they are rapacious, health insurance companies--I am not say insurance companies generally, but health insurance companies--and they have done very well, as the Senator from Michigan has just pointed out.

So I think it is only fair to ask them, at a time when we are going to be insuring a lot of new people and a lot of new revenue is going to be coming in for them, that they actually spend the money on health insurance, or at least a large portion of it.

Now, they will claim that they are, and I will talk about that. But my amendment really just says that they have to demonstrate a medical loss ratio of 85 percent, and they have to demonstrate that to the Secretary of Health and Human Services.

This is what it would mean. It would mean that 85 percent of every premium dollar must, in fact, go towards medical care. That would seem to me to be a reasonable and fair requirement for a health insurance company whose business in public life is to provide health insurance with premiums that go back and forth. But regardless of what those premiums might be, the majority of the premiums, the majority of what they make is spent on medical care for the people that they are in business to insure.
Now, we have discovered--and I have discussed this before--the Ingenix the case, which is owned by United Group Health and which is going out of business because they were taken to court in New York; and faced between a choice of paying $350 million or not, they picked $350 million because, had they not, they would have been charged with fraud.

Now, why is this important? It is important because Ingenix was, in fact, the engine and the sole interpreter of what people could charge, and insurance companies took all of their advice, all health insurance companies, from that one particular subsidiary of group health insurance.

Just on health insurance. That is all I am talking about.

That is an amazing thing. They are going to go out of business because of this New York court case. But it talks about how little we know about what they do and yet how much we pay for what they do in all of its various iterations.

So the Secretary of Health and Human Services, who under this mark is required to collect data on medical loss ratios, would be authorized to enforce this requirement, not just collect the data but to enforce the requirement. That is commonly done. Rules and regulations can be drawn up to do that, to watch.
You remember when we were talking about self-insured? The self-insured market, they are watched over not by State insurance commissioners but by the Federal Government, the Department of Labor, which does absolutely nothing to overlook them because of the fact they do not have any people, they do not have any money, or they may have no will. I have no idea, but in any event, large self-insured companies have no protection.

Insurers that fail to meet this requirement would be required to issue rebates for the missing dollars to the enrollees and the Federal Government. The amendment is based on the Fairness in Health Insurance Act—I should say, in all candor, legislation which was introduced by Senator Al Franken, myself, and a number of other Senators.

Now, as an original cosponsor of this legislation, and particularly given the events regarding what happened in the public option, which was to me a very important way of holding down the cost of health insurance and disciplining competition within the health insurance market, that did not pass for the moment. So I then needed to move to this amendment. I feel even more strongly that this Committee has a responsibility to make sure that hard-earned taxpayer dollars that are funding the subsidies for the coverage, subsidies which make up
more than half of all the money that we are spending for health care in this bill in any form, that—and this is under the subsidies, the coverage in the exchange, are indeed going towards medical care and not for a profit for insurance companies for frivolous purposes and very, very, very high profits.

Again, $465 billion is going towards the insurance companies’ subsidies. I wonder why. Why is that? So many health care needs, why are they getting these subsidies? But there it is.

Now, as the Senator from Michigan has pointed out, insurance companies, health insurance companies have seen their profits soar over 400 percent since 2001. Nobody knows that, but we know that now. I appreciate the Chairman’s provisions to report on medical loss ratios—that is important—and require greater definitions and transparency for insurance coverage. However, given the amount of the subsidies, there are few provisions in this bill to improve Federal oversight of insurers of these taxpayers’ dollars, or any kind of oversight. It is time we demanded something from insurers in exchange for these subsidies.

I am going to end up by saying they are going to make a 15-percent profit which is going to be, you know, well over $50, $60 billion, so, I mean, do not start
weeping. At the very least, we need strong assurances, again, that this money will be spent in the main, 85 percent of the subsidies will be spent on medical care.

Now, the medical loss ratio is one of the basic financial measures that health insurance companies use to measure their performance. It is simply the value of the premiums a health insurance company collects from consumers divided by the value of the medical claims that it pays. That is what medical loss ratio is.

For an example, if a company's medical loss ratio is 75 percent, it means the company has spent 75 percent of every premium dollar on health care, while it used the remaining 25 percent for other purposes, such as underwriting, marketing, administrative costs, and profit.

The truth is a little bit complicated. In West Virginia, for example, our insurance commissioner reports that consumers and small businesses do not get medical ratio anywhere near close to 87 percent. In fact, in West Virginia, in the individual market, health insurers are spending 65 percent of their premiums on health care, and the rest, who knows what? For small group, it is 75 percent. For large group, expectedly, it is pretty good. It is 90 percent, and that is true, I think, more or less throughout the country.
In Texas, we do not have the large-group numbers, but we know that they are probably fairly decent. But in the small group, it is, again, Texas medical loss ratios is 73 percent, which means that 27 percent is going for something else, most of which I think is return on investment to shareholders to satisfy Wall Street or to pay higher salaries or have more marble in their buildings.

I think it is a very wrong system that we do not say to them, "You have got to do what your business is." They are not doing it. I would not put up this amendment if they were doing it. But everything we have learned is they use every trick in the books to purge, rescissions, all the rest of it.

Now, the Chairman's mark, happily, takes part of that out, but not all of it. And the lump sum of what they spend on medical insurance and medical care for their consumers and their customers is not anywhere laid out.

In most States, this kind of information simply is not available, and were the Senator from Florida here, I am sure he would agree with that.

I can understand why insurance companies do not want people to know how much of their money they use for overhead and for profits. I understand that. I had a
great-grandfather who was probably pretty good at that. But I am another generation. This is another situation. But it is something that consumers should know, and I want the people I represent in West Virginia to understand this, to know they are getting ripped off, and to know that we can do something about making sure that they get the medical care they expect when they pay the insurance companies.

Now, in August, I wrote the insurance companies—lots and lots and lots of them—asking for a detailed accounting of their medical loss ratios. They still have not turned all of this information over to me that I requested. They just do not want their customers to know how much of their money is being wasted or, in other words, not used for medical care.

What this amendment is saying is that insurers who participate in the exchange have to spend 85 percent—or 85 cents out of every dollar on health care. What is wrong with that? That leaves ample money over. I would say 40, 50—probably $50 to $60 or $65 billion over for profits in a given year.

Now, this is only 2 percent less than the insurance industry claims they are already doing. The problem is—therefore, you could say, well, it is not a very big amendment. But the problem is we do not know what they
are doing. And we do know that they are merging their large business customers and their small individual markets and group markets, they are kind of merging all those together to come out with figures that look as favorable for them as possible. So they say, Well, heck, we are only 2 percent less than what you are suggesting today.

Now, again, the Chairman's mark provides $465 billion in subsidies to the insurance industry to provide health care to American consumers, and I think in a health care bill we are required to be serious about that. And this bill is saying that they can only keep $69.8 billion of those subsidies for overhead and profits. Let us $70 billion. They are going to get $70 billion for overhead and profits. Is that not sufficient? Is that not sufficient when we are asking them to spend money on health care for their people?

So, to close, I want to reiterate that while reporting of medical loss ratio is an important first step, it is only that. We must require a minimum medical loss ratio for all plans at some point that receives subsidies through the exchange. If we include the magnitude of subsidies for private insurance in this mark, with no requirement that a significant portion of over half a trillion dollars or almost half a trillion
dollars in premium subsidies actually goes towards coverage, then I do think that this could be a significant Government giveaway to private insurers and Wall Street.

Now, I have made my point. You can disagree or agree. But I think this is extraordinarily important, and I reiterate--yes, that is the first chart. I reiterate again, medical loss ratio, what does it mean? According to the National Association of Insurance Commissioners, the medical loss ratio measures the relationship between premiums earned and claims incurred. Eighty-five percent is a fair amount. I originally had it at 90 percent. The House has in some of theirs 85 percent, so I just took it back to 85 percent.

I think this is an important amendment. I realize it is a heavy-hitting amendment. But, on the other hand, they say it is only 2 percent more than what they are already doing. So they should not be too worried about it if they are telling the truth.

The Chairman. Discussion? Senator Stabenow.

Senator Stabenow. Thank you, Mr. Chairman. I appreciate very much what Senator Rockefeller is bringing to our attention in his amendment, which I support. This really goes to the heart of the challenges we have with a primarily for-profit insurance system through which we
provide health care for people. And I have always felt that it was concerning when providing a cancer treatment or a heart surgery or some other health care for somebody is viewed as a loss by the health care provider. It is a loss.

I understand in car insurance, you know, if somebody has an accident, well, the payout is viewed as a loss; or if you have home insurance and there is a fire, that that is a loss. But when you are settled to provide health care, the purpose is to provide health care. That should not be viewed as a loss. And so I think it is very important that we define what we expect, that in our system--again, we are opening this up for more customers with the insurance industry. It is important that the majority--I do not think it is too low say we should expect that 85 percent of what they have, what they spend, goes to actually providing health care for people, because if they are going to be participating, we should be requiring that they be spending their funding on providing health care for people.

So thank you, Senator Rockefeller, for the amendment.

Senator Grassley. Mr. Chairman?

The Chairman. Senator Grassley.

Senator Grassley. I presume that the amendment is
well intentioned, but as I look at it, I see an administrative nightmare that is going to do considerable harm to a lot of progress that we have tried to make in the delivery of health care. And I will try to explain that, but I also want to ask staff some questions in the process.

One thing I cannot fault with, Senator Rockefeller, is that there is greater transparency. I have always been a strong supporter of transparency, so I am not necessarily objecting to making some of this information public, although I think it is important to point out that a lot of people question the effectiveness of using medical loss ratios as proxies for quality and efficiency.

In fact, I want to quote from a newspaper or a magazine, Health Affairs. "The medical loss ratio is an accounting monstrosity that enthralls the unsophisticated observer and distorts the policy discourse."

So I do have concerns about using this measure to decide who is doing a good job and who is doing a bad job.

I also have some concerns about setting an arbitrary medical loss ratio standard that all health plans must adhere to, and adhere to regardless of where they are located, regardless of their risk pool, and regardless of
the level of medical utilization in a particular area. Medical loss ratios dictate the percentage of premium dollars that have to be spent on medical care. So, put simply, it involves the Government using a highly questionable measure to dictate how private companies manage their operations.

I have concerns about the Federal Government, which clearly has some problems of its own, keeping its own house in order, being involved in the daily activities of private companies. And I will tell you, at town meetings you hear about the nationalization of banks and you hear about nationalization of General Motors, and it is not a very popular thing to have the Federal Government getting that deeply involved. And I do not propose that that is what Senator Rockefeller is trying to do, but it has some unintended consequences that occur as a result of this amendment. And I am worried about those.

Just to see if those concerns are justified, some questions.

Do we know why the amendment uses 85 percent as an appropriate medical loss ratio for all plans to meet? Whichever one of you folks are qualified to answer that.

Do we know where the 85 percent comes from?

Ms. Fontenot. I think Senator Rockefeller mentioned that--
Senator Rockefeller. It comes from me.

Ms. Fontenot. --the current industry average is 87 and--

Senator Grassley. Okay. So it is your view of a legitimate breaking point, I presume. I will just leave it at that because a lot of times you have to be arbitrary. But let us say that it is arbitrary then.

Let me ask another question. Disease management programs encompass both administrative spending and medical spending. How would we differentiate between medical and administrative spending in these types of programs?

Ms. Fontenot. Senator, I think Senator Rockefeller mentioned that the National Association of Insurance Commissioners has a working definition for "medical loss ratio measures." I am not familiar enough with that definition to tell you.

Senator Grassley. Okay. But at least there is--I mean, I guess I respect that organization. They do do some work in this area.

Ms. Fontenot. They do work in this area, but I would say the amendment actually defers to the Secretary of HHS to develop a standard definition. So I assume there would be some relation, but I am not certain.

Senator Grassley. Well, whether it is arbitrary or
whether something in the first question--let us say the 85 percent is arbitrary in the place of the other, there might be some intellectual basis for it. But I guess it causes me to worry about undermining these programs that we have out there.

We have made a lot of progress in the last few years to improve, for instance, the use of health information technology for providers and health plans. Actually, the Chairman has in the mark been expanding on those efforts through some of the administrative simplification provisions.

I would ask you, would the use of health information technology be considered medical or administrative spending?

Ms. Fontenot. Again, I cannot say. The amendment defers to the Secretary of HHS to actually develop a standard definition, so I cannot say what would be included in that definition.

Senator Grassley. Do you know, have the State commissioners worked in that direction?

Ms. Fontenot. Again, I am just not familiar enough. I apologize.

Senator Rockefeller. Would the Senator yield?

Senator Grassley. Yes.

Senator Rockefeller. There is a chart here that
comes from AHIP, based on PricewaterhouseCooper's analysis, in which the industry says that they are already spending 87 cents on every dollar. Now, it just so happens that I do not believe that. I do not believe that. And so what I am saying is that I want 85 cents; they are saying they already do 87 cents; so this should not be that much of a threat if they are doing what they say they are doing.

Would the Senator not agree with that?

Senator Grassley. Well, I guess, then, what is the beef?

Senator Rockefeller. The beef is that they have used—and I wish the Senator were on the Commerce Committee, because we had people come before us and testify that—I mean, it was astounding. The purging, the incentivizing people who work at insurance companies to find reasons to cut people off.

Look, what is insurance? Insurance is that you make money on some people and you lose money on others. You make money on healthy people; you lose money on less healthy people.

What they have done systematically over the years—and a former high executive for 20 years in CIGNA came and told us this; he said he just could not live with it anymore—that their whole business is about trying to
purge the rolls. And I think actually we came up with a figure of some $9 million that they had cut off for arbitrary reasons. And then you get into stuff we have already described here with some male, for example, being told that, yes, he has health insurance but it has been discovered that he has gall stones. And this is a true example. If a male has gall stones, my guess is he is probably going to know something about that; he is going to feel that. So I do not have gall stones, they say. Well, the insurance company says, yes, you do and we are cutting you off.

The same has been used with acne. A person had acne. That is a revelation. And, therefore, we are cutting you off.

Senator Grassley. So there are abuses, Senator Rockefeller. Nobody--

Senator Rockefeller. There are massive--

Senator Grassley. Nobody denies that there are probably abuses. And one of the main points of almost every bill here on the Hill, including a lot of Republican bills, is to eliminate a lot of those abuses within private health care. But it would seem to me your amendment does not deal with those abuses. Your amendment goes beyond this.

So can I please proceed?
Senator Rockefeller. Of course.

Senator Grassley. One other question, Ms. Fontenot, that maybe you have to give me the same answer to, but I want to ask it anyway. When it comes to understanding what health plan efforts to reduce waste, fraud, and abuse—and, by the way, let me say before I ask the question, waste, fraud, and abuse, private insurance companies do a heck of a lot better than Medicare does in that area. Can you imagine just the billions of dollars that comes out every spring in a report that we get about waste, fraud, and abuse within Medicare? You do not hear that much in the private plans because they put a great deal of effort into reducing it.

Would this be considered administrative spending?

Ms. Fontenot. Again, Senator, to the extent that it is left to the Secretary, I cannot really answer that question.

Senator Grassley. Okay.

Senator Rockefeller. Would the Senator yield for another question?

Senator Grassley. Yes.

Senator Rockefeller. What is the objection for setting a medical loss ratio floor? What is the objection? Eighty-five percent is already the law, State law in California. I do not know of any insurance
companies fleeing that State. They have got a lot of customers there. This is not original. This is not novel. This is trying to, particularly in view of the loss of the competition—the public option, et cetera—this is trying to find some way to corral them into doing what they are meant to be doing and not focusing as much on profits, and perhaps, radically enough, to even think about trying to help people and provide medical services for people.

Senator Grassley. Well, maybe I can ask the Senator a question in exchange. Does this 85 mean that anybody below or any company below 85 is not providing enough medical care or is doing a bad job? I do not think so. What if they were building up reserves or implementing a more sophisticated disease management program, as maybe progressive companies would be trying to do?

You are going to create an opportunity for incentives and improvements. You are going to try to micromanage every company in the country.

Senator Rockefeller. Senator, I am not, and I think the Senator, with all due respect, knows of my great admiration for him. Even during election time, I believe he knows of my great admiration for him. I think you are stretching. You are trying to find—you are
trying to make up situations which undermine this.

What is wrong with having a basic footing set like they do in California? What is wrong with that?

Senator Grassley. By the way, next year is an election year. I might need those repeated.

Senator Rockefeller. And you will probably get them.

Senator Grassley. I will finish with this, Mr. Chairman. I tried to ask these questions in good faith, and I have made some quotes from health experts. At least the magazine is considered an expert. So I raise these concerns. I said I had a great deal of respect for transparency. Nothing wrong with that.

What I have asked in questions are just a few examples of initiatives that a lot of us support that could be discouraged if we put in place an arbitrary medical loss ratio requirement. If health plans are told that health IT, disease management, reducing waste, and fraud, and abuse all count towards higher administrative spending, they will naturally cut back on those efforts.

So this amendment I do not think provides enough detail on how we would differentiate between medical and administrative costs, and it also uses questionable measures to tell private companies how to run their business. So it is quite obvious I think it is a bad
The Chairman. Senator Cornyn, did you seek recognition?

Senator Cornyn. Thank you, Mr. Chairman. I would just like to respond briefly.

I think we all know one of the main causes of health care inflation is overutilization, and I think one of the strong things in this mark is trying to realign incentives—both individual incentives, as Senator Carper and Senator Ensign tried to do with their amendment last night—to encourage people to do the right thing personally, and we want to encourage providers to go for value over volume, which is what we have said.

My information is that insurer profits are on a national basis roughly 3 cents on every dollar. Now, I realize—I think Senator Kyl pointed out insurance companies are wonderful to hate. Nobody likes insurance companies. But the fact of the matter is insurance is based on a contract. Contracts are enforceable by not only the parties to the contract, but here we pointed out that they are also—enforcement can also be undertaken by the insurance commissioners, by the attorneys general, and by private individuals under State consumer protection laws.

In Texas, for example, I am advised that the small
group loss ratio is below what the distinguished Senator
would set, but the large group is higher, at 90 percent;
and that nationally it is roughly 88 percent. So, first
of all, I do not understand the need for the legislation—
or for the amendment.

Secondly, I agree with Senator Grassley, I do not see any case for Government micromanagement and intervention into what is a private contractual relationship between an insured and an insurer, particularly when there are other enforcement mechanisms available. And, frankly, with the excise taxes we are putting on insurance companies, the $60 billion in fees on insurance companies, and now trying to micromanage their medical loss ratios, I just wonder if we are not likely to run many insurers out of business so that we have less and less opportunity for people to make choices about their health care.

Those are all concerns I have, and I urge my colleagues to oppose the amendment.

Senator Bingaman. Mr. Chairman?
The Chairman. Senator Bingaman.

Senator Bingaman. Mr. Chairman, I reluctantly am compelled to speak against the amendment and vote against it. I do agree with Senator Rockefeller that there are all kinds of abuses that have been amply demonstrated by
the industry, and I believe this legislation will correct
the worst of those abuses. And there may develop a need
for further legislation in the future, but I think the
legislation does a good job of identifying the abuses we
know about and correcting them.

In addition, as I think his amendment points out,
there is a requirement in the Chairman's mark for health
plans to report the proportion of premium dollars that
they spend on items other than medical care or their
medical loss ratios, and I think that is a very good
provision. And I hope that information is taken by the
Secretary and widely publicized and that it will help
people to choose which companies to purchase insurance
from to the extent that they decide to purchase insurance
from private sources.

But the proposal to put in law a strict limit of 85
percent of their earned premiums having to go to medical
claims I think is a very major change in the way we have
tried to regulate insurance, and particularly health
insurance, since we have begun to try to regulate it.

As I see it, this is very analogous to what we do
with utilities. When I was Attorney General of my State,
we represented the State of New Mexico before the Public
Regulation Commission, which had the job of essentially
looking at the various utilities that were doing business
in the State and ensuring that their rate of return was appropriate and that their charges were appropriate. And it was a much, much different structure than what we have ever had in the area of health insurance, at least at the national level.

So I am not saying that I would not be open to argument that we should go to some kind of a utility model in the future. But I do not think the case has been made that we should, and if we did go to a utility model for the regulation of the insurance sector, health insurance sector, I think the more appropriate course would be to set up a national commission and give them that kind of a responsibility instead of saying, by the way, this is another responsibility of the Secretary of Health and Human Services, because I do think this is a very major undertaking. There are a lot of companies in this country that sell health insurance at the current time, and I would not want to just have this be one additional responsibility that we would load on the Secretary without more understanding of the import of it and what it would do the insurance market.

So for that reason, I would not support the amendment.

Senator Rockefeller. Mr. Chairman?

The Chairman. Senator Rockefeller.
Senator Rockefeller. Not quite making the closing argument here, but I am forced to look at the West Virginia medical loss ratios as reported by the insurance industry, and they say for individuals only 65 percent of their premium goes to health care coverage; the rest goes for other things. And I am forced to report that in the small-group market, which is called small business, et cetera, the ratio is 75 percent, and the rest goes for whatever it goes for. Yes, in the large-group market, where things are much more certain, the percentage is much higher.

But we have put—I would just put this to my colleagues—over half of the money of this bill into subsidies for insurance companies. And I ask my colleagues, why is it so difficult to be like California—and perhaps other States that I do not know about—to say that 85 percent ought to go to health care? I mean, this is a serious part of health reform. We are giving a lot of money to insurance companies who are already making a lot of money, hundreds of billions of dollars. And they may say it is 3 percent, but it is a fortune.

Why wouldn't we do that? Why wouldn't we do that if we are spending all that money in this health care bill and it is meant to encourage medical coverage of people? But we are not doing that. We are deciding, evidently,
that we are not going to do that, that we are going to
let things go on as they have been, status quo, with some
modification from the Chairman's mark.

I find this unacceptable. I can count the votes,
but--and I will not ask for a vote on this, in part
because we do not have a CBO score, although I am
confident that it is budget neutral. But, you know, the
argument of the day is that does not work, you have got
to have a CBO score, so we will have to wait for that.
And we have not given them very much time, in their
defense. I am not blaming them.

I think it is very important. I think not to do it
would be a statement about us, and I think to do it would
be a statement about us.

The Chairman. The amendment is withdrawn. Any
further amendments? We are looking for amendments. You
know, we can finish tonight.

Senator Kyl. Mr. Chairman?
The Chairman. We do not have to offer all these
amendments, you know.

[Laughter.]

Senator Kyl. Mr. Chairman?
The Chairman. Senator Kyl.
Senator Kyl. I believe that the next amendment of
mine is amendment number F6 as modified, and the
modification is strictly the so-called pay-for, the offset. This relates to flexible spending account caps, spending caps.

The Chairman. Senator, I do not know if this is fair because I understand you have the same offset that you had for an earlier amendment. Maybe you have a different offset, but in the interest of comity here, please tell us what your offset is.

Senator Kyl. I am sorry. I thought that this had been amended to use the Stabenow offset, if I can be facetious.

The Chairman. Oh, you want to do that.

Senator Kyl. I thought that we had done that. No, no, Senator Stabenow, the one that you so graciously noted had been used, I think, eight times. But since it always fails--

Senator Stabenow. Oh, yes. The one cutting middle-class tax credits?

Senator Kyl. Since it always fails, we will just call it "the perennial," would that work?

Senator Stabenow. Yes, that would be good.

Senator Kyl. I thought that my amendment had been modified to do that, Mr. Chairman. Hold on just a second.

The Chairman. It is like customs user fees?
Senator Kyl. I am sorry?

The Chairman. It is like customs user fees?

Senator Kyl. Except there would actually be real money with this one.

The Chairman. All right.

Senator Kyl. Okay. Shall I go ahead?

The Chairman. Yes, please.

Senator Kyl. Thank you. As you know, in the modified mark, beginning in 2011, contributions to health flexible spending arrangements, FSAs, would be limited to $2,500 a year. Under current law, there is no indexing factor, and my hope would be that we would not have one, so it would eliminate this cap.

Now, the question is: What is the impact of imposing a cap on the arrangements? Well, one thing, you raise money by it, which I presume is why the Chairman wrote it into the mark. But it hurts the people who utilize these arrangements.

Under current law, employees can make tax-free contributions for medically necessary goods and services to pay out-of-pocket costs. There is no legal limitation, as I said, right now on the amount that can be contributed. So employers generally establish their own limitation at $5,000. The mark would limit that to $2,500, and Joint Tax estimates that this limit would
raise $15 billion over 10 years.

I note that the average FSA election in the year 2008 was only $1,386, an amount that is substantially under the cap. There are some who incur higher out-of-pocket expenses that would exceed the proposed $2,500 limit for elements like diabetes, autism, even things like purchasing braces.

While healthy Americans spend, on average, about $850 per year for out-of-pocket medical expenses, individuals with chronic conditions can spend nearly $4,400 a year. According to the Employers Council on Flexible Compensation, the 35 million people who use FSAs spend 43 percent on hospital admissions and physician visits, 26 percent to purchase prescription and over-the-counter drugs to manage chronic diseases, 21 percent for dental, and 10 percent for vision. The median income for a policyholder utilizing an FSA is $55,000 a year.

It is important to emphasize the point that, relative to current law, a $2,500 cap is still a tax increase on people with chronic diseases who earn $55,000, which, I would note, is in violation of the President's pledge not to raise taxes on families who earn under $250,000, and the reason is obvious. When you have a tax benefit today and we are taking that away by imposing this limit, you impose a new tax liability on
people that did not exist before.

Mr. Chairman, I had previously used a different offset, the one that we have been precluded from using, and that is the reason for adding the other offset.

Mr. Chairman, there is--I am having a little trouble thinking here. We have got a lot of conversation going.

The Chairman. I am sorry, Senator--

Senator Kyl. No, I appreciate that. I just wanted to close by saying we have a long list from IRS of expenses that can be reimbursed through FSAs. These are really important. And if we are talking about families at $5,500 a year that have these—if they have got a chronic condition, over $4,400 in expenses, I would just hate to put a $2,500 limit on these accounts. We are talking everything from artificial limbs to breast reconstruction, ambulance, diagnostic services, dental treatment, eye surgery, all kinds of medicines, oxygen, and many other things.

So I would hope that we would not impose an additional tax on our constituents by putting a cap on the amounts that could be spent for these kinds of items under flexible savings arrangements.

The Chairman. Is there discussion?

[No response.]

The Chairman. Let me ask, if I might--Mr.
Barthold, perhaps you know, or Mr. Hughes--what is the average income of persons significantly utilizing flexible savings accounts?

Mr. Barthold. Well, Mr. Chairman, we actually do not have really good information on FSA use by income that I could give you an answer that is sort of consistent with the distribution tables that we prepared. But I can tell you that FSAs are most prevalent in large firms, and large firms tend to be higher-wage firms. So the first that Senator Kyl cited, that the median income of someone with an FSA was $55,000 per year, is within plausible range.

The Chairman. What would the income be for those who meet the caps?

Mr. Barthold. The mark's proposed--

The Chairman. Right, but if we are to meet the proposed cap.

Mr. Barthold. Actually, that is the more difficult part for us to determine, because the take-up rate among eligible employees is less than 20 percent, although we project that that is growing somewhat over the budget period. And that is one of the reasons that we do not have really good information on how this matches up.

The Chairman. All right.

Senator Roberts. Mr. Chairman, on that point?
The Chairman. Senator Roberts.

Senator Roberts. I have here from one of the many hearings—I cannot really detail which one it was when we had the FSAs testify, but I think it was indicated there were 35 million Americans that now participate and it is growing. They are a key benefit for individuals for whom health insurance does not cover or does not cover adequately, as Senator Kyl has pointed out, but the other thing I wanted to mention as to your specific question, they are primarily used by individuals with an average income of between $50,000 to $70,000.

So this is clearly, I think, a health care benefit that aids middle-income families.

Mr. Reeder. Mr. Chairman, I have some statistics I can add.

The Chairman. Mr. Reeder.

Mr. Reeder. The Bureau of Labor Statistics did a survey for 2006, and on the income level, I agree with Mr. Barthold that we do not have detailed specifics on income level, but they did do a breakout between people who make above $15 an hour and people who make below $15 an hour. And for those who make about $15 an hour, 45 percent have access to an FSA, while those who make below $15 an hour, only 21 percent have access to an FSA.

The Chairman. I approximately that. You know,
there are all kinds of statistics on this, and nothing is very precise that I can tell thus far. According to Mercer, a human resource consulting firm, in 2005, 4 years ago, the average contribution was $1,235 among employees in all firms participating, and the average account in 2006 had $1,261. Just lots of stats here that just indicate to me that they are somewhat used, but there is not a huge demand for these as one might think.

The second point is that all the numbers I see, there is just nothing that shows that there is a big bump against the proposed $2,500 cap. There just does not seem to be a huge, big cry for that.

So with the availability still there in the mark, for the vast majority of people they will still be able to utilize these flexible savings accounts.

Second, I do think it makes some sense to put some cap on these. We are trying to bend the cost curve, but we are trying to do it fairly. It is a balance. What should we put a cap on? What is too tight? What is too loose? et cetera. And my judgment is--and everybody is entitled to his own judgment, but my judgment is that a $2,500 cap is well within reason. It is probably not going to have much effect, if any, on the cost curve. It may have some, but I do not know that it is going to have a heck of a lot because they are not utilized that much.
I frankly think that we should--

Senator Roberts. Mr. Chairman?

The Chairman. Also, one other major point here, who is paying for this amendment? Well, just to repeat myself, this is paid for by middle-income and lower-income people. They are the ones who are paying for this. You know, I think the people utilizing these tend to be a little higher income, and the pay-for tends to be those people with lower income.

Now, I do not want to overdramatize the point or overstate the point, but I think if you look at this amendment and the proposal, that is basically what the shift would be—that is, lower-income people under this amendment would be paying for relief to middle- and higher-income people, and I do not know if it is a good thing to do because it is not being utilized—FSA is not utilized that much, anyway.

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl.

Senator Kyl. Just a couple of points. I remember a friend of mine bought an old vehicle one time, and it was kind of rusty, and he wanted it painted. So we went to a place called Earl Scheib—and I do not meant to put down the Earl Scheib paint shops. But we took it in, and it was kind of a rusty bucket of bolts. And he said,
"How much does it cost to paint it?" He said, "All of our paint jobs are $19.95." And he says, "Well, can you cover this?" And he said, "It will cover it $19.95's worth."

The point is this is going to hurt people $14.6 billion worth. I mean, you say it will not have much effect, there is not a huge demand, and so on. Well, it is $14.6 billion. That is not peanuts.

So that is a tax increase. Somebody is going to have to pay $14.6 billion. Now, who is it? The median—of course, median means that half the people are above and half the people are below. So half the people are below $55,000 a year income, half the people are above $55,000 in income. The $15 per hour, that is, I think, a $30,000 income. You have a lot of people in that range, and they are going to be paying for this.

It is hard to know exactly what income level benefits from this more or less, but we do know what kind of folks in terms of medical expenses, and it is folks with chronic conditions. They are the ones that end up taking advantage of this and being benefited.

And it is a little bit like the deduction, the itemized deduction above 7.5 percent. We determined a long time ago—and IRS treats it this way; remember when we had this conversation?—that, you know, folks that
have a catastrophic medical condition, IRS does not treat that as an intentional act, but an unintentional consequence of life. And, therefore, we tend to treat it in a tax way in a more benign fashion. We give people an income tax deduction for those huge expenses, catastrophic expenses.

Here, too, we give people a bit of a tax break if they have a chronic condition that puts them into that $4,400 a year expenditure because of a chronic condition. That is who this really helps. Some of them are going to make more than $50,000 a year; some are going to make less than $50,000. But we know the total impact is $14.6 billion.

Finally, Senator Roberts points out the fact that I do not think that this amount is indexed, so before long it is not going to be worth much at all. And I would hope, as you proceed to write legislation that is melded with the HELP Committee and take the bill to the floor and all of that, that you would consider that fact, that indexing is something that you would want to consider here.

So, anyway, my bottom line is we know we are hurting a lot of folks. A lot of them do not make that much money. It is $14.6 billion worth. That is a big tax increase.
The Chairman. Well, we have a simple choice. Who pays the $14.6 billion? Lower-income--middle-income and lower-income, or middle-income and higher-income people? That is the question. Who pays the 14.6? I frankly think it is wrong for the middle-income and lower-income people to be paying the 14.6.

The clerk will call the roll--

Senator Kyl. Well, Mr. Chairman, as you know, the top 5 percent of taxpayers pay almost all the taxes in this country. That is who pays it. It is not poor people. This is a tax break. And so it falls on the entire taxpaying public in general. And I think it is two-thirds of the taxes are paid by the top 1 or 2 percent of the taxpayers. So it is rich people that are, in effect, subsidizing people who have these chronic conditions who take advantage of this tax provision.

The Chairman. Okay. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.
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?  
7. The Clerk. Ms. Stabenow?  
8. The Chairman. No by proxy.  
9. The Clerk. Ms. Cantwell?  
11. The Clerk. Mr. Nelson?  
13. The Clerk. Mr. Menendez?  
14. The Chairman. No by proxy.  
15. The Clerk. Mr. Carper?  
17. The Clerk. Mr. Grassley?  
19. The Clerk. Mr. Hatch?  
21. The Clerk. Ms. Snowe?  
23. The Clerk. Mr. Kyl?  
25. The Clerk. Mr. Bunning?
Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Hatch. Aye by proxy.

The Clerk. Mr. Roberts?

Senator Roberts. Aye.

The Clerk. Mr. Ensign?

Senator Hatch. Aye by proxy.

The Clerk. Mr. Enzi?

Senator Hatch. Aye by proxy.

The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Chairman. The clerk will tally the vote.

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

The Chairman. The amendment fails.

Senator Bunning, do you want to offer an amendment?

Senator Bunning. I will go.

The Chairman. Okay. Thank you.

Senator Bunning. Let me call up amendment F1 as modified.

The Chairman. F1 modified.
Senator Bunning. I think everybody--

The Chairman. I do not know if I have it.

Senator Bunning. Well, I will wait.

The Chairman. Okay. That would be a good thing to do.

Go ahead, Senator. Why don't you proceed?

Senator Bunning. All right. Thank you, Mr. Chairman. This is a simple amendment, like the other three simple amendments I have offered on this bill. It sunsets in 2019 every tax increase in this bill. Note that this is a different amendment from my earlier amendment, which only affected tax increases that increased costs for consumers. We have already had discussions about how the tax increases in this bill will be passed along to consumers and drive up out-of-pocket health care costs. I will not rehash that again.

I think the American people will be surprised to learn that the only way Congress can enact health care reform is to increase the tax burden. I do not accept that. But at the very least, we should ensure that this new tax burden does not last forever, especially when so many of these tax increases would cause permanent increases in health care costs.

On one of the Sunday talk shows this past weekend, former President Clinton was asked if tax increases would
be necessary in order to have health care reform. He first equivocated on the question. But when pressed to answer it, President Clinton said that tax increases might be necessary in the short run, but in the long run, health care reform would reduce costs so that tax increases would not be necessary. So let us put President Clinton's theory to the test.

Since tax increases will only be required in the short run, let us sunset all those new taxes by 2019. Then we will have several years to see what impact all these taxes will have on health care costs and whether they have made health care more affordable or less affordable for the American people.

How many of us remember the astonishment from our constituents when they found out that the 2001 and 2003 tax cuts would expire in 2010? Apparently it is okay when tax relief expires, but every tax increase must last into eternity.

Earlier today, the Chairman was quick to point out that CBO said the bill is a net tax cut. But I think most Americans would strongly disagree with that statement. To most Americans, tax relief means that you get to keep more of the money that you earn. But here is how it works under this bill. You earn your money, you send it to Washington, and then Washington forces you to
buy health insurance. Then for some lucky Americans, the Government will send your money to insurance companies.

You do not get to keep this so-called tax relief to use in any way you decide is best for your family. I think most Americans would be stunned to learn that this is a new definition of a tax cut.

I also point out that billions of dollars of this so-called tax cut would go to people who do not even pay income tax at all. Even CBO considers this to be a Government spending outlay rather than a tax reduction.

I am not saying that this is the right policy or the wrong policy, but it is certainly spending rather than tax relief.

Earlier today, the Chairman said that we would be irresponsible if we did not make all of these tax increases last forever. Let me repeat the reasons this is not the case. I hope every deficit hawk will be paying attention.

If we are worried about what will happen to our deficits after 2019, there are three solid options for you under this amendment.

First, President Obama and former President Clinton have said repeatedly that health reform will reduce costs. If all those savings we were promised magically appear, there will be no need for tax increases to
finance health care reform.

Or if the savings do not magically appear, there is a second option. Congress will have 10 years, from 2010 to 2019, to find spending cuts rather than tax increases to finance the mandates in this bill. Surely we can find spending cuts and efficiencies in the trillions of dollars Americans spend on health care.

And there is a third option for our future Congress. By 2019, Americans will be so in love with the health reform they have gotten that they will not mind paying higher taxes. In that case, our constituents would joyfully contribute their shared responsibility, and a future Congress will have no political problems simply restating the tax increases. In fact, they will probably be hailed as heroes.

If anyone claims that my amendment does not bend the cost curve after 2019, then this is a stunning admission that the only way this mark can claim to bend the cost curve is to raise taxes.

I hope my colleagues will stand up for their constituents and their taxpayers and support my amendment. Thank you, Mr. Chairman.

The Chairman. Let us see. Does anybody wish to speak?

Frankly, Senator, this is similar to one—I think it
was you--offered earlier. This is even more sweeping.
Maybe it was somebody else, somebody sitting over there.

Senator Bunning. I mentioned the fact that I had
offered a similar--

The Chairman. That is right. Okay. But this is
even more sweeping. Essentially it says that we are
going to sunset the pay-fors but not sunset the spending,
and I think that is irresponsible. I mean, it would be a
little bit more responsible to sunset both, but that is
not your amendment. Your amendment is to sunset the pay-
for but not sunset spending. I think that is just not
the responsible thing to do, and I suggest we not vote
for the amendment.

Senator Bunning. Well, let me just remind the
Chair that if, in fact, the savings in this bill occur as
you have and most people have predicted, there will be no
need in 2019 to have any kind of tax increases. We will
have the spending we need, the American people will have
their health care, and they will be overjoyed with the
health care that they do have.

The Chairman. Well, I might say to my good friend,
we have a problem as it is with the accumulated deficits.
I saw, I guess, CBO, I think--or maybe it was Joint Tax-
that, all things being equal, the projection is about a
trillion dollars in total additional deficits over the
next 10 years. I do not think we want to take action that adds to that. Most of us would like to kind of get deficit spending down a little bit, not get deficit spending up. I think we should not support this amendment.

Senator Bunning. Well, if I can just respond, and this is the last thing I will say. If what you say is true, that there is $40 billion savings in this bill--

The Chairman. No. I said $40 billion in net tax cuts in the year 2019.

Senator Bunning. Forty billion.

The Chairman. Forty billion.

Senator Bunning. Yes, sir. Then why would we continue to have more taxing at the end of that time if you are going to save $40 billion?

The Chairman. Because at the end of the 10-year period, we have to have offsets for the spending, and you want to discontinue the offsets but continue the spending. I am a little surprised at that because most Members of the Senate do not like deficit spending very well.

Senator Bunning. Well, no, I agree with that. But I think your statement is contradicting exactly what you have promised in your mark. So I would urge my colleagues to vote for this amendment.
The Chairman. Okay. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Ms. Stabenow?

The Chairman. No by proxy.

The Clerk. Ms. Cantwell?

The Chairman. Pass.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

The Chairman. No by proxy.

The Clerk. Mr. Carper?

The Chairman. No by proxy.
The Clerk.  Mr. Grassley?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Hatch?

Senator Hatch.  Aye.

The Clerk.  Ms. Snowe?

Senator Snowe.  No.

The Clerk.  Mr. Kyl?

Senator Kyl.  Aye.

The Clerk.  Mr. Bunning?

Senator Bunning.  Aye.

The Clerk.  Mr. Crapo?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Roberts?

Senator Roberts.  Aye.

The Clerk.  Mr. Ensign?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Enzi?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Cornyn?

Senator Hatch.  Aye by proxy.

The Clerk.  Mr. Chairman?

The Chairman.  No.  The clerk will tally the vote.

The Clerk.  Mr. Chairman, the tally is 9 ayes, 13 nays, and one pass.

The Chairman.  The amendment does not pass.
Senator Kyl. Mr. Chairman, if you want me to, I have an amendment.

The Chairman. Okay. Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman. This is amendment number C17. I had brought this up before. We set it aside because I was trying to get a different offset than the one that we have been using in the past.

The Chairman. You know what? I appreciate that. You are exercising good faith here, and I deeply appreciate that.

Senator Kyl. I appreciate it. And because you have not agreed with any of my amendments so far, that offset is still available, and, therefore, I will be happy to provide it again. But, again, to my friend Senator Stabenow, it is not that I am trying to enact a policy of the offset. I have a different idea in mind.

This is actually a very simple amendment dealing with the health savings account. The effect would be simply to conform the amount that individuals can contribute to high-deductible health plans and enable contributions to health savings accounts to equal the same amount—in other words, allow individuals to contribute money to their HSAs equal to the amount of the out-of-pocket limits for high-deductible health plans.

Mr. Chairman, I think we are all well aware of the
advantages of HSAs, so I will simply summarize it with a couple of points.

Republicans have generally believed that we want to empower consumers and enable them to take more direct responsibility. Part of that has to do with getting some skin in the game so that they will be better health consumers. And as a result, these HSAs have proven to be a very popular way to have a relatively low-cost insurance policy but still provide for catastrophic coverage and not bankrupt you if you have something really bad happen to you.

The other point that I want to make is there is kind of a misconception—let me make this point first. The difference, for example, on the average is about $2,200— in other words, you can get an HSA about $2,200 less than you can the average employer-sponsored family premium. So it is a way to save money, and you have more skin in the game, you are a better consumer of health care, and save money in the process.

The second thing I want to mention is there is kind of a myth that the people that invest in these are all younger and more wealthy and so on, and we just got these statistics together, which I think will put the lie to that myth. Forty-six percent of the people with HSAs—these are last year's numbers, by the way—lived in
lower-middle-income neighborhoods, 34 percent in middle-income neighborhoods, for a total of 80 percent who live in, at best, middle-income neighborhoods and more than that in lower.

Fifty-three percent of all individual market enrollees were 40 or older. In other words, the majority are over 40 years of age. And small employers are one of the fastest-growing markets for these kinds of products.

So these are popular with the folks that we want to try to help here. Small business folks, it is a way for them to provide cheaper coverage for their employees and still make sure that they have what they need. And there is no reason why we should not, therefore, allow them to contribute more. The obvious amount would be the same amount that can be contributed to a high-deductible health plan.

And so the amount that they should be able to deduct in the HSAs we believe should be conformed, and I have those actual numbers. I think Senator Conrad pointed them out before, the 2009 annual contribution limits: individual, $3,000; family, $5,900. But the out-of-pocket limits are $5,800 for an individual and $11,600 for a family. So this would be a substantial benefit to folks who rely upon HSAs.

Thank you, Mr. Chairman.
The Chairman. Thank you, Senator. I am sorry. I missed--what is the revenue shift here? How much?

Senator Kyl. It is $15.2 billion.

The Chairman. Okay. I do not want to get into a big argument here, but, again, as I understand it, we offset--you offset it how? Increasing the income cap is the same offset we have been talking about.

Senator Kyl. Yes, sir.

The Chairman. I wonder how many times we have used this offset.

Senator Kyl. I think this is it--well, excuse me. Depending upon the Schumer amendment, I have one more amendment on this subject, and it will follow the Schumer amendment, pursuant to your request. So if I have the misfortune of not prevailing on this amendment, this offset could be offered one more time.

The Chairman. Okay.

[Laughter.]

The Chairman. Well, I really do appreciate your--

Senator Kyl. Unless someone has a better idea.

The Chairman. I think we are finally getting to figure out what the offset is after so many times.

Again, it is tantamount to income shift from middle- and lower-income people to higher-income people. That is not the right thing to do, and I suggest we not vote for
The clerk will call the roll.

Senator Kyl. Mr. Chairman, do we have a quorum.

The Chairman. We need eight. One, two, three, four, five, six, seven. We do not have a quorum.

Senator Kyl. But we are going to grab somebody.

The Chairman. Here we go. Blanche is here. We have eight. We do have a quorum.

The clerk will call the roll, but thanks for checking. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

The Chairman. No by proxy.

The Clerk. Ms. Stabenow?
The Chairman. No by proxy.

The Clerk. Ms. Cantwell?

The Chairman. Pass.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

The Chairman. No by proxy.

The Clerk. Mr. Carper?

Senator Carper. No.

The Clerk. Mr. Grassley?

Senator Hatch. Aye by proxy.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.

The Clerk. Mr. Roberts?

Senator Hatch. Aye by proxy.

The Clerk. Mr. Ensign?

Senator Hatch. Aye by proxy.
The Clerk. Mr. Enzi?
Senator Hatch. Aye by proxy.

The Clerk. Mr. Cornyn?
Senator Hatch. Aye by proxy.

The Clerk. Mr. Chairman?
The Chairman. No.

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

The Chairman. Will the clerk tally the vote?
The Clerk. Mr. Chairman, the final tally is 10 ayes, 12 nays, and one pass.

The Chairman. The amendment is not agreed to.

I think, Senator Lincoln, you have an amendment you want to offer and withdraw. Is that correct? That is my understanding that Senator Lincoln has an amendment. Senator Lincoln, you are recognized to offer an amendment.

Senator Lincoln. Thank you, Mr. Chairman.

Mr. Chairman, I would like to call up my amendment D11. This amendment is to overturn a portion of recent Medicare regulations that would significantly cut reimbursement to radiation oncology services based on what I believe is really a faulty assumption.

In its annual physician fee schedule released this year, CMS rebalances reimbursement to physicians based
upon new practice expense data. I recently was joined by
31 Senators in sending a letter to the administration
expressing some concern we had specifically regarding
assumptions used to determine the radiation oncology
payment rates. But I wanted to also highlight them here
as we are discussing physician payment issues in the
context of health care reform.

Mr. Chairman, the CMS rule changed payment to
physicians in a budget-neutral way so that many primary
care specialists received increases in Medicare payment
and other specialists received reductions in their
payments under Medicare. And I certainly applaud the
administration in recognizing that primary care
physicians should be reimbursed adequately. For those of
us who come from small rural States, having enough
primary care physicians is absolutely critical in making
sure that access to health care.

We have been talking an awful lot about coverage,
and coverage does not necessarily equate access if you
live in areas where it is difficult to find access to
health care, where medical providers are not there.

So I certainly applaud them in recognizing that
primary care physicians do need to be reimbursed
adequately, whether they are serving in large areas or
small areas. And that should help to address our
workforce shortages that are particularly pronounced in primary care.

However, as a part of the payment rates, the rule established for radiation oncologists, CMS used data that should never have been applied to radiation oncology.

Now, remember, when we talk about radiologists, we are talking about diagnostic imaging.

Some of what we have seen here in this misinformation or the data being misinterpreted stems from a misreading of a proposal by the Medicare Payment Advisory Commission, MedPAC, which we have talked an awful lot about here. And I have expressed my concerns in making sure that MedPAC is adequately represented by rural areas, which I think is going to be critical.

But the misreading of the proposal by MedPAC regarding diagnostic imaging services, there is a clear distinction between radiation therapy and diagnostic imaging. Radiation therapy, many of us certainly remember our good friend Senator Kennedy. When using radiation therapy, oncologists use radiation to actually pinpoint to cancer in difficult-to-reach spaces or sensitive spaces. But it is used as a therapy instead of imaging.

In fact, in its comment letter to CMS on the proposed rule, MedPAC states, "MedPAC did not contemplate
applying this equipment utilization policy to radiation
therapy machines."

So, in other words, those machines that are
radiology therapy are going to get the same 90-percent
utilization--they are going to be subjected to the same
90-percent utilization rate that diagnostic imaging is
going to see.

So, Mr. Chairman, I think that there was clearly a
mistake on the way that CMS interpreted this. MedPAC was
clear that it was misunderstood, that that was not their
intent to see that happen. And I just would love to see
us make sure that we recognize that, particularly for
those radiation oncologists that really need this
equipment and oftentimes, because of its specialization,
are not going to see that 90-percent utilization that you
would see in a regular diagnostic therapy practice.

I hope, Mr. Chairman, that you will work with me to
solve this problem. I am glad to withdraw the amendment
if it becomes a complication. But I think many of my
colleagues understand this issue, and I had 31 other
Senators join me in my letter to CMS and would really
appreciate the opportunity to continue to work with you,
Mr. Chairman, and the administration to address these
cuts and ensure that the cancer patients will continue to
have access to the vital radiation oncology services that
they are now receiving.

   It is wonderful that we have these technologies. They are miraculous in many ways, and I would hate to see us lose those practices and that technology because we have misinterpreted—or that CMS has misinterpreted what MedPAC's recommendation actually was.

   The Chairman. Senator Stabenow.

   Senator Stabenow. Thank you, Mr. Chairman. I just want to thank Senator Lincoln for her amendment and join her in expressing great concern about the cut to radiation oncology in the upcoming physician fee schedule proposed rule, because I share the concern that this could create serious risk for patients in Michigan, Arkansas, and across the country.

   The cuts to certain families of radiation therapy procedures provided in free-standing centers is more than 35 percent on average and up to 44 percent or more for certain procedures critical to the provision of radiation therapy. In Michigan, there are 24 free-standing radiation therapy centers which represent about one-third of our capacity to treat cancer patients with radiation therapy. More than half of these centers are considered at risk for closure under the various estimates of the proposed rule's impact.

   Obviously, this would be very bad for patients.
Research shows that increasing the travel time for cancer treatment not only imposes a burden on cancer patients, but also can impact patient compliance and even the choice of treatment.

So I thank Senator Lincoln for bringing it to the Committee's intention, and I look forward to working with you to address this.

Senator Lincoln. I would just like to thank Senator Stabenow and the other Senators that I know have a concern with this. You may have 44 centers. We do not have nearly that many in Arkansas, but even trying to reach those 90-percent utilization rates, it is going to drastically decrease our ability to serve cancer patients. And you are exactly right: The distance that cancer patients are now going to have to travel to get that kind of specialized care is going to be enormously disproportionate because of this misrepresentation.

So I thank the Senator from Michigan.

The Chairman. Thank you, Senator. I share your concern. I have heard some of the same concerns, and, I might say, more than once. I very much do want to work with you on this and see if we can find a solution.

Senator Lincoln. Well, I appreciate it, and I appreciate the Chairman's willingness to work with us, and I will withdraw my amendment.
The Chairman. You bet. Thank you.

Senator Lincoln. Thank you.

The Chairman. Okay. It is my understanding there will be three votes on the floor shortly, and we have about ten amendments left to complete action on this bill. And my hope is and my expectation is that during this short recess we have this evening, we can perhaps work out some of those amendments, maybe combine one or two. And then when we come back, it would also be my hope that Senators can keep their remarks short, maybe we can taken an amendment by voice or two.

We are within striking distance. I can see the light at the end of the tunnel. And it may be a little dark, but we will finally get to that light at the end of the tunnel. But I am going to do my best tonight to see if we can wrap up. And I really thank Senators. We have been working so cooperatively on this bill on both sides, and I really appreciate that.

Unless Senators have something they want to say, my intention is to recess until 8:30 tonight, and we will come back at 8:30, and with a little extra effort and cooperation we can wrap this up.

The Committee stands in recess until 8:30.

[Whereupon, at 6:46 p.m., the Committee recessed, to reconvene at 8:30 p.m., this same day.]
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.
Current law requires that Medicaid recipients, with the exception of pregnant women and children, be U.S. citizens or legal residents who have lived in the country for five years. So if you are eligible for Medicaid, you would be eligible for this. It marries the requirements for this benefit to those of Medicaid, as well.

I said most other federal welfare programs require that an individual be in the country for five years. That is pursuant to originally a law that dates back to 1882, but we specifically provided, in Section 403 of the Welfare Reform Act of 1996, the specific definition, which reads that aliens "are not eligible for any federal means-tested public benefit for a period of five years beginning on the date of the alien's entry into the United States," end quote.

So, Mr. Chairman, there is more that I could say about this. I think, obviously, we welcome immigrants to our shores. We want them to be productive citizens, when they become a citizen.

For a period of five years, they agree not to, in effect, take public welfare, and this, of course, is one of those means-tested benefits that otherwise would be denied to them. Nothing, of course, prohibits them from buying insurance; obviously, we would like to encourage that. But we do not have to subsidize them and that is
what this amendment would do.

Senator Menendez. Mr. Chairman?

The Chairman. Senator Menendez?

Senator Menendez. Mr. Chairman, let me just put this name out there -- Specialist Rodrigo Gonzalez Garza of San Antonio, Texas. He was the first soldier to die in Iraq. He was a legal permanent resident of the United States.

Under Senator Kyl's provisions, he and his family would have been barred. Now, this amendment sets up a catch-22 for legal immigrants. Unlike the suggestion that these are welfare programs, a subsidy under this will, when someone is mandated to have insurance and pays a penalty if they cannot meet that mandate is much different than a welfare program.

I certainly do not consider any of the subsidies under these bills for U.S. citizens and legal permanent residents to be a welfare program. We are talking about creating affordability for families. That is first and foremost.

Secondly, the reality is that we are going to put a mandate on legal permanent residents of the United States. This is new and it exists for those who are already here as legal permanent residents of the United States.
So now they have a mandate placed on them and they are told, even though they serve in the Armed Forces of the United States, even though they pay all taxes that any other citizen would pay in this country, that in addition to the fact that they meet all those obligations, that when we mandate them to have insurance and/or pay a penalty, they cannot have subsidies that are established for everyone else. So that clearly is a catch-22.

This amendment prevents low and middle income families from applying for critical tax credits for purchasing health insurance, putting quality affordable health care out of the reach of those working families.

And to make matters worse, as I said, it would force them to pay a tax penalty for not having insurance under the new individual mandate.

Now, under this amendment, legal permanent residents would be prevented from accessing federal health programs which they help fund. They pay taxes just like any citizen.

In fact, we have moved in a different direction, particularly in a bipartisan vote of the Children's Health Care Initiative, where, in fact, we removed that hurdle.

By imposing wait periods, this amendment undermines
the goal that I think this legislation is all about, health care form, and driving up the cost of health care for all Americans.

I heard various arguments here earlier today, including legal permanent residents paying into the system to make health care affordable for everyone. Artificially restricting legal permanent residents from enrolling in affordable health care coverage at the same time we put a mandate on them limits the pool of participants and increases the cost of health care for everyone.

It also creates a set of circumstances under which simple problems that could be addressed through preventative care will be delayed. They will become more complex and more costly emergencies at the end of the day.

So I believe, Mr. Chairman, that you cannot have it both ways. I heard various of the arguments here earlier today, including legal permanent residents paying into the system to make health care affordable for everyone. Artificially restricting legal permanent residents from enrolling in affordable health care coverage at the same time we put a mandate on them limits the pool of participants and increases the cost of health care for everyone.
It also creates a set of circumstances under which simple problems that could be addressed through preventative care will be delayed. They will become more complex and more costly emergencies at the end of the day.

So I believe, Mr. Chairman, that you cannot have it both ways. You cannot put a mandate and say "You have to have health insurance, you pay your taxes, you can serve in the Armed Forces of the United States. But guess what? As we put this new mandate on you, you do not have any access to the subsidies."

That is far different than the suggestion of welfare and the amendment should be rejected.

The Chairman. Further discussion?

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman?

Senator Bingaman. Mr. Chairman, let me just underscore the points that Senator Menendez was making. These are legal permanent residents. They have come here and complied with all the laws of this country. They are taxpaying citizens and it would be a grave mistake for us to deny them the right to participate in this effort to expand coverage that we are talking about. This mark, which the Chairman has presented to us and which we have before us, does not change the law with
regard to Medicaid. That is my understanding.

Let me ask staff if I am accurate on that. Is that correct?

Ms. Baker. That is correct.

Senator Bingaman. So that the five-year ban that the Senator from Arizona is now trying to impose in the exchanges, which, frankly, I do not agree with, I do not agree with having the five-year ban in Medicaid, but we are not trying to change that in the mark.

What we are saying is that this program of advanced refundable tax credits to assist people in obtaining the health care coverage we are requiring them to obtain is not welfare, it is not Medicaid. It is something that is in our interest as a country to see as many people as possible participate in, and that certainly includes the legal residents who have come to this country.

So I would strongly oppose the amendment by the Senator from Arizona.

The Chairman. Further discussion? Senator Kyl?

Senator Kyl. Mr. Chairman, first, with regard to the individual who served in the military, of course, he has got military care. His family has the benefit of TRICARE, I would presume.

It is true that Medicaid is different and that was the point I made. It would be inconsistent to deny
people Medicaid, but then provide the benefits that are authorized in this legislation.

There is a point, when you say that they are mandated, of course, I would prefer that the mandate did not exist either and would be happy to modify the amendment to that extent.

I would like to preserve the law as it is. As it is, a permanent resident, until he has been here five years, would not be entitled to this benefit. This mark changes our law.

I suggest that an "aye" vote for the amendment is to keep the law the way it is today. Thank you, Mr. Chairman.

The Clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?
The Chairman. No by proxy.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

Senator Menendez. No.

The Clerk. Mr. Carper?

The Chairman. No by proxy.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.
The Clerk. Mr. Roberts?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Ensign?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Enzi?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Cornyn?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Chairman?

The Chairman. No. The Clerk will tally the vote.

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

The Chairman. The amendment is not agreed to. I note, for my colleagues on my side, that we have a list here and it is unclear exactly how many amendments there are. It is in the nature of 11 or 12 amendments.

I also note that most of them are amendments offered by Democrats. There are only three on the list that are Republican amendments.

Maybe some of our amendments can be accepted, maybe some can be folded into another amendment, maybe we can offer them on the floor. I just point out that there are some on our side and perhaps -- without having not a recorded vote, maybe a voice vote, et cetera.

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

Senator Conrad. Mr. Chairman, they are not on that list, but I had two amendments that I had offered still pending and I just would notice now that I do not intend to offer those amendments, in the interest of allowing people to complete their work and get home to their families and live to fight another day. That is my intention.

The Chairman. Well, thank you, Senator, very much.

Senator Lincoln?

Senator Lincoln. Thank you, Mr. Chairman. Mr. Chairman, my amendment is pretty straightforward. The plan we have before us will require all American consumers to purchase health insurance coverage in the private marketplace.

This will bring millions of new customers to private insurance companies. This amendment would set a reasonable executive compensation limit of $500,000 annually that can be deducted as a business expense for businesses that provide coverage meeting the individual's mandate requirements.

It does not dictate at all what a business pays an employee, but it does limit the taxpayer subsidies for that compensation. Let me be very clear on this point. Without this change, under current law, every Arkansas
taxpayer, every U.S. taxpayer subsidizes these big
insurance executive unlimited salaries and deferred
compensation packages.

   It is my hope, Mr. Chairman, that this amendment
will encourage the insurance companies to put the
additional premium dollars they will be bringing in as a
result of the new mandate, the new insistence that all
Americans be covered, towards lower rates and more
affordable coverage for consumers, not in their own
pocketbook.

   We heard from Senator Rockefeller earlier this
evening about the importance of that loss ratio and how
important it is that everyone be at the table in trying
to achieve what it is we are working hard to achieve
here, and that is health care reform that is going to
benefit all Americans and, also, be effective for our
economy.

   There is evidence that this companies need this
encouragement, particularly now. Over the last two
decades, the medical loss ratio or the formula that
determines what percentage of profits goes to patient
care versus the administrative and marketing
expenditures, which Senator Rockefeller mentioned
earlier, has shifted.

   Where health insurers spent more than $0.90 of every
dollar on patient care in the early 1990s, that number has decreased to $0.81 of every dollar in 2007.

And according to testimony in Senator Rockefeller's Commerce Committee earlier this year, the shift in the medical loss ratio in recent years has translated into a difference of several billion dollars in favor of insurance company shareholders and executives at the expense of health care providers and their patients.

So we need to do what we can to reverse that trend, particularly now when the number of dollars coming into these companies will be increasing substantially.

We have heard conversations from the other side about how important it is to create incentives for good behavior, making sure that we are working to encourage people, Americans, to have healthy habits, and it is so important here as we are providing a whole new marketplace for the American insurance industry to be able to encourage, again, those healthy habits, of moving back to where we were in the 1990s, where $0.90 of every one of those dollars was going into patient care.

I think it is so important as we look at this bill that we do present incentives. Again, I do not preclude any of them, any insurance industries or anyone from being able to pay what they would like to pay to their employees, but just simply saying that subsidizing it by
American taxpayers' dollars is not going to be something that is acceptable.

Those defending the status quo for health insurance companies in opposition of my amendment have argued that if we do not maintain the existing tax subsidy for this executive compensation, then the cost of the compensation will be passed on to the consumers.

What they do not really seem to understand is that the American people are the ones footing the bill anyway. This is a tax windfall for health insurance executive pay.

Additionally, with an estimated 20 million new customers and their corresponding premium dollars rolling in, we can most definitely assume that health insurance companies will have additional profits coming in.

So if we are not lowering definitely the premiums for consumers with those profits, what exactly will they be doing with those profits?

And a final point, the opposing view that this will result in higher premium costs to consumers illustrates a lack of forward thinking and understanding of what the Chairman's mark actually does. Their assumption is based on the current broken marketplace, where insurance companies bully their customers and monopolize choices.

But the insurance market reforms we are
implementing, along with more consumer choices through the exchange, these insurance companies are going to have to work to keep the business that they have and our hope is that they will be working hard to supply the product for those new members that are in the exchange.

We want to ensure that our private insurers stay healthy. We also want to make sure that as we provide a captive audience in terms of consumers with the mandates that we are putting into this bill, that there is not a windfall or a temptation to those in the industry to be able to continue to use those tax subsidies to pay outrageous amounts of executive compensation.

Mr. Chairman, I think this is a fair policy change that is aimed at reassuring American consumers and taxpayers that health insurance executives are not receiving a personal windfall and the companies they work for are not receiving excessive tax breaks, while, at the same time, profiting from a government mandate.

So I appreciate it, Mr. Chairman, for you allowing me to bring up my amendment. I think it is so critical as we look forward in what we are trying to do comprehensively in changing health care, making sure we create greater choices, more competition in the marketplace that is going to really benefit everybody, moving ourselves from that volume-based health care
delivery to value and to quality, and making sure that
more Americans are covered.

So I hope that my colleagues will take a look at
this. I have tried very desperately to make it a
reasonable amendment that really does reassure the
American public that what we are doing is not creating
something as a windfall to the insurance executives, but
more importantly, creating a balance with the resources
that we have to cover more Americans under health
insurance in a private system.

So, Mr. Chairman, with that, I would like to also
mention that I have got two others on this amendment,
Senator Menendez and Senator Conrad, who both have a
portion of the amendment that we are offering here
tonight, and I will punt it over to Senator Menendez.

Senator Menendez. Thank you, Senator Lincoln, Mr.
Chairman. Let me say I associate myself with the remarks
of Senator Lincoln on this. This is, in essence, simply
saying you are not going to be allowed to deduct
excessive remuneration from a tax code which we all pay
to, if, in fact, it goes beyond a certain level,
particularly from the proceeds of what are $0.5 trillion
in subsidies.

I appreciate specifically Senator Lincoln working
with me to have a part of that savings be used for
federally qualified health centers. It is incredibly important. We are both big supporters of community health centers and the services they provide.

This amendment is important, because once Congress passes health reform legislation and expands health coverage to millions more of our fellow citizens, our task does not end there. We have to ensure that the promise of expanded coverage translates into the reality of access to care.

In the wake of this reform, we will be looking to our nation's federally qualified health centers or community health centers to bring access to care to those who gain coverage through this reform effort.

This amendment would ensure that community health centers would not lose revenue when treating newly insured patients, specifically those insured through the exchange.

They have an exemplary track record when it comes to delivering high quality care, often to the patients in communities most in need, in both rural and urban parts of the country. In my home state, over 300,000 of our most vulnerable citizens receive high quality, affordable primary and preventative care at more than 100 health center sites across the state.

So with that, Mr. Chairman, I strongly support
Senator Lincoln's amendment and look forward to a very supportive vote of the committee.

Senator Grassley. [Presiding.] As Chair pro tem, I would like to use the privilege of it not to speak for or against her amendment, but there is some involvement I have had, through nonprofit investigations, certain abuses of nonprofit.

I want to put a long statement in the record, but I would like to just read three paragraphs from it so you kind of know what I am getting at when I put this in the record.

Now that the Chairman is back, I better ask if I can put it in the record.

The Chairman. [Presiding.] Without objection.

Senator Grassley. There was much discussion Tuesday about the motives of nonprofit organizations versus for-profit organizations.

Let me just say that all nonprofits are not tax-exempt, as my staff 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 returned profits to shareholders, while tax-exempt returned profits to executives. In the bill before us, there is nothing that would prevent nonprofit
co-ops from paying their executives what AIG executives
get, just as an example.

I had an amendment that I am not going to bring up.
It was F-8. It does not set limits on compensation. It
would just hold tax-exempt organizations more accountable
for what they pay their executives.

I am going to put the rest of the statement in the
record. Thank you.

The Chairman. Without objection.

[The information referred to appears at the end of
the transcript.]

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, first of all, I want
to thank Senator Lincoln for her amendment that saves
$700 million and $200 million of that is going to the
Menendez amendment on federally qualified health centers,
which I strongly support.

In my state, we have five community health center
networks, with 12 clinics across the state. I have been
so impressed by how they conduct their operations. They
are providing a medical home, which almost all of the
health care reform advocates say is important to
improving the health care system in the country, and they
are operating at substantially lower cost than many of
the other medical facilities in my state.

So they play a very important role in reaching a population that might not otherwise be reached.

My part of this amendment is far more modest. It is $50 million and it will follow legislation that I introduced with Senator Susan Collins that will correct a longstanding inequity in the reimbursement for nurse midwives.

Nurse midwives, as every member of this committee knows, provide very important services to women. My amendment would provide reimbursement for services within their defined scope of practice, as determined by state law.

Nurse midwives currently receive only 65 percent of what other health professionals receive for providing similar care, and this addresses that inequity.

I might indicate that, interestingly enough, the American College of Obstetricians and Gynecologists, along with the American Nurses Association and the National Rural Health Association, strongly support this equitable reimbursement for nurse midwives.

I know in many parts of the country, they perhaps are not as familiar with nurse midwives as we are in our part of the country, but they play a very, very important role in our communities.
I want to thank the Chairman for working with us on this amendment, and, certainly, again, to Senator Lincoln and Senator Menendez.

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl?

Senator Kyl. Thank you. If I could ask a couple of questions to the sponsor of the amendment. Does this amendment apply to hospital executives?

Senator Lincoln. No.

Senator Kyl. Does it apply to drug company executives?

Senator Lincoln. No. It is executives of insurance.

Senator Kyl. How about executives of firms that receive subsidies from the United States Government, like solar companies or wind companies, that sort?

Senator Lincoln. No. I do not think that is the purview of the bill.

Senator Kyl. Mr. Chairman, I would just make a point.

Senator Lincoln. But I do not think we are providing them a captive group of consumers, either.

Senator Kyl. Right. No. What we are doing is providing them with direct cash money. I am talking about all of the businesses that the United States
Government subsidizes.

This is really establishing an incredibly, astoundingly bad precedent. I actually jokingly told a person who was involved in one of these lobbying firms downtown, it had something to do with insurance, I said, "You know, if those folks that you're working for think that they're going to do themselves a big favor by making some kind of a deal with the Congress," I said, "the next thing you know, Congress will be setting their pay."

Well, I thought it was a joke and now I see it has actually come to pass. The United States Government should not be setting private firms' salaries or putting caps on them for tax deduction purposes, and yet that is what is being done.

But it is mostly, I gather, because it is either a disfavored group of people who do not have a lot of friends around here anymore or it is on the theory that we are doing them a favor, in this case, providing a mandate that people buy their product. But as I said, we provide a lot more direct subsidy for people we just give cash to.

Robert Reich, who is a former Labor Secretary in the Clinton Administration, wrote an op-ed piece in which he talked about this and he said the worst thing you want to do in today's -- he calls it the super-competitive
capitalism environment -- is to punish the people who provide the ideas that enable a firm to do better than its competitors, and he goes into a lot of reasons for this.

But he says, "How does the modern corporation attract and keep consumers and investors who have better and better comparative information? How does it distinguish itself?" More and more, that depends on its CEO, who has to be sufficiently clever, ruthless and driven to find and pull the levers that will deliver the competitive advantage.

The reference to the TARP legislation also is a bit misleading, because there we limited this to specifically the chief executive officer, chief financial officer, and the three highest paid officers other than those two.

But this amendment applies to all officers, employees, directors and other workers or service providers, such as consultants performing services. So it does not apply just to the top five people. It applies to anybody that has any connection working for the company, including consultants.

Mr. Chairman, if we start down this road, this may play well in some groups of constituents, but the reality is it is involving the United States Government in more and more places where the government has no business.
We are not taking over the insurance companies, but we are dictating to them what kind of insurance policies they can offer. They can offer no more than four specific kinds. They have to offer two of them.

We set the exact value of those policies, many of the conditions, all of the things that have to be covered. Now, we tell the executives that they can make up to a certain amount of money and have it tax deductible.

I think the American people are tired of Congress meddling in the private sector and this is one more example this committee I do not think will be very proud of if it passes this amendment at the end of the day.

Senator Lincoln. Mr. Chairman?

The Chairman. Are we ready to vote? Senator Lincoln?

Senator Lincoln. Can I just make a few last comments? I certainly appreciate Senator Kyl's comments. I think there are good folks out there in the insurance industry. I know I have worked with an awful lot of them and certainly appreciate that and appreciate what they do.

I will say, just to qualify, that it only applies to insurance companies that get 25 percent of their revenues from the premiums from mandates. So we want to make sure
that it is those that are participating and that are working hard to make this a success and who are taking advantage of the fact that we have required every American to participate in this.

And we are not dictating what they can pay their employees. We are just simply saying that if they want to pay more than $500,000, they are not going to get incentivized to do so by tax deductions, that the taxpayers are not going to pay for that subsidy to increase that executive's pay.

I would just say to the gentleman, you look back from 2007 and there are some good apples and there are some good folks in the insurance industry and I do not disagree with that, but there are others that are making, in executive positions, upwards of $23 million annually.

So if we are looking to these companies where we are going to provide a captive audience of consumers, I think it is only fair to ensure to the consumers that they are not going to subsidize the tax incentive for them to increase that executive pay over the $500,000 limit.

I would just end by saying, Mr. Chairman and to my colleagues, I heard a speech the other day that talked about why people do the right thing, and there are really four reasons why people do the right thing.

First of all, they sometimes do it out of guilt.
They feel guilty, so they do the right thing. Some of them do it out of fear. I have got teenage boys and if they know they are going to get grounded, they pretty much do the right thing.

Some people do it out of selfishness, there is something in it for them. And then sometimes you do the right thing because it is the right thing.

I think this is the right thing and the right message to the American people as we move forward in trying to put our country back on track and its economy back on track, with health care that is going to be more efficient and effective. It is going to be broader coverage for all Americans, and we are going to require them to get into that marketplace.

I think it is only fair to say that they are not going to subsidize any windfall for the executives of these companies.

So thank you, Mr. Chairman, I appreciate it. I would also like to compliment my colleagues, thank Senators Menendez and Conrad for working with me to craft this amendment package.

Arkansas's federally qualified health centers serve more than 100,000 patients in our state with comprehensive, preventive and primary care, mental health, dental, pharmacy, other services. They are often
the lifeblood of our communities and we are grateful to
them and to Senator Menendez.

Without a doubt, the certified nurse midwives in
Arkansas have done a tremendous job and I want to
compliment Senator Conrad on moving forward with that.

Thank you, Mr. Chairman.

The Chairman. Thank you, Senator. We are ready to
vote on your amendment. The Clerk will call the roll.

The Clerk. Mr. Rockefeller?


The Clerk. Mr. Conrad?

Senator Conrad. Aye.

The Clerk. Mr. Bingaman?

The Chairman. Aye by proxy.

The Clerk. Mr. Kerry?

Senator Kerry. Aye.

The Clerk. Mrs. Lincoln?

Senator Lincoln. Aye.

The Clerk. Mr. Wyden?

Senator Wyden. Aye.

The Clerk. Mr. Schumer?

Senator Schumer. Aye.

The Clerk. Ms. Stabenow?

Senator Stabenow. Aye.

The Clerk. Ms. Cantwell?
Senator Cantwell.  Aye.
The Clerk.  Mr. Nelson?
The Clerk.  Mr. Menendez?
Senator Menendez.  Aye.
The Clerk.  Mr. Carper?
The Clerk.  Mr. Grassley?
Senator Grassley.  No.
The Clerk.  Mr. Hatch?
Senator Hatch.  No.
The Clerk.  Ms. Snowe?
Senator Snowe.  Aye.
The Clerk.  Mr. Kyl?
Senator Kyl.  No.
The Clerk.  Mr. Bunning?
Senator Bunning.  No.
The Clerk.  Mr. Crapo?
Senator Crapo.  No.
The Clerk.  Mr. Roberts?
Senator Grassley.  No by proxy.
The Clerk.  Mr. Ensign?
The Clerk.  Mr. Enzi?
Senator Grassley.  No by proxy.
The Clerk.  Mr. Cornyn?

Senator Grassley.  No by proxy.

The Clerk.  Mr. Chairman?

The Chairman.  Aye.  The Clerk will tally the vote.

The Clerk.  Mr. Chairman, the final tally is 14 ayes, eight nays, and one pass.

The Chairman.  The amendment carries.  Next recognized, Senator Grassley.

Senator Grassley.  This is amendment F-5.  I offer this amendment in pursuit of the President's philosophy that he expressed in the joint session of Congress that health care reform would not add to the deficit.

Quote, "I will not sign a plan that adds one dime to our deficit either now or in the future.  I will not sign it if it adds one dime to the deficit now or in the future, period," end quote.

The President did not stop with a hollow pledge on this point, however.  He backed up his promise with a promise to have a fail-safe mechanism to ensure that health care reform would not add to the deficit.

Here is what he said on that point, quote, "To prove that I'm serious, there will be a provision in this plan that requires us to come forward with more spending cuts if the savings we promise don't materialize," end of quote.
CBO may well estimate that this bill is deficit-neutral. CBO could be wrong. We have, unfortunately, seen this several times. That is not saying anything in a denigrating way to the professionals at CBO, because they have a tremendous tough job sometimes looking to the future.

So let us face it. It is really pretty impossible to predict exactly how the spending in this bill will play out, especially when you think about predicting 10 years down the road.

Yet, right now, there is nothing to prevent provisions in this bill from adding to the deficit in the likely event that the spending under health reform turns out to be different than CBO is predicting, and that increased spending will add to the deficit.

So I go back to the President's strong commitment that he made in the joint session of Congress. He said he wants a fail-safe mechanism.

So my amendment would require a fail-safe to make sure there are no deficit increases because of health care reform, not even one dime, as the President said. This amendment would work this way. Starting in 2012, the director of White House Office of Management and Budget would be required to certify whether or not health reform will add to the federal deficit in the
coming fiscal year, and that certification would be included in the President's budget.

If the OMB director finds that health reform is adding to the deficit, then Congress must be notified and exchange subsidies are automatically reduced to the point that they are fully paid for and not adding to the deficit.

At that point, Congress can always intervene and pass additional cost reductions to keep exchange subsidies in place.

So my amendment is a circuit-breaker. If it turns out that health reform starts adding to the deficit, it kicks in and dials the spending back.

We are all aware of our ballooning budget deficit. Both CBO and OMB estimate 2009, $1.6 trillion, 11 percent GDP. This is the highest since World War II. August, OMB increased its cumulative 10-year deficit projection $2 trillion.

According to CBO, the publicly-held national debt in 2019 will be $14 trillion or 68 percent of GDP. So I think we are all alarmed by this and I could go on and on about why we need to do this as we look into the future. But I think you can see that we have something here that will make sure that this does not happen and keep the President's promise. And I will put the rest of the...
statement in the record.

[The statement appears in the appendix.]

The Chairman. Senator, thank you very much. We are all committed to not add to the deficit. We believe this bill will not add to the deficit. I believe CBO's determination that it will not.

But I clearly want to do what we can to achieve that objective and I am willing to accept the amendment.

Senator Grassley. Thank you very much.

Senator Wyden. Mr. Chairman?

The Chairman. Without objection, the amendment is agreed to. Senator Wyden?

Senator Wyden. Mr. Chairman, I would call up D-17, as modified.

The Chairman. Senator, are you ready?

Senator Wyden. Yes. Thank you, Mr. Chairman. Mr. Chairman, this amendment is one that has been authored by Senator Nelson, Senator Schumer and yourself. I will be brief.

The goal of this amendment, as it is for health care generally, is to reform our system so as to promote high quality care. What this amendment would do is move the Medicare Advantage program into exactly that kind of incentive-based, reward-driven system.

The amendment would increase payments for the very
best plans. And this amendment, in the context of the
mark, is budget-neutral.

Mr. Chairman, I think you have helped to move
Medicare Advantage in the right direction. I am very
appreciative of it and I think this is an effort to go
further.

The government now provides what amounts to a
quality rating system, where, in effect, senior citizens
can now go to Medicare.gov and see, for example, how many
stars a program actually has. It is possible to compare
health plans on the basis of quality.

What our amendment would do is boost the payments by
1 percent to those plans that receive a very high rating.
Right now, not only are these high quality plans in
Oregon, but there are ones in Massachusetts, New York,
Florida, Idaho, Montana, Kentucky, Washington, and a
number of other states in our country.

Seniors across the country are going to benefit from
this amendment. We all have seniors in our home states
who are looking for high quality health care plans.

Let me wrap up by just making a short reference as
to what constitutes a high quality plan. The government
makes a number of judgments with respect to quality.
They focus on staying healthy, screenings, tests and
vaccines, getting timely care from physicians and
specialists, managing chronic or long-lasting conditions, and, also, the appeal rights that would be available to senior citizens under the plan.

Mr. Chairman, let me close by saying that I believe modernizing the Medicare program is an integral part of reforming our health care system nationally. Rewarding plans across the country ensure that it will be possible to give the best possible care for the nation's older people, and I hope my colleagues will accept the amendment.

I thank my colleagues, particularly Senator Nelson, Senator Schumer and yourself, Mr. Chairman, for your assistance in this effort.

Senator Schumer. Mr. Chairman?
The Chairman. Senator Schumer?
Senator Schumer. Thank you, Mr. Chairman. I rise in support of this amendment. Thank Senators Wyden, Nelson and yourself for helping with it.

It does not add any new costs. It rather says what we are going to do for Medicare Advantage and puts it into the high quality programs in my State of New York. We have a good number of very high quality programs, everyone agrees, and they should not be given the same type of treatment as the programs that are not high quality and do have many of the abuses we have talked
about.

So I hope we can move this amendment quickly.

The Chairman. I am willing to voice vote this amendment. Seeing no objection, all those in favor, say aye.

[A Chorus of Ayes.]

The Chairman. Those opposed, no?

[No response.]

The Chairman. The ayes have it and the amendment is agreed to.

I understand Senator Kerry has an amendment or two.

Senator Kerry. Mr. Chairman, thank you. I would call up Kerry amendment number 235 C-10. Mr. Chairman, obviously, we are wrestling with this issue of affordability and this morning at our meeting, we had some discussion about it, and both of my amendments are geared to try to deal with components of that.

All of us know, we have heard this for the last few days, everybody understands that people have an increasingly difficult time affording health care and even those who have the insurance are finding it increasingly difficult to hold onto it.

So people make a lot of choices, health care or savings, college education, other things. I know you have been trying to deal with this issue of
affordability, but I still think we have to make some
progress on it, to be honest with you.

I guess we are going to have a vote at some point on
the Schumer amendment, which will address one component
of that.

But you have tried to deal with it, Mr. Chairman, in
the mark by creating a system that bases the cost of
health care on people's ability to pay, and the modified
mark reduces the maximum amount of income that a person
can spend on a health care premium.

We have a range from 2 percent for those with income
at 100 percent of the poverty level and 12 percent is the
maximum amount of income you can spend if you are at 300
to 400 percent of the poverty level.

I think that is a good start. But still, under that
plan, too many low and middle income families, I believe,
would still be paying too much. And those percentages do
not include out-of-pocket expenses. So the total
expenses for those families could be even higher.

What concerns me here is that perhaps one of the two
most essential ingredients, and I have said this since
day one, is what we do here has to slow the rate of
growth in health care costs and hopefully lower the
premiums for a lot of Americans.

The second thing is it has to guarantee we deliver
at least equal quality care, if not better quality care.
Now, I am concerned that the low actuarial values of the
plans may make it difficult for some folks to afford the
out-of-pocket expenses. That is one concern.

But, also, if I had my druthers, I would rather
include an additional cost-sharing subsidy, and I am
going to look for it when we get to the floor today and
that may be a better place to do that.

But I do believe we could improve on the mark here
by making the premium tax credits more affordable for
those with low incomes. I talked previously about the
age rating band -- so older Americans do not have to pay
premiums that are prohibitively expensive, and we have
sort of moved beyond that now.

But here is what happened. There is a chart that
shows where we go here. The Chairman's mark forces low
income families to pay a greater percentage of their
income on health insurance premiums over time, and I am
not sure a lot of colleagues have necessarily focused on
that, maybe they have.

Premiums cannot consume more than 2 or 12 percent of
income based on your level of poverty. However, the
premium caps are allowed to grow based on the increased
cost of the premiums.

So in effect, we are linking the cap to the rising
cost of health care itself rather than to some other index, like consumer price or something else. As a result, low income individuals could face a premium that, down the road, consumes from 6.5 percent to 20 percent of their income just two decades from now.

Now, Mr. Chairman, if it is unaffordable for a low income person to pay more than 12 percent of their income on a health insurance premium in 2013, why is it acceptable to allow a premium to consume nearly 20 percent of their income in 2029?

So this amendment would prevent the premiums from consuming a growing share of income over time. It would eliminate what I think is a wrongly chosen indexation and allow premium contribution levels to remain at a consistent percentage of income, which it seems to me is the principle that we are trying to invoke here.

The provision in the mark was designed to limit how much the Federal Government would have to pay for health care for low income people and in its attempt to save federal dollars, it forces low income families to pay nearly one-fifth of their incomes on premiums, and that does not include deductibles, co-pays or other out-of-pocket expenses.

So I think we have got to ensure that we have affordable insurance premium options to low and middle
income families and, by any standard, I think that becomes unaffordable.

So it seems to me that if we do not seize this moment for this historic reform to truly reform it for those folks, we are all going to pay a price in the failure of the system down the road and that will continue to debilitate the health and the finance of millions of families and our economy.

So I just wanted to chat about this a bit, Mr. Chairman. Maybe there is a way to have a guarantee that between now and the floor, we can actually get something on this.

But what concerns me is we have been talking for a month or more about the $25,000 versus $21,000 and we have not yet landed on that. So I just want to try to make certain here that we are going down the right road.

Do you want me to talk about the other amendment? I want a commitment, Mr. Chairman, that we are going to get something done between now and the floor. I do not want to withdraw it if we are not prepared to actually address it.

The Chairman. Well, you raise an issue, frankly. There is a tradeoff between basically holding people harmless, on one hand, and just sort of bending the cost curve on the other, and the provisions in the mark, I
would say, significant in addressing utilization.

But you make a very good point that the amendment you are offering will have the effect of holding individuals harmless.

I understand that point. I think it is a very good point and I think it is something that deserves very strong consideration.

Senator Kerry. According to Gruber, who has been our guide on a lot of this, it is somewhere in the vicinity of an $8 billion cost. We could not get CBO actually to score this for us. But that is about the cost that I think it is.

I have a couple of offsets. If the Chairman is willing, I know we are not going to do that here tonight, but I really would like to know that we are going to address this in good faith between now and the floor or even a melding of the bill.

The Chairman. You have got my pledge to address it in good faith, because you raise a good point.

Senator Kerry. I appreciate that, Mr. Chairman. And with that commitment, I know you have kept your word on this otherwise. In many instances, we have been able to make progress. So I will withdraw the amendment and try to do that.

I have a second amendment, Mr. Chairman. It is an
issue we talked about the other day, I think yesterday. I cannot remember which meeting, we have had so many. And a number of our colleagues thought this was an idea that --

Senator Kerry. This is Kerry amendment number 233 C-8.

Senator Kerry. Now, Mr. Chairman and my colleagues, in Massachusetts, which has been the subject, happily, of a lot of discussion about some of the things we have been able to make happen, our health insurance exchange is not just an open market of choices. It provides consumers with a variety of plans that have been chosen because of their value and their competitive features. States, in my judgment, ought to have the ability to be able to be prudent purchasers. I think we want states to be able to leverage the best plans and the best prices and the best options that they can according to the standards of those states.

Allowing exchanges to simply offer every licensed health plan is only going to lead to consumer confusion and I think it is going to lead to wasteful spending on inefficient plans.

Now, I appreciate that the changes reflected in the
modification, the mark, creates a rating system based on quality and price, and that is a fair, good first step. I accept that.

But what we are really talking about here is getting value out of the health care system. And if we are going to set up a new health care marketplace, we ought to give consumers the benefit of offering a high value-added plan, a high value plan for those people to choose between.

In Massachusetts, Mr. Chairman, the Connector is able to negotiate with plans for lower bids in Commonwealth Care. In other words, someone wants to offer health care, they come into the Connector, and that is not the end of it. They do not just give you the plan and say, "Here, take it or leave it."

The Connector has the ability to come back and say, "Well, we think you can do better here." It is like any bidding, like any kind of contract.

And the result is we save 6 percent off the cost of premiums; 6 percent is an enormous amount when translated to the billions of dollars for the American taxpayer. And the Connector works with plans in order to find cost-effective savings, including limited networks, wellness programs, participation discounts, and favored enrollment rules.
We had the vote earlier that passed on Senator Ensign’s amendment, and I voted for it in the end to improve wellness programs. And the Connector's ability to negotiate contracts for Commonwealth Care, Mr. Chairman, has placed an appropriate level of pressure on carriers to keep the rate increases low.

We had a very spirited debate here about public plans. Many of us feel very strongly, and I think we will pick this fight up on the floor, obviously, that you need something in order to compete with the companies and pressure them to change outdated, outmoded, simple, easy, status quo practices.

Over the three years of our program, the average premium increases in our state have been only 4.7 percent compared to 8 percent average premium increases for private insurance.

Medicaid managed care organizations have also been shown to be cost-effective, save money and they produce good outcomes. I think we need to develop policies to encourage the participation of Medicaid managed care organizations that are comparable in quality and the networks to other plans.

In Massachusetts, Commonwealth Care started with exactly such plans, local, nonprofit Medicaid managed care organizations, which enjoy a 10 to 20 percent
premium advantage over the local broad network nonprofit commercial plans, which, in turn, enjoy a 10 to 20 percent premium advantage over national for-profit health plans.

That is how you offer people an opportunity to have a choice with a low premium and affordable plan. Most of the savings from Medicaid managed care organizations are due to negotiating low provider payment rates, as well as their own low administrative overhead.

They pay Medicaid Plus rates to get provider deals and they retain about 8 percent for administration and 2 percent for the margin.

So the savings realized from using MCOs would be used to improve affordability, and that is a smart policy. It saves money for both the taxpayer and for the consumer.

Taxpayer dollars are used for subsidies and MCOs would reduce the dollar amount necessary for each subsidy. So you win on both sides of the equation.

Mr. Chairman, the Commonwealth Health Connector, in other words, is much more than just a portal for allowing information about insurance options.

It performs a variety of functions, bidding and contract negotiation, enrollment, premium billing, management of subsidized and unsubsidized insurance
plans, and customer service support.

And that is how we have been able to get to only 2.6 percent of our population that today does not have any insurance at all.

Mr. Chairman, this amendment would simply allow state exchanges to engage in prudent purchasing with no federal intrusion. The Federal Government does not do this. There is no federal takeover. There is no Washington decision.

We simply allow states exchanges to engage in prudent and selective purchasing of insurance and that would empower exchanges to be good stewards of taxpayer dollars. It would encourage states to allow Medicaid managed care organizations or comparable plans to provide coverage to enrollees.

If you allow plans to compete to participate in the exchange, that is exactly what large employers already do to vet their health plan options for their employees, including, I might add, the Federal Employees Health Benefits Plan.

I believe we ought to allow the average American to do what we in Congress get the benefit of. At least we are not giving the same plan, but why not give them the same right to have their state negotiate for the better benefits that lower the prices and give them a better
option.

Regrettably, I am still waiting for CBO, as we wait often here right now, for them to score this amendment, but I am convinced it will generate savings. It is hard to understand how this amendment would not generate savings and the question for us is how much.

We are struggling with this question of the $21,000 versus $23,000 versus $25,000 and this is an ideal opportunity to be able to raise that threshold and provide capacity to have competitive bidding.

Mr. Chairman, in your mark, you had proposed a policy for competitive bidding for Medicare Advantage. The implementation of that policy is supposed to weed out inefficient plans and ensure that federal Medicare dollars are being spent to reward value.

Why would we not want the same principle to apply across the board here? The Federal Government is devoting $463 billion in subsidies to provide coverage to people with low and moderate income.

Why do we not want the taxpayer paying for their subsidies to be able to get the best deal that they can get?

So my amendment would ensure that the Federal Government is not simply writing a blank check to insurance companies and it would only subsidize plans
that are cost-effective and efficient. And I would ask
that we think about this and pass it.

The Chairman. I see it is being met with a
deafening silence. I appreciate that, Senator. I have
been conducting other business. You would like what,
now?

Senator Kerry. Well, I would like you to pass it.
I would like you to accept it.

The Chairman. I know you would, which we,
obviously, cannot do.

Senator Kerry. Well, I would like to know why we
should not.

The Chairman. Is there a score?

Senator Kerry. As I said, we do not have the score
from CBO yet, but we are guaranteed savings. If you
negotiate a plan for less than it is offered at bid, you
save, and we save taxpayer dollars.

Can I tell you exactly how much we save today? No,
but we saved 6 percent in Massachusetts. So the question
is: is 6 percent worth it and is it worth it to give
people a better buy for their dollar? I would think
everybody would vote for this. I mean, this is free
enterprise. This is competitive bidding.

The Chairman. Every state is unique, including
Massachusetts. So it is unclear exactly how this is
Senator Kerry. Mr. Chairman, it just gives the state, the State of Montana would have the right in its exchange to not just collect plans, but to actually allow the person collecting the plans to go back to the person who gave it to them and say, "I think you can shave off of this. I think you could provide this service for less money."

The Chairman. It raises, again, the basic question that you raised earlier on public option. It also gets a little bit into what Senator Cantwell is doing.

Senator Kerry. With a zero public component to it.

The Chairman. It also raises the question of cost. This is something that is certainly meritorious, but I do not think we can work it out at this late time tonight.

I think it is very important to look at ways to enhance negotiation. I think that is important. But I do not know that -- this has come up very late. There has been a lot of discussion about exchanges, what they do and do not do, are they a clearinghouse, are they a gatekeeper.

I think it behooves us to have thought this through a lot more before we can consider it tonight. But you raise a good point about negotiation, the importance of negotiation.
Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, I have heard Senator Kerry on this point now two or three times and the more I listen to him carefully, the more convinced I am that he has got something here that has value.

I try to put myself in your shoes and the difficulty, of course, is we do not have a score, as we have experienced on other amendments, including two of mine that I am not offering here because I cannot get a score, and I know other colleagues are in this spot, too.

I am not being critical of CBO. I know that they are swamped and this is extraordinarily difficult to respond to the hundreds of amendments that all of us have put on the table.

But it does create an awkward situation for the Chairman when we do not have a score; I know that, as well.

I wonder, Mr. Chairman, if there is not some way to say to the Senator that between now and combining the bills, that there will be a -- hopefully, there would be a score by then, which would make a considerable difference, and if the score reflects what Senator Kerry believes it will, there would be savings here that could be applied to other needs, and that at least the
assurance could be given him and others of us who are interested in the concept that you would bend your best efforts to get a score and then to seriously consider the merits of it before the bills are combined.

The Chairman. That is a good idea.

Senator Kerry. Mr. Chairman, first of all, I thank the Senator from North Dakota enormously and I know that he has been thinking about this a lot.

There is no hidden whammy in this thing. This is, I think, good policy and I think, on reflection, as we look at it, other Senators are going to come to see it as something they would want.

If you are a state's rights supporter, if you are somebody who likes your home state to be able to make its own choices, boy, this is right up your alley. This empowers states and it also saves money and we have proven that.

So I know we do not have the OMB score tonight. Is it an amendment we have had filed the whole time. What I would ask you is a twofold thing, Mr. Chairman. Number one, I accept that you are willing to work with me in the next days. I would like to have the number from OMB.

The Chairman. How about CBO?

Senator Kerry. CBO, excuse me. But second, I would also like to ask that if we get that number back,
given my strong feelings about raising that $21,000 threshold level up to hopefully -- I have asked for $25,000, but I recognize we are dealing with difficulties here.

But if we get a decent savings here, I would like to think about applying it to that effort.

The Chairman. I do not know if I can make that commitment. I can make the first, but I do not know about the second. There are a lot of other Senators' interest, which you, I am sure, would agree with, in addition to what you mentioned just now.

I do not want to commit to how savings are allocated. Money is fungible anyway.

Senator Kerry. Well, what I am asking you to commit to is the --

The Chairman. I understand the issue and I am very sympathetic with raising those threshold levels. I am thinking right now the Senator from Michigan, she is very interested in raising those threshold levels.

Senator Kerry. Well, we have been working together on it.

The Chairman. So there are certain allies there.

Senator Kerry. We have been working together on it.

The Chairman. So we will work to get those...
thresholds up.

Senator Kerry. Fair enough. With that stated, I would ask unanimous consent to withdraw the amendment.

The Chairman. The amendment is withdrawn. Senator Rockefeller is recognized for amendment.

Senator Rockefeller. This is amendment C-1 and I will not ask for a vote on this tonight, because we have kind of agreed that we are going to work this out, because there is not that much difference between us.

And it has to do with this very unusual situation where the self-insured, which is mostly the larger companies, very big, semi-big, et cetera, are under federal insurance jurisdiction, so that DOL does not do that. So that they really do not have -- their insurance does not have any controls at all.

The Chairman's mark goes a considerably way to change that. I add on some more individual facts of -- I will just use lifetime caps or that kind of thing. It would not necessarily be that, but it would be like that.

I guess maybe some of my colleagues may argue that many self-insured plans already follow many of the reforms, but companies are different and they do not all do it, and my idea is that it should be equal.

Those that are self-insured and larger and those that are not self-insured and subject to state
regulations should have the same kind of constraints upon insurance.

I have talked with the Chairman and I am incredibly grateful to him for indicating that we will work on this. We will not have a vote on it now and we will come to agreement either before the vote or before the merging.

The Chairman. I appreciate that, Senator, and I especially appreciate your raising awareness that the provisions in the bill with respect to insurance market reform, the individual market and the small group market, namely, bans and prohibiting a company from denying coverage based upon preexisting condition or health care status. In addition to that, the reform will need to state rating bands.

Those provisions basically, at least the first one does not help insurance market reform, do not apply to your large companies, do not apply to self-insured, do not apply to ERISA plans, and that is a very important point to make.

The second logical very important point is maybe they should. Maybe they should apply. So that Americans are better assured that they will have quality health insurance, whether it is individual market, small group market or large group market.

In the legislation, in the mark, so far, currently,
employer plans may not discriminate on health status, medical condition, claims experience, and there are two others. But your amendment would also require that effective January 1, 2013, all self-insured will be required to apply these requirements to all new plans; that is, prohibition from applying preexisting condition exclusions, prohibition on rescissions, guaranteed issue, and guaranteed renewability.

Those are all very worthwhile goals and I, frankly, think that they and perhaps a couple others may be, a couple other provisions, the guarantees should be looked at very seriously, very closely.

As the bills emerged and as we go through the process, I would like to very much increase the protections for Americans with respect to ERISA plans and self-insured plans. You have got a good idea here.

Senator Rockefeller. Thank you.

The Chairman. Thank you. All right.

[Pause.]

The Chairman. We are pausing temporarily here to work out some agreements. We are very close. Let me list the amendments outstanding and somewhat in order, somewhat.

First is a Schumer amendment, which he offered earlier and withdraw. Next would be the Kyl amendment.
Senator Schumer. Mr. Chairman?

The Chairman. Yes?

Senator Schumer. It is now a Schumer-Snowe amendment.

The Chairman. A Schumer-Snowe amendment. Oh, are you not good. Are you sure it is not Snowe-Schumer?

Senator Schumer. It could be.

The Chairman. Well, I am not going to get into that one. Anyway, it is the Schumer-Snowe amendment; then Kyl F-3 on medical device fees; and then probably Rockefeller with respect to CHIP; then Rockefeller, Medicaid; Wyden, free choice; and, we might have a cleanup amendment to fix a couple of minor points. That is it.

Senator Bingaman?

Senator Bingaman. Mr. Chairman, the amendment that I earlier talked about, I think, two days ago related to two items. One was trying to streamline enrollment in the exchanges and then the other part, the offset was related to state mandates.

There has been some concern about the offset and it was my hope that the part related to streamlining enrollment could still be adopted as part of our markup and I hope that is still possible.

The Chairman. I think it is.
Senator Bingaman. Well, I would like to be sure that is somewhere on your list, if that is possible. I have spoken to Senator Rockefeller and he is a strong supporter of that effort, as well as I am a strong supporter of his CHIP amendment.

The Chairman. But that further complicates matters, because we have got to find revenue. I think yours, as I recall, cost about $4 billion to $5 billion.

Senator Bingaman. $4.4 billion. And we have advised staff about possible ways that it could be paid for and they are looking into that.

Senator Ensign. Mr. Chairman, please do not agree to the amendment without that discussion, because we had some problems with the streamlining.

The Chairman. All right.

Senator Bingaman. This is C-1, I believe, was the amendment.

Senator Ensign. Did we not talk about this and then it got put aside for a while?

The Chairman. Yes.

Senator Ensign. This is the one.

Senator Bingaman. I think the only part that I had heard concerns about was the offset.

Senator Ensign. Well, just we did not discuss it, because we put it off because we had some problems with
Senator Bingaman. Really?

Senator Ensign. Yes, because it can make it possible -- with some of the streamlining processes, it could open it up to people who are here illegally because it could make it too easy for them to apply.

That is one of the things I wanted to look into with it.

Senator Bingaman. Well, I will be glad to debate that with the Senator whenever the time is right.

The Chairman. Well, maybe we ought to do that right now. We do not know what the offset is, but maybe we could debate the merits of the administrative streamlining and get that out of the way.

Senator Bingaman. Should I go ahead and describe that part of the amendment?

The Chairman. I suggest that. Maybe have a debate on the streamlining.

Senator Bingaman. Well, we had earlier passed it out, it is C-1, and we can pass it out again. C-1, as modified, and that is what we had passed out is C-1, as modified.

The Chairman. They should be given a copy.

Senator Bingaman. Let me go ahead and describe this while it is being passed out. The portion of the
amendment we are talking about now, which is the
streamlining, would direct the Secretary of Health and
Human Services, working in conjunction with the Secretary
of the Treasury, to establish a system of application,
enrollment and retention for Medicaid, CHIP and tax
credits that meet a series of requirements.

There are eight requirements listed and they are
requirements that we developed with the help of experts
who had looked at this.

The purpose, of course, is to facilitate people
signing up for the benefits that they are eligible to
receive, either in Medicaid or in CHIP or through this
new tax credit system that would be established in this
legislation.

The Secretary could promulgate model agreements,
enter into interagency agreements concerning data
sharing, consistent with the safeguards of privacy and
data integrity.

We have made it very clear that all of the
protections that otherwise exist in the law against
anyone fraudulently obtaining credits or obtaining access
to these benefits, all of those protections would remain
in place.

The only issue is whether a person has to go to
three or four offices to try to figure out what they are
qualified for or whether they could go to the exchange
and have that determination made and verified and sign up
at that point.

Senator Ensign. If the Senator would yield for a
question.

Senator Bingaman. Certainly.

Senator Ensign. What I thought earlier, and maybe
I am reading this wrong and maybe staff can even clarify
this if the Senator cannot, it says this form can be
filed online, in person, by mail or by telephone.

How do you know that that is who this person is if
they can do it by online, in person, by mail or
telephone? And what kind of protections are put in
place?

Senator Bingaman. Let me ask staff to respond to
that and ask if this is a procedure that is not currently
possible in these programs otherwise.

Mr. Schwartz. We may give a joint response here.
But at least as it relates to Medicaid, I think a number
of states have tried to already undertake some of these
efforts, as you indicated, Senator Bingaman, especially
in recognition of the situation that that population
finds itself in, and we have talked a lot about that in
the past couple weeks, the difficulty of going in person
to an office when you have an hourly job that would
require you to take off during working hours.

Senator Ensign. Could you describe to me, while you are describing that, kind of give an example and tell me how we know that it is you, that you are here legally, that there is not some kind of monkey business going on or whatever, and that we also know that it is you?

Is there a fingerprint? How do we know, if you are on the telephone and you are filling out this form on the telephone?

Mr. Schwartz. Well, obviously, Senator Ensign, there is no fingerprint if you are not in person, but I am not aware of any fingerprint requirements for Medicaid.

But there are documentation requirements that were added in the Deficit Reduction Act to the Medicaid program. We have talked about them, as well. So that goes to your question about your status as a citizen or a legal permanent resident. There is a list of documents. A number of them do also confirm your identity, because things like a passport or a driver's license would have a photo. So those sort of kill two birds with one stone.

Senator Ensign. Except that if you do not see the person, how do you know the photo is correct? Let me give you an example. I remember watching 60 Minutes -- I
do not want to give credit to any programs out there, but
birth certificates and death certificates are not cross-
referenced in states.

So let us just say, for instance, somebody dies, and
we have all had these cases in our offices where
somebody's Social Security benefit gets cut off or
whatever. We call them our Lazarus cases, where we have
to raise them from the dead, because they really did not
die.

There are all kinds of things like this that go on
because they do not coordinate the death certificate and
birth certificate.

So let us say that somebody wrongly has a birth
certificate. They read the obituary. They got
somebody's birth certificate. They fill it out. How do
they know that this is not being done? They have got a
valid birth certificate.

Mr. Schwartz. Obviously, we have talked about this
before, as well, that there are ways around the system.
Of course, that is illegal. So if you apply for federal
benefits -- I am unfamiliar with all of the statues, but
certainly it is like a False Claims Act violation,
because you are misrepresenting the truth.

Senator Ensign. But you are already here
illegally. By definition, if you are here illegally, you
have broken the law already. You are an illegal alien. You are now applying with somebody else's birth certificate that you have obtained.

How do we know it is you? He said that there are protections built in. I do not see the protections.

Senator Bingaman. Let me just clarify that the concerns that you are raising relate to the Chairman's mark. They do not relate to my amendment.

Senator Ensign. Well, it says that the form can be filed online, in person, by mail or telephone.

Senator Bingaman. But that is true with Medicaid, as I understand it. Is that wrong?

Mr. Schwartz. That is true under current law and how the program operates.

Senator Bingaman. Yes. That is current law you are concerned about.

Senator Ensign. Yes. I have been concerned about that for some time.

Senator Bingaman. Right. So it is not a concern about my amendment. It is a concern about current law. I just wanted to make it clear that I am not changing the requirements that people have to meet in order to sign up.

I am not changing the eligibility and I am not changing the verification requirements that they have to
Senator Kyl. Senator Bingaman, would you yield for a question on that point? I know this language is not legislative language, but line two says the form can be filled online, in person, by mail or by telephone.

It is hard to see how you could do that and maintain the same verification requirements that are in the legislation.

Senator Bingaman. I think that is just what the staff just advised is current law, that each of those is possible under current law. I do not mind crossing out line two, if you do not like line two.

But we are not changing current law with regard to what process you follow. All we are saying is let us all do it in a coordinated way so that you do not have to go to one office to get signed up for CHIP and a different office to get signed up for Medicaid and a different office to get the exchange.

Senator Kyl. Current law, though, there are no tax credits in current law. So we are creating a new product here.

Senator Bingaman. No. We are creating --

Senator Kyl. Is staff telling me that for Medicaid, you can sign up by telephone?

Mr. Schwartz. I do not know for sure about
telephone, but I do know that you can do things online and by mail.

Senator Kyl. I really suggest that the Senator think carefully about this, because this is one of those ones that is just made to order for the talk shows, I am afraid, and would strongly suggest that you consider modifying that.

People are already concerned that we are going too easy on eligibility and, obviously, there is a lot of money involved here.

If we are worried about waste, fraud and abuse, and the President at least has said he is, then we should do everything we can to ensure that people cannot skirt what would make good practices in eligibility verification.

Thank you.

Senator Bingaman. Could I ask staff to confirm or contradict what I am trying to convey to my colleagues here, that nothing in this amendment changes the law with regard to how a person's identity is verified? Is that right?

Mr. Schwartz. I think that is correct, Senator, in terms of the Medicaid program. I think the question that Senator Kyl asked specifically was what states do today, and I honestly do not know if states allow telephone applications.
They do vary and so there may be some that I am unaware of. They certainly do in person, mail or online parts of the process.

And if I understand your point correctly, you are saying that you would leave that untouched, the state flexibility, and that the goal of your amendment is to better coordinate among these three programs, the tax credits, CHIP and Medicaid. And the way that I read your amendment, you are not changing the current law for CHIP or Medicaid.

Senator Grassley. I think somebody ought to tell us exactly how citizenship will be checked. The Senator's good faith says you are not changing anything, but we are down to a basis of how do you do it.

If there is an Internet application or phone application, how do you know -- how do you check citizenship under those circumstances?

Mr. Schwartz. Senator Grassley, for Medicaid and CHIP, there are two basic ways. There is the list of documents that were included in the Deficit Reduction Act and then, more recently, earlier this year, in the Children's Health Insurance Program reauthorization, we created what we have come to refer to as the Social Security option, which involves submitting the applicants.
Senator Grassley. All right. But what if it is done over the phone, how are you going to show those documents?

Mr. Schwartz. Again, I do not actually know if the phone works. I do not know if it is an option in the states right now.

Senator Grassley. Through the Internet then, let us say, through online application.

Mr. Schwartz. If you do an online application, it is theoretically two ways. If it is a passport, you could certainly be required to give your passport number, or you could be required to mail in, I guess, a copy of the front page -- I have to admit that I have not applied for benefits in these programs, so I do not know.

Senator Bingaman. Mr. Chairman, let me just point out here for my colleagues. It says here the form can be filed online, in person, by mail or by telephone. So this is not saying that all the verification is done that way. It is saying that is a way that you can file your application.

Senator Ensign. Senator Bingaman, how do you file it by telephone, though, was my question?

Senator Bingaman. You can fax it.

Senator Ensign. You could fax it if that is --

Senator Bingaman. Or you can call up and you can
say, "Here is all my information" and they can fill it out while you give it to them over the phone.

Senator Ensign. Could you put a line in that actually says that the verification has to take place in person with a photo ID?

Senator Bingaman. That is not current law. You have lost that amendment.

Senator Ensign. Could we not make it better?

Senator Bingaman. You have lost that amendment.

Senator Ensign. Since you will not go for photo ID, can we at least say that it should be verified in person?

Senator Menendez. Senator Bingaman, will you yield?

Senator Bingaman. Yes.

Senator Menendez. This is largely the debate we had the other night and there was a vote and the vote was pretty decisive, same issue.

It is an attempt to move a birth certificate or a naturalization certificate as proof of citizenship to a photo ID, a government-issued photo ID.

But I have to be honest with you, there are plenty of government-issued photo IDs for which you do not have to show your citizenship. You only have to show your place of residency in a county and that will get you a
government ID.

Are you familiar, Mr. Schwartz, at all with the GAO report that reviewed six state Medicaid programs in 2007 and found that verification rules had cost the Federal Government an additional $8 million and they caught only eight undocumented immigrants?

So in other words, according to the GAO report, the Federal Government spent $8 million to save $11,000. For each dollar the Federal Government saved, we had to spend $755. Are you familiar with that GAO report?

Mr. Schwartz. I am. I believe it was a review of the list of requirements for citizenship that the Deficit Reduction Act added.

Senator Menendez. $8 million spent to catch eight undocumented immigrants, saving $11,000; to spend $8 million to save $11,000, that is really cost-efficient.

Senator Bingaman. Let me ask staff to just briefly review when an application is made for these tax credits in the exchange, how that process will work.

As I understand it, people would apply for the tax credits. It would be verified with the IRS. Could you go through that very briefly?

Mr. Klouda. Certainly, Senator. The way the mark reads, everyone who has an SSN, their name, date of birth and SSN will be verified with the SSA, Social Security
If that person attests to be a U.S. citizen, that attestation will be checked against SSA's records, as well. If they claim they are not a U.S. citizen, they are also required to supply their A number or their I-94 number and that information will be checked with DHS to see if they are lawfully present in the United States.

We also require that people submit their income information, which we verify with the IRS.

Senator Bingaman. So all of that is in the Chairman's mark.

Mr. Klouda. That is correct.

Senator Bingaman. And all of that would continue to be there under my amendment.

Mr. Klouda. That is my understanding of your amendment.

Senator Bingaman. We lost our Chairman, but that is about all the explanation I can think of to give you.

Senator Ensign. Are those required in everything; in other words, not just the tax credit? Are they required for the other portions of the bill, the other government programs in the bill, the Medicaid expansion?

Mr. Schwartz. I am sorry, we got confused. Could I ask your indulgence? Could you repeat your question?

Senator Ensign. Yes. The requirements that Mr.
Klouda -- we are learning how to pronounce names around here. Those requirements that you just read off, are those requirements for all of the new programs in the bill, required for all the new government -- some kind of subsidies, whatever new programs that their citizens are signing up for?

Mr. Schwartz. If I understand correctly, to get the tax credits, you need to have a Social Security number or a taxpayer ID number. That is not a requirement for Medicaid or CHIP. If you have that, it is one way that we can verify, but it is not a requirement.

Senator Ensign. Let us just give an example. If somebody has an I-10, taxpayer identification number, that person was here legally, now that person has overstayed their visa and still has an I-10 number, are we going to know that? Are we going to find that out through any of these?

If you are going through Medicaid, the expansion of Medicaid right now, are you going to be able to find that out?

Mr. Klouda. Well, if the person was a non-citizen, they would have an A number or an I-94 number and that would be checked with the DHS data.

Senator Ensign. That is what I just said, but he
just said that that was only applied for the tax credits. I am saying is it applied for all of the programs in the Chairman's mark?

Mr. Klouda. For the access to the exchange.

Senator Ensign. Yes, for the access to the exchange. For expansion of Medicaid?

Mr. Schwartz. So I misspoke and I apologize. We would catch them under the same mechanism, because you do actually have to submit a Social Security number for Medicaid. So I misspoke. I apologize.

You have to submit your Social Security number when you apply for Medicaid.

Senator Ensign. And is that checked against if somebody has overstayed a visa? You get a valid Social Security number when you have a work visa in this country.

Mr. Schwartz. So when you apply for Medicaid, if you are not claiming to be a citizen, but you are claiming to be here legally, then that would --

Senator Ensign. And you started legally, but now you overstayed your visa. From what I understand, there are several million in this country that have overstayed their visas.

I do not know the exact numbers, but would those people be found out?
Mr. Schwartz. The system would work the same, because if you are not claiming citizenship, then it is DHS, as Mr. Klouda said.

Senator Ensign. For all of the programs in the bill. Not Medicaid expansion, from what I understand.

Mr. Schwartz. But it is current law.

Senator Bingaman. I think if my amendment is adopted, the problem that the Senator is identifying or thinking he might be identifying is solved.

As I understand it, when a person comes into the exchange, if we are going to have these benefits provided through an exchange --

Senator Ensign. By the way, I am not trying to like be argumentative. I want to just make sure that it is. Do you understand what I am saying?

Senator Bingaman. But I am telling you I think --

Senator Ensign. We want to have all these precautions in place. I am just trying to make sure they are.

Senator Bingaman. The chance of these precautions being place is enhanced very substantially by my amendment, because everybody comes into the exchange, everybody's identity is verified, everyone demonstrates what their income situation is and then if they are eligible for Medicaid, they can be referred at that point.
to Medicaid.

But they will already have been identified and verified through IRS or through the Department of Homeland Security.

Senator Ensign. Does the staff agree with the statement?

Mr. Schwartz. I was actually conferring with people smarter than I am to try to be better able to answer your question. And when I said that for current law, for Medicaid, they are required to verify, that is in Section 1137 of the Social Security Act.

So we do not have to specifically apply it to the Medicaid expansion, because it is current law in Medicaid and what we do in the expansion is increase the mandatory minimums for income eligibility levels. But we do not specifically reapply all of the rules, because we are just adding new people to the program as it exists.

Senator Ensign. My concern, actually, is his amendment would strengthen and it would actually require all of the things that Mr. Klouda said would be applied across the board to everything in the bill now. Is that correct?

Mr. Klouda. My understanding is that the procedures that are in the Chairman's mark for verifying eligibility very similar to some of the procedures that
we are using in Medicaid. So I think the statement is
essentially correct.

Senator Ensign. He said it strengthens. Does it
strengthen or keep it the same?

Mr. Klouda. I am sorry. I missed his point on how
it strengthens.

Senator Ensign. Would you mind repeating it,
Senator Bingaman?

Senator Bingaman. Well, what I was trying to say
was that having a coordinated system for identifying
folks when they come in and routing them to the right
place would, I thought, help solve the concern that I
think the Senator from Nevada is trying to raise here,
which is that someone is going to sneak through the
cracks and not be properly identified or verified for
eligibility before they get their benefits.

It seemed to me that having it done in a coordinated
way, which is what my amendment tries to do, would help
solve that.

Mr. Klouda. I think to the extent that there is
sort of one gateway into the system and the same
verification is occurring, yes, it probably would be a
more efficient and strengthened system.

Senator Ensign. Where in statute does a state have
to cross-check with DHS? Where in statute? You
mentioned current law. In statute, they have to cross-check with DHS if they are a non-citizen.

Mr. Schwartz. Also, in Section 1137 of the Social Security Act, I do not have the exact cite, I can get that for you, but it says if such an individual is not a citizen or national of the United States, there must be presented either, and then there is an A or a B, alien registration documentation or other proof of immigration registration from INS.

Skipping some words, "or such other documents as the state determines constitutes reasonable evidence indicating a satisfactory immigration status."

Senator Ensign. So if the state determines that it does not want to, it does not have to check with DHS, because you said A or B.

Mr. Schwartz. A or B relate to the documentation you have to present. So then the verification of those, because this is for a non-citizen, is done through DHS.

Senator Ensign. And it has to be done with DHS.

Mr. Schwartz. Well, states are charged generally under 1137 with verification of these things. So that is my understanding. That is the federal agency that does the verification.

Senator Ensign. Mr. Chairman, could I just make one final point on this? Senator Bingaman, staff here
was talking about the almost futile effort of the Internal Revenue Service, which has now spent billions of dollars to coordinate all of its computer activity.

I am also aware of the FBI -- Senator Grassley is aware of the FBI's attempts, as well, spending I do not know how many billions of dollars to try to computerize their operation. They have been at it for, what, 10 or 12 years or so and still do not have it done.

The intention here is, at least I think, laudable, but I suspect that there is no idea of how much it might cost or how long it might take to coordinate all of this among all the different agencies where it would have to be done.

This is meant as a constructive suggestion. Rather than mandating this in the law, would it not make sense to say that there should be a study with a recommendation back to Congress to determine how long it would take, how to do it and how much it would cost, and any recommendations or something along those lines?

Senator Bingaman. Mr. Chairman, if this legislation becomes law, we are putting place a system that will have about a four-year time period before it goes into effect and, to me, it would be foolhardy for us to miss the opportunity to direct that this be done in a coordinated fashion.
For us to say we ought to study whether it makes sense to do it in a coordinated fashion would be crazy.

Senator Ensign. I agree. How to do it in a coordinated fashion?

Senator Bingaman. Clearly, they are going to have to come back and figure it out, but they have got four years to do it. We may have to have some oversight hearings down the road to find out whether they have done it properly.

But in this legislation, we are trying to say here is what we are directing you, the Executive Branch of government, to go do and, clearly, it makes sense to direct them to go do it right, not to study it.

Mr. Schwartz. Senator Bingaman and Senator Ensign, if I could just actually complete an answer I should have given before? I apologize.

It is 1137(d)(2), that list of documents that I said for non-citizens. And if I had continued reading down the page, I would have seen (d)(3) specifically does reference the state's obligation once those documents are presented.

It says, "The state shall utilize the individual's alien file or alien admission number to verify with the INS the individual's immigration status through an automated or other system."
So there is actually a statutory reference for the state to verify for a non-citizen.

Senator Bingaman. I do not think that the Chairman intended for us to vote at this point. I think we were still waiting to be sure we could find the offset that was necessary to pay for this. So maybe there is other business to transact.

Thank you, Mr. Chairman.

The Chairman. Senator Rockefeller is recognized.

Senator Rockefeller. Thank you, Mr. Chairman.

This is about Medicaid. That is not a surprise perhaps to some of you, but it is necessary for a lot of people.

You always hear a lot of talk --

Senator Bunning. Do you have a number, Senator?

Senator Rockefeller. Yes. I have somebody who will give it to me.

Senator Bunning. Thank you.


Senator Bunning. Thank you.

Mr. Schwartz. I believe it is C-14 and 15.

Senator Rockefeller. Merged.

Mr. Schwartz. Right.

Senator Rockefeller. And one scores 20 positive and the other 20 negative. So it is neutral. I have heard a lot of talk about protecting the needs of the
vulnerable populations, children, pregnant women, the
disabled, seniors, et cetera, and very little talk about
the vulnerable. That is sort of the nature of our
American society.

Medicaid is a reflection -- if I could have the
attention of my colleagues.

Senator Grassley. Can I ask the Senator, is this
C-21, the CHIP bill?

Senator Rockefeller. No, it is not. It is the two
Medicaid bills, 14 and 15, joined together.

Medicaid is a reflection, to me, of the nature and
the tradition of community and mutual obligation that we
share as a country. It is unique. We care about our
poor and we care about our underprivileged;
insufficiently, but we do and we have programs for it.
Lyndon Baines Johnson signed in not just Medicare, but
Medicaid, and that was significant.

It is an extension of the guiding principle of our
nation's foundation. I care about Medicaid not only
because I care about the people who are on Medicaid, but
it is also the type of social contract that America has
made as a commitment that does not involve Republicans or
Democrats. It is bipartisan commitment. It is a moral
obligation.

I have to say that because Medicaid so often gets
painted as a Democratic program, and it is not. It is an
American program and it is worth improving and it is
worth protecting, and that is what my amendment is about.

I know the Chairman agrees. When he issued his
health reform whitepaper several months ago, he included
significant improvements of the Medicaid program.

As is often the case during intensive negotiations,
many of the provisions were, however, lost and the final
mark actually includes provisions that will harm the
people who depend on Medicaid for health care, which is
what we are here for.

I believe -- if I could have the attention of my
colleagues. I believe that people who like the Medicaid
and the CHIP coverage they have today should be allowed
to keep it.

This bill does not achieve that goal, this mark. It
forces vulnerable populations into private coverage,
mandates them into private coverage, and reduces benefits
for new Medicaid enrollees.

It is for this reason that I am offering an
amendment tonight to allow Medicaid populations to remain
in Medicaid and to eliminate the Deficit Reduction Act
language requiring states to reduce Medicaid benefits for
people who need them.

Now, we did that some years back, DRA. There was
not a single Democrat who voted for it, I think, in either the Senate or the House. It was a unanimous -- on our side, a unanimous no, everybody no on DRA. But it is the law, and that is why I am trying to change it.

Before we proceed to vote on my amendment, I have a few questions I would like to ask the staff.

Mr. David Schwartz?

Mr. Schwartz. Yes, sir.

Senator Rockefeller. Last week, you and I discussed the fact that some Medicaid eligible beneficiaries will be forced to enroll in private coverage, forced into private coverage instead of staying in Medicaid. I would like to talk a bit more about that today.

The mark includes a provision that gives non-elderly, non-pregnant adults between 100 percent and 133 percent of poverty a, quote, "choice," closed quote, between Medicaid and private coverage.

So my question, number one, Mr. Schwartz, is how did CBO score this provision? Does it cost the Federal Government money or does it save the Federal Government money?

Mr. Schwartz. Senator, according to CBO, that costs the Federal Government money.

Senator Rockefeller. And is it not the case that
the increased cost is largely because private insurance
is much more costly, approximately 25 percent more costly
than Medicaid coverage?

Mr. Schwartz. I cannot swear to the 25 percent,
but your basic premise is correct that private coverage
is more expensive than Medicaid.

Senator Rockefeller. Additional follow-up. So let
me get this straight. In addition to the $463 billion
that we are giving private insurers in premium subsidies,
we are also giving them $20 billion in Medicaid funding
for vulnerable populations, despite the fact that we know
that Medicaid is more efficient and provides better
coverage. In fact, it provides better coverage than
Medicare.

Mr. Schwartz. That is correct.

Senator Rockefeller. Question number two. Mr.
Schwartz, the Medicaid overpayments to private insurers
that would be allowable under this bill are eerily
similar to the Medicare Advantage overpayments. That is
my judgment.

Some have made an argument for privatization of
Medicaid, not so much recently, but it has been big, and
Medicare, at all cost. And it seems that the Chairman's
mark also includes some elements of Medicaid
privatization. That is me talking.
My question: Isn't it true, Mr. Schwartz, that states can already contract with private insurers to enroll Medicaid eligible populations in private managed care plans?

Mr. Schwartz. It is absolutely true, Senator.

Senator Rockefeller. How do the consumer protections under Medicaid managed care compare to the beneficiary protections that would be required of private plans in the exchange?

Mr. Schwartz. The protections available in Title 19 for Medicaid managed care do not apply in the exchange and I think it is probably fair to say that the protections available within Title 19 for Medicaid beneficiaries are more protective, particularly as relates to cost sharing and an extended benefit package, depending on the population within Medicaid that you are talking about.

Senator Rockefeller. Medicaid is the best coverage you can get. You do not have to answer that.

A follow-on. Would private fee-for-service plans, the most inefficient and expensive private plans in the market, be able to enroll vulnerable Medicaid populations?

Mr. Schwartz. Senator, to the extent that a private fee-for-service plan could operate in the
exchange, then, theoretically, yes, they could. If a beneficiary opted to use this Medicaid bridge, as we call it, and leave Medicaid for the exchange, then it is theoretically possible that they would enroll in any of the exchange plans.

Senator Rockefeller. And would lust for that opportunity. You do not have to answer that.

Mr. Schwartz, question number three. Except for children, are there any requirements that private insurers have to provide the same benefit and cost-sharing protections as Medicaid in order to receive the $20 billion in extra payments?

Mr. Schwartz. No, Senator. Adults that go over the bridge into the exchange get what is available in the exchange and do not bring Medicaid provisions or protections with them.

Senator Rockefeller. So how does the 90 percent of FEHPB compare to the value of the benefits offered under Medicaid? As I understand from CRS, Medicaid is the standard in terms of benefits, particularly for children, and FEHPB actually provides less benefits than Medicaid. Am I right?

Mr. Schwartz. I think you are correct. I think, on average, actuarial values are lower everywhere compared to Medicaid, because they approach 100 percent.
Senator Rockefeller. So, Mr. Schwartz, let us recap everything we have just discussed. Under the mark, Congress would effectively be paying private insurers an extra $20 billion to provide fewer benefits and fewer consumer protections than what states currently provide under Medicaid; is that correct?

Mr. Schwartz. I believe so, sir.

Senator Rockefeller. Finally, the final question. Mr. Schwartz, on the first day of this markup, you and I had an exchange about the so-called benefit flexibility language that has always caught my attention, from the Deficit Reduction Act, included in this mark, which I am trying to get rid of.

First, I want to point out that flexibility in this context means cut. The DRA gives states the option of reducing benefits or cutting people off all together. This is me talking.

I would state for the record once again that no Democrat in Congress supported the Deficit Reduction Act. Furthermore, it should be noted that the language included in the Chairman's mark, with all due respect, is far worse than the language in the DRA.

The DRA gives states the option of implementing flexible benefit packages. The language here makes Medicaid benefit reductions mandatory in the mark,
mandatory. That is me talking.

Mr. Schwartz, can you explain the characteristics of the newly eligible parents and childless adults included in the Medicaid expansion, are these individuals healthier than the current Medicaid population?

Mr. Schwartz. Senator, I think they are very similar to the current Medicaid population. They are low income, obviously, below 133 percent of the federal poverty level. They are sicker than their higher income counterparts, on average. And some parents are already covered in the Medicaid programs and they tend to be very low levels, in some states, as low as 11 or 12 percent of poverty.

So we would be adding people like that up to 133 percent of the poverty level.

Senator Rockefeller. In closing, Mr. Chairman, I want to close this debate by appealing to all of my colleagues on this dais and I want to say that we can do better than this.

It is our job to help American families and provide policies that work for them in this bill, not to take those solutions away.

Some of you know -- no. None of you know, when I was governor, I worked very hard to provide health care for the people of West Virginia to make a difference,
with very limited resources. I had to fire 10,000 highway workers at one point.

I saw firsthand what Medicaid meant to the poorest families and the hardest hit workers struggling all across West Virginia, just holding on. When nothing else was certain, they could count on Medicaid. It was rock solid protection from the worst.

So when I came to Washington, I made these issues central. That is my close. I hope that this amendment passes.

The Chairman. Senator, when I stepped out, this amendment came up. I did not realize this was going to come up at this time. I very much appreciate the amendment you are offering.

In order to expedite our business tonight, I would ask that this amendment be temporarily laid aside so we can take up the Schumer-Snowe amendment. Then we can come back to this later this evening.

Senator Rockefeller. But this evening.

The Chairman. This evening, yes. That is right.

Senator Schumer?

Senator Grassley. Mr. Chairman, while we are waiting.

The Chairman. Senator Grassley?

Senator Grassley. Members on my side want to know
what the plan is for tonight. It seems like we are bringing out a lot of amendments we never thought a little while ago that we even had. So my members would like to know where we are and what you have planned.

The Chairman. Frankly, it is kind of like the last inch of darkness. It is the dark just before the dawn. We are close. We are working out some issues. They can be worked out without a lot of difficulty and we do not have very many yet to work out.

Once we take up and dispose of the Schumer-Snowe amendment, then the Kyl amendment to medical devices, we have then yet to do the Rockefeller amendment that was set aside, and then we have the CHIP and then Wyden free choice, and that is it.

We are getting there and I just think it is worth the effort, it may take a couple hours, to get this done tonight.

So I now recognize Senator Schumer.

Senator Schumer. Thank you, Mr. Chairman. I offer this amendment on behalf of Senator Snowe and myself. It is similar to the amendment we discussed before, with a few changes.

Just to go over the thrust of the amendment, it is to take the affordability waiver down from 10 percent to 8 percent. The idea, same as before, is, first, to give
middle class families in a difficult situation relief
from a proposal that would say you have to spend 12
percent of your income for insurance.

It would say if no plan is offered at 8 percent of
your income, you are waived from the mandate. There are
many, many families in my state and every other state
making 60, 70, 80,000. They may have two kids in
college. The small business that they run may have run
into trouble. And it would be just wrong to put such a
burden on them for the good of having insurance.

Most people want insurance. They want to be able to
pay for insurance. Families will stretch and scrounge to
do it to help their loved ones.

But some of them cannot and this gives much more
flexibility to those families by moving the affordability
waiver down from 10 percent to 8 percent. I had
originally asked for seven. Eight is where the consensus
came about and that is where we are and we will see if
that will go further on the floor.

The second benefit, it will get insurance companies
to offer low cost insurance, not just Cadillac plans or
gold plans or even silver plans. There are many families
who would want a lesser plan they would not have been
offered without this amendment. Now, it will be and that
is good.
And then, third, of course, the third benefit is that we are using the savings that come here to reduce the penalty. We have modified that. I am going to call on Senator Snowe or let Senator Snowe explain that, because it was her suggestions that we adopted here.

I think there is a broad consensus on both sides of the aisle that the penalties should be reduced. They were originally $3,000 for a family of four. The Chairman, in his wisdom and in the mark, moved them down to $1,900, and here there will be a further reduction or phase-in, more accurately, over a period of time.

We have taken Senator Ensign's second suggestion, which we very much appreciate, and not only removed the criminal penalties, but the more extreme civil penalties, such as wage garnishment, that Senator Ensign was concerned about.

So if you do not pay, there will be some kinds of penalties. You will not get your refund back, they will put that towards it, but not the kind of things that Senator Ensign was correctly worried about, and I thank him for his help.

This is the major amendment on affordability. I want to say that I would agree with Senator Bingaman, Senator Menendez and so many others, Senator Stabenow, Senator Rockefeller, Senator Kerry, so many others who
have talked about we should make the insurance more
affordable by increasing the subsidy. That was not
fiscally possible to stay within the constraints that we
have in this committee.

Hopefully, we can make them better as we move
forward in the process. But if we cannot do that, it is
unfair to put the entire onus on the middle class
individual family, and this removes it.

CBO has scored the entire amendment as generating
modest savings, about two million people, same as four,
will not be on the rolls in 2019 who would have been
without the amendment, but there are people who could not
really afford it and of middle income, because if you
have a high income, you will never get a plan. All plans
will be at your income level. So you will be all right.

With that, let me call on my colleague, Senator
Snowe, who will discuss the penalty stretch-out and
waiver and the GAO report that was added at her request.

Senator Snowe.

Senator Snowe. Thank you, Mr. Chairman. I thank my
colleague Senator Schumer for working on some
modifications to the individual mandate and the penalties
that were contained from the Chairman's mark. And I know
the Chairman's mark was modified further from the
original proposal, and I think that this represents a
very strong step forward. I still have concerns about
the overall individual mandate, and I hope we can work on
it even further on the floor of the Senate because I do
that, first and foremost, we have an obligation to ensure
that we have achieved and accomplished the goal of
affordability, which is what this legislation is all
about.

So I happen to think that these penalties are even--
you know, we have reduced them. In fact, in 2013 there
will be no penalties. It was delayed for a year. And
then thereafter they increase by $200 increments from
$200 in 2014 to $400 in 2015, $600 in 2016, $750 for
2017.

I would prefer to have no penalties, frankly. I
understand the rationale that we need to get everybody
into the system, but, frankly, we are creating a whole
system that would require a national plan. And I think
until we have been able to demonstrate that we have
accomplished the goal of achieving the level of
affordability for average Americans, we should withhold
the idea of penalties. It is one thing to suggest an
individual mandate. It is quite another on the penalty.

So I think that this is a first step in this
process, and I appreciate working with Senator Schumer so
that we could reduce the penalties, defer them for a
year, and incorporating Senator Ensign's suggestions about having no civil penalties, interest, or fees or assessments that would be levied by the Internal Revenue Service. I mean, after all, this is not about, as I said earlier, punishing people. It is about making sure that we can create an affordable health care system in this country, which is, after all, long overdue.

The amendment also will include a Government Accountability, GAO, report to undertake a study of the affordability of coverage so that we can have the ability to measure whether or not we are successful in our efforts, including the impact of the provisions on small businesses and individual tax credits, maintaining and expanding coverage, the availability of affordable plans, the ability of Americans to meet the personal responsibility requirements. So we will have the ability to have GAO review what has been achieved to that date.

In the first year that the exchange is up and running, the tax credits for small businesses will already have kicked in for 2 years prior to the exchange. The individual tax credits will have been operable for a year. So we will have the ability to really learn a lot in that year as to whether or not we are achieving the goals and the targets that are established in this legislation to expanding affordable coverage for all
Americans.

And then this report will be made available to the committees of jurisdiction no later than February 2014, and then the committees will have to report the legislation to the full bodies, the House and the Senate, by April of 2014 on the implementation and assessment of this particular provision on an expedited consideration within the Congress.

So that gives us the ability to review it and to take action based on that report, and also, we can also revise the penalties, if necessary.

I think it is important to mention here, Mr. Chairman, as well, in looking back and even reviewing the experience in Massachusetts, their rate reforms had been underway for almost a decade before the implementation of an individual mandate and the penalties that were incorporated in Massachusetts.

We are doing a phase-in, a rating reform phase-in, of 5 years in the Chairman's mark. So at the time when the exchange and the rate reforms begin in 2013, we will have--it will not be fully implemented. In fact, it would be the first year of rate reforms. And as I said, they will be phased in over 5 years.

So I think that it is important to make sure that we have a system that is working, and, therefore, we should
not punish people before, you know, the rate reforms have fully kicked in, that we have an ability to evaluate the plans that will be offered on the exchange to ensure that they are affordable to average Americans. That is what we are hoping for through the tax credits and the subsidies and from the competitiveness of the exchange that will drive down the pricing of plans.

So, hopefully, all that would be accomplished. But we do not know, and because we do not have that assurance, I think it is all the more crucial that we defer and, frankly, in my opinion, eliminate penalties that are imposed on individuals through this individual mandate requirement until we have a better opportunity to evaluate the impact of all that we are trying to achieve in this legislation.

And as I said, rate reforms will be phased in over 5 years, so that is 2018. Therefore, I think it is premature to impose any penalties on individuals as we are trying to make the major changes in this legislation to achieve the affordable standard that we hope to accomplish as a result of our efforts.

So, Mr. Chairman, I appreciate your patience in all of this. Hopefully we can even do more on this particular provision on the floor of the Senate because, frankly, I think we should defer the penalties. I do not
want to see Congress imposing penalties on average
Americans who are struggling, and I certainly do not want
to impose penalties for which they have zero to show for
it. So if we are asking people to pay penalties on their
inability to get health insurance for whatever reasons,
but we ought to certainly give a reasonable period of
time to see whether or not we have achieved the
objectives and the goals of this legislation through
affordable health insurance.

Senator Schumer. Mr. Chairman?

Senator Kyl. Mr. Chairman?

The Chairman. Let me say, first of all, I thank
you both, Senator Schumer and Senator Snowe, and other
Senators who have been working on this, because this is
one of the key issues, frankly, in the coverage part--
that is, making sure that the insurance that is required
is affordable. And it gets to the affordability issue,
and it gets to the penalties. It gets to the basic point
of whether people can afford the insurance that we are
asking them to get. So I thank you very, very much. And
I think we probably do need more work on this down the
road.

Senator Schumer. Mr. Chairman, just briefly.

The Chairman. Very briefly because others--

Senator Schumer. Yes, just briefly, I want to
thank Senator Snowe. I agree with her it will be—I will work with her to try and reduce the penalties further, particularly none in the first 2 years, as we move to the floor.

Senator Kyl. Mr. Chairman, 10 seconds?

The Chairman. Senator Kyl.

Senator Kyl. Mr. Chairman, I think we have got a problem with this last paragraph, the paragraph that outlines a procedure for committees of the Senate to report legislation within certain time frames, the Senate to act on it within a certain number of hours and so on. It seems to me that there are several things that preclude us from doing this.

First of all, one Congress, I do not think, can bind another with the kind of procedure that is established here. Certainly this Committee does not have jurisdiction to require another committee to report legislation, as is required here. This seems like sort of a reconciliation-like kind of procedure that I do not think we have the ability to do in legislation in this Committee.

I am not sure whether the Rules Committee would have jurisdiction to do this or whether it would have to be done on the Senate floor as an amendment to the Senate rules. But I would strongly suggest that this paragraph
not be included in the amendment.

The Chairman. Is there further debate?

Senator Ensign. Mr. Chairman, just 30 seconds?

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman.

Senator Bingaman. Mr. Chairman, let me--did you want to respond on that before I commented?

The Chairman. I do not know if anybody does.

Senator Snowe, did you wish to comment, or Senator Schumer? I do not want to--

Senator Snowe. On the expedited procedure?

The Chairman. On the provisions--

Senator Schumer. On the reporting.

The Chairman. The question raised by Senator Kyl.

Senator Snowe. It is similar to--the language is similar to the language we included in the Medicare Commission. I mean, it is an expedited procedure. So I do not see--

Senator Schumer. I think we have rules, you know, in statute that bind us to reports in future Congresses all the time.

Senator Kyl. Mr. Chairman, I--

Senator Snowe. This is standard language.

Senator Schumer. Could I make a suggestion to Senator Kyl? Because I know he is trying to improve it.
I am Chairman of the Rules Committee that has some jurisdiction over this. Could we work on the floor--this is Senator Snowe's provision. She has put a lot of effort into it. Could we work on the floor, and if it violates the rules, we will modify it to stay within the spirit of what Senator Snowed asked, but at the same time make sure we stay within the Senate Rules? Would that be all right?

Senator Kyl. Well, Mr. Chairman--

The Chairman. Senator Kyl.

Senator Kyl. If I ask counsel for a ruling, then you could base your decision based on that. You know, we tried to do Medicare--excuse me, medical malpractice reform and were told it was outside the jurisdiction of the Committee and, therefore, we could not even talk about. So we dropped all of our amendments.

I am not trying to be pernicious here, but I do think this goes beyond the jurisdiction of this Committee. And maybe counsel could speak to the issue.

The Chairman. I might just--that is an interesting question. But, on the other hand, this Congress has passed expedited decisionmaking, for example, the trade bill, the Trade Act, the fast-track provisions, that is all expedited, and it is in the statute. It is in this Committee's jurisdiction when this Committee passed that
act. Then the modernization act, as Senator Snowed refers to, that had a 45-percent trigger.

I think in the spirit of working together here, the suggestion offered by the Senator from New York is a good one, that is, he is Chairman of the Rules Committee, and let us see what is proper here. But this Congress has passed legislation requiring expedited procedures, and I do not see why this is any different in terms of the power and ability of our Committee to do so.

Senator Ensign. Mr. Chairman?

The Chairman. Senator Ensign.

Senator Ensign. Just 30 seconds. I want to compliment both the Senators for the amendment, especially on the individual mandate. I want to appreciate you including the language.

But I also want to recognize Mr. Barthold. He is the one who brought the issue to our attention, as we talked about, and because of that work, because of professional staff, you know, we actually improved things around here. And I think that because of his comments and the note that he wrote to me, we were able to include this and to protect people from really some pretty harsh penalties in the future. So I wanted to recognize him and also thank both the Senators.

Thank you, Mr. Chairman.
The Chairman. Well, thank you, Senator. I think we are ready to voice vote this.

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

The Chairman. Senator Bingaman?

Senator Bingaman. I just wanted to be clear. In that second paragraph where you are saying that individuals--where the cost of lowest-cost coverage exceeds 8 percent of income, the individual would be exempt from the personal responsibility assessments, you are also--that implies that they are also exempt from any obligation to purchase insurance. Is that correct?

Senator Schumer. Yes.

Senator Bingaman. I just wanted to be sure. That is the part that I objected to. The rest of it, I think, is a very constructive set of changes.

The Chairman. All in favor--

Senator Snowe. Mr. Chairman, just to that point, they would be eligible for the Young Invincible plan.

The Chairman. Senator Kerry?

Senator Kerry. Mr. Chairman, I am in favor of the basic concept. I just want to clarify one thing, if either the sponsors or the staff could clarify it. This does not affect any cost to the bill itself because these fines were going to go the Treasury. Is that correct?

Senator Schumer. No, as I understand it, we save
money on the first part. We spend a little money on the second part. But overall there is a net savings.

Senator Kerry. And we do not have that figure?

The Chairman. Well, CBO has confirmed that it will generate modest savings. CBO could not determine the exact amount.

Senator Schumer. They said there is modest savings.

The Chairman. That is correct. Okay, all--

Senator Ensign. Mr. Chairman, just real quickly, Senator Snowe and Senator Schumer, I just wanted to clarify, because staff raised it back here. On the individual mandate, this applies not just to the people who are under the 8 percent; it applies across the board--I just wanted to make sure it was on the record.

Senator Snowe. Yes.

The Chairman. Okay. All in favor, signify by saying aye?

Senator Kyl. Mr. Chairman, could we have a roll call vote here, please, Mr. Chairman?

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

The Clerk. Mr. Rockefeller?


The Clerk. Mr. Conrad?
The Chairman. Aye by proxy.

The Clerk. Mr. Bingaman?

Senator Bingaman. Aye.

The Clerk. Mr. Kerry?

Senator Kerry. Aye.

The Clerk. Mrs. Lincoln?

The Chairman. Aye by proxy.

The Clerk. Mr. Wyden?

Senator Wyden. Aye.

The Clerk. Mr. Schumer?

Senator Schumer. Aye.

The Clerk. Ms. Stabenow?

Senator Stabenow. Aye.

The Clerk. Ms. Cantwell?

Senator Cantwell. Aye.

The Clerk. Mr. Nelson?


The Clerk. Mr. Menendez?

Senator Menendez. Aye.

The Clerk. Mr. Carper?

The Chairman. Aye by proxy.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Grassley. Aye by proxy.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.

The Clerk. Mr. Kyl?
Senator Kyl. No.

The Clerk. Mr. Bunning?
Senator Grassley. Aye by proxy.

The Clerk. Mr. Crapo?
Senator Crapo. Aye.

The Clerk. Mr. Roberts?
Senator Grassley. Aye by proxy.

The Clerk. Mr. Ensign?
Senator Ensign. Aye.

The Clerk. Mr. Enzi?
Senator Grassley. Aye by proxy.

The Clerk. Mr. Cornyn?
Senator Grassley. Aye by proxy.

The Clerk. Mr. Chairman?
The Chairman. Aye.

The Clerk. Mr. Conrad?
Senator Conrad. Aye.

The Chairman. The clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is 22 ayes and 1 nay.

The Chairman. The amendment passes.

Senator Wyden?
Senator Wyden.  To offer an amendment?

The Chairman.  Which one is it?

Senator Wyden.  D10.  It is the--

The Chairman.  Just hold on a second, please.

[Pause.]

The Chairman.  Senator Wyden, why don't you proceed?  Thanks for waiting.

Senator Wyden.  Thank you, Mr. Chairman.

Mr. Chairman, this amendment combines two areas that I think represent state-of-the-art medicine.  Both of them, Senator Carper and I have teamed up on.  One is to promote independence at home.  It is a piece of legislation sponsored by a large number of Senators on both sides of the aisle--Senator Burr, for example, Senator Isakson, Senator Chambliss on that side of the aisle; many Democrats as well.

It is based on something that I think responds to a concern Senator Conrad has talked to us often about over the years, and that is, somewhere in the vicinity of 10 percent of Medicare beneficiaries, particularly those that have multiple chronic conditions, account for nearly two-thirds of Medicare spending.  These are individuals with diabetes, heart disease, Alzheimer's, a host of problems.

And what happens, Mr. Chairman and colleagues, is
when these individuals get ill, very often they go to a hospital, an emergency room in an ambulance after calling 911. They have what physicians usually call a "million-dollar work-up." And what we seek to do is, in effect, through Medicare, start a program to use primary care providers to make house calls. And they would be out in the community working with individuals, and we believe that the modest cost of this legislation can be paid for as part of this package through a reduction in clinical laboratory fees.

The second part of the package, Mr. Chairman and colleagues, involves an area you and I have talked about, and that is, the promising field of personalized medicine. What we have learned over the years is that a particular drug will not necessarily affect Sally and Mary in exactly the same way, and innovative molecular diagnostic tests provide the foundation for the application of personalized medicine for individuals suffering from a host of life-threatening diseases.

Unfortunately, present law presents a barrier to the use and development of personalized medicine. This is because of a Medicare rule that stipulates if a test is ordered less than 14 days after a beneficiary leaves a hospital, the laboratory is barred from billing for that particular laboratory service.
The policy that Senator Carper and I propose tonight would allow these laboratories to bill Medicare directly for a 2-year period. It would stipulate that the policy would only apply to the molecular diagnostic tests that we think are going to be essential to promote this exciting field. It is going to be widely known in a few years as the field of personalized medicine.

I hope that colleagues will accept it. Both of these proposals have had widespread support in the last several years. It is time to promote them, and we ought to pay for it through a cut in the clinical laboratory fee schedule because innovative clinical labs would benefit from these particular policies.

Mr. Chairman, thank you.

The Chairman. Thank you, Senator.

Is there further discussion on the Wyden amendment?

Senator Carper. Mr. Chairman?

The Chairman. Yes, Senator Carper?

Senator Carper. Could I be recognized? A couple years ago, I remember reading about a request for FDA approval of an oncology drug that had been developed I believe by AstraZeneca. And as the drug went through the FDA approval process in this country, it was found, as I recall, to have modest benefit but not great.

Later on, the same drug was tested in Japan, in
Asia, with Asian populations, and it had a much better
effect, a much more positive outcome on those who took
the same medicine.

And I thought that was peculiar, and later on I
started learning a little bit about how mapping the human
genome maybe opened up an opportunity for us to figure
and better understand why certain drugs worked for some
of us and the same drug for the same condition does not
work for somebody else.

It is one thing, you know, we are getting to be
smart enough now to figure out how to make drugs
available to people, to enable them to acquire them and
pay for them, have access to them. We one part of this
amendment, we are trying to make sure that when folks are
supposed to be taking certain medicines, they are more
likely to do that, because we are going to coordinate the
delivery of care, including taking pharmaceuticals.

But wouldn't it be great if—we will just use those
of us who serve on this Committee, 23 of us, if we all
had the same condition—maybe we do—but if there were a
particular medicine that would help four of us but there
is no way it is going to help the other 19. And what we
have here is a potential of figuring that out and making
sure that the four people who are going to be helped by
that particular medicine take it, and the 19 of us who
are not going to be helped, we are not going to be spending the money, and neither will anybody else, for us to take a medicine that, frankly, is not going to have any kind of positive effect.

I think this is a very bright and promising prospect, and I hope that we can find a way clear to support this. And I am very pleased to support both amendments which have been pieced together. I think they are nice package. They are paid for in a way that makes sense, and I am pleased to join Senator Wyden in supporting them.

The Chairman. Thank you, Senator, and thank you, Senator Wyden.

I understand, Senator Wyden, you spent some time working on this and, frankly worked it out with the groups most directly concerned--that is, it provides for a medical home--for homebound patients and high-cost patients, but also provides access to critical--what is the second part, lab tests?

Senator Wyden. It is called "personalized medicine," in effect to promote innovative molecular diagnostic tests.

The Chairman. Okay. And very, very slight cost, and the slight cost is paid for with reductions to clinical labs. My understanding is the lab industry
supports this amendment because--

Senator Wyden. That is largely correct.

The Chairman. --what they lose on the one hand they make up on the other.

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

The Chairman. Senator Kyl.

Senator Kyl. Since DRGs, there is one or more DRGs that cover this when it is billed through a hospital. How is the billing then going to be done for this? I mean, it is a different--it is a breakout from within a DRG, so how is that going to work?

Senator Wyden. It is a direct billing, Senator Kyl. Essentially, the problem occurs because there is a Medicare rule that stipulates that you cannot really have that kind of direct billing. So it is a direct billing approach.

Senator Kyl. So at least for Medicare, there would have to be a new fee schedule or reimbursement schedule developed then?

Senator Wyden. I think it is fair to say they would develop a direct billing, but the industry most directly affected, which has a long history of telling the United States Congress--I know firsthand about rules that are bureaucratic or intrusive--they have said that
this direct billing approach makes sense.

The Chairman. Is there further discussion?

[No response.]

The Chairman. All in favor of the amendment, say aye?

[A chorus of ayes.]

The Chairman. Opposed, no?

[No response.]

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

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl.

Senator Kyl. This amendment is amendment F3. It is an amendment that I had previously begun to discuss but deferred. It would strike the tax on medical devices. Since I think we are all pretty familiar with what this tax is, let me simply summarize.

The tax is annually $4 billion--over 10 years, $40 billion--on medical device manufacturers, on Class III and certain Class II devices, beginning in 2010. It applies to manufacturers or importers of devices. It would include both domestic and foreign.

CBO has specifically written that this particular type of fee or tax would increase costs for affected
firms, which would be passed on to purchasers and would ultimately raise insurance premiums by a corresponding amount.

So the reason for striking the tax is that the premium holders, the people who buy insurance, are going to end up paying the tax. This means that a $40 billion savings for the people who we are trying to help could be achieved if my amendment is adopted.

Mr. Chairman, some of our colleagues--Senators Klobuchar, Bayh, Lugar, and Franken--have written to you, Mr. Chairman. You perhaps remember their letter. I will quote part of it.

The Chairman. I remember it well.

Senator Kyl. It said, and I quote: "The provision would harm economic development and health care innovation nationwide. Independent estimates indicate that this tax could translate into an annual income tax surcharge of between 10 and 30 percent on medical device manufacturers. The amount of capital that these companies would have available to reinvest in product development and innovation would be threatened, dramatically reducing both the number of jobs in the industry and the types of devices available to patients."

I would also note that the industry spent about $9.6 billion on R&D, and this would account--this tax would
account for about half that amount. As the letter notes, we are concerned this tax would stifle technological innovations that can improve patient outcomes and lower health care costs.

Mr. Chairman, there is a Wall Street Journal editorial to the same effect dated April—excuse me, dated September 18, 2009, and I would ask that at the conclusion of my remarks this be put in the record of the Committee.

Senator Bingaman. Mr. Chairman?

Senator Kyl. Mr. Chairman, I had asked for unanimous consent that an items be put in the record, and I will conclude my remarks.

The Chairman. Without objection.

Senator Kyl. Thank you.

[The editorial appears in the appendix.]

The Chairman. Consider it in the record.

Senator Stabenow?

Senator Kyl. There is an argument that—

The Chairman. Oh, sorry. I thought you—I am sorry.

Senator Kyl. There is an argument that we are giving device manufacturers a windfall because we have presumably created some new purchasers of health care; people that do not have insurance today, because they are
going to have insurance, they might buy more of these products. But it is important to understand that medical device manufacturers will actually experience reductions in sales and prices when Medicare imposes cuts on its customers.

For example, hospitals are the device industry's biggest customers, accounting for about 60 percent of the total sales. When their hospital reimbursements are cut, obviously they will reduce the medical device spending, along with spending on other suppliers. And there are some statistics here that demonstrate that the cuts will be rather dramatic.

So the bottom line—and this is what the Advanced Medical Technology Association, AdvaMed, concludes: "Imposition, therefore, of a direct tax on medical device makers, in addition to the cuts in Medicare reimbursement already in the bill, amounts to double taxation. Providers effectively get taxed once through cuts in Medicare payment. Device and diagnostic manufacturers get taxed twice through their share of the cuts to their customers and again through the separate device tax."

So, Mr. Chairman, my amendment would simply restore the status quo. There would be no tax on medical devices, and this would save consumers about $40 billion over the course of the 10 years.
The Chairman. Thank you, Senator. Without prolonging the debate too long here, I would like to ask Mr. Clapsis just basically how the medical device allocation was arrived at and the degree to which it is or is not proportionate to other fees imposed on other industries.

Mr. Clapsis. Sure, Senator. Thank you.

We looked at a number of factors, I think, when we were looking at different industry contributions. One clearly is size, and that is an issue that has been brought up a number of times.

The device industry is actually larger, I think, than is typically well understood. AdvaMed data suggests the industry was $130 billion as of 2006 and has been growing at about 8 percent per year. So over the next 10 years, you are looking at an industry that can be projected to have approximately $2.5 trillion in revenues. It is actually, again, bigger I think than most people think.

The average profit margins also tend to be relatively high, so I think, in our view, the $40 billion fee was roughly proportionate with some of the other industry contributions that we have seen.

On the question of the double tax--I think that was sort of brought up as well--is certainly one, I think,
the Committee has looked at also. This sort of--taking a step back--gets to the question of hospitals and I think potentially how they fare in this bill. So I think the hospital contribution--you know, normally I think, given negative Medicare margins, it is hard to necessarily even reduce Medicare market baskets on the hospital side. Hospitals I think have admirably stepped up and offered their contribution, knowing that their bad debt expense is going to be reduced. We think that is roughly in line with the contribution that they are offering, the point being it is arguable, actually, the extent to which hospitals, I think, will feel reductions given, again, the significant reduction in bad debt they are going to see.

You know, the Committee has also looked at the questions of pass-through. You know, specifically we tried to look at some industry data that was given to us, looking at sort of the 1997 to 1999 period where you saw some of the most significant reductions in reimbursement to providers. And the growth rate, I think, on the medical device side looked fairly constant in the data that we reviewed as well.

So we certainly looked at a number of these factors, and obviously there are a lot of perspectives. But that is some of the way I think the numbers came from.
The Chairman. I appreciate that. I might ask Senator Kyl, is this the offset here, the tried and true reduction in tax credits for middle- and low-income people?

Senator Kyl. Yes, it is, although I really do not like the description of it, "low-income people."

The Chairman. Low- and middle-income.

Senator Kyl. Well, if we want to have a debate on that, which I do not think would be productive at this point, I could refer to the fact that even between 100 and 150 percent of poverty, folks are still getting $16,500. So it is not as if we are reducing these subsidies down to nothing.

I would like to ask staff a question, though. I was not exactly sure what the import of everything you said was, but I gather, notwithstanding what you said, you do not disagree with the CBO analysis that I quoted earlier with regard to the corresponding pass-through to consumers of both the other taxes and fees that I talked to and including this. I guess this is called a fee.

I quoted the CBO relative to the fees that would increase the cost of these affected firms be passed on and ultimately raise insurance premiums by a corresponding amount. So you are not disagreeing with that CBO assessment.
Mr. Hughes. Well, to repeat the--

The Chairman. Speak into your microphone, please,

Mr. Hughes. Thank you.

Mr. Hughes. To repeat the discussion we had recently regarding the insurance fee, they are structured in a similar manner. And as the Chairman described, the fee is a lump-sum amount that is determined on an annual basis, and it is allocated on a market share approach among the companies in the industry, with the intent to separate the tax which would be applied at the entity level from the underlying product.

So it has been designed in a manner to make it more difficult to pass through as opposed to, say, an excise tax that could have just been applied to the cost of the product directly.

Senator Kyl. Well, but there is nothing to prevent it from simply being put into the cost of the product. I mean, the firm is going to know—even in advance, it is going to know roughly its place in the marketplace, and it is going to have to count on paying this tax every year.

You are not saying that they would not build into the cost, either prospectively or retrospectively, the cost of business that this imposes on them, are you?

Mr. Hughes. I think it is impossible to say
definitively what a particular company may do. I think part of the decisionmaking as to whether it is passed on or not is also based upon the benefits that they will get from reform with the additional business that will be forthcoming.

Senator Kyl. Well, then you are personally expressing—you are not sure that you agree with what CBO has said. Is that the bottom line?

Mr. Hughes. I think it is very difficult to say definitively what each company will do in each situation.

Senator Kyl. Yes, that is not contradicting what CBO said.

Thank you, Mr. Chairman.

Senator Kerry. Mr. Chairman?

Senator Stabenow. Mr. Chairman?

The Chairman. Senator Stabenow.

Senator Stabenow. Thank you, Mr. Chairman.

First, I do have to say again that this is now the 11th time that this same offset that lowers tax benefits for middle-income people is being used, although this time it really is even more harmful because it is my understanding it would actually take the top level for middle-income people back up to the level before the Chairman modified his mark and actually improved it.

We have made improvements in affordability in the
Chairman's mark, and this would take us back to where we were before, which in my judgment is even worse.

But having said that, I do want to support the concerns that are raised by my friend from Arizona, because I share those concerns and would like very much to work with you as we go to the floor to see if we might find some other way to address this.

We have great medical device companies in my State that are providing good-paying jobs and not being outsourced and that are actually exporters of goods that are made right here in America. And my concern is that they will be hit twice in terms of a cut—once from the hospitals who will be cut, and then once directly.

And so I understand the industry has expressed a willingness to work on ideas that would provide direct revenues, and I would hope that we could do that as this moves forward to find a better way.

Recently Stephen MacMillan, the president and CEO of Stryker, which is a very important and great company in Michigan, indicated that he supported nearly all of the main points the President has raised for reforming health care, but he was very concerned about this fee and wants to work to find another way. And I know that that is the feeling of people in the industry who understand this is all about everyone being a part of the solution, being
part of the funding of this. But I believe that this is
too much and is done in a way that they are going to be
hit twice.

And so I would like very much, Mr. Chairman, to work
with you and Senator Kyl when we go to the floor--and
with the industry--to see if we might find some other way
that would be of less concern.

Senator Kyl. Mr. Chairman. I am ready to have a
vote. There is an old saying, "Where there is a will,
there is a way." I guess we will see whether there is
really a will.

Senator Kerry. Mr. Chairman?
The Chairman. Senator Kerry.

Senator Kerry. Mr. Chairman, I was chairing a
Committee hearing earlier today when Senator Kyl raised
this issue, and I want to thank Senator Stabenow for
raising my concerns at that point in time.

I share Senator Kyl's concerns about the impact here
on the industry, and you have listened to us. We have
met with you, Mr. Chairman, and we have talked at length
with some of the leaders of the industry. But I think we
really have to be careful here and thoughtful as we go
forward.

You know, we completed negotiations with the
hospitals. We completed negotiations with the PhRMA
industry. We have not completed negotiations here. They really just have not finished.

The Chairman. That is correct.

Senator Kerry. And so, you know, I look at how this industry saves a lot of money. In some cases, obviously, some new devices cost and raise prices, and it depends a lot on the utilization. And I have not raised this here in the course of these discussions yet. We have had some discussions about it during the early meetings we had, Mr. Chairman, when we talked about defensive practice. And often the technologies are the things that get used the most in defensive practice, and there is no question in my mind that it has a certain impact on driving costs.

But the technologies also save enormous amounts of money. They treat strokes, help to diagnose stroke ahead of time. We save enormous sums there. We have huge savings--I think it is about $800 million of savings to the hospital--because of some of the medical devices; and, obviously, life-changing impacts on people as a consequence of many of these devices, which keep you out of hospitals and out of intensive care.

So we have got to look at the savings side and what it takes to get there. It takes a considerable amount of investment money, innovation and time, research and
development.

So I just want to make certain that we are not stifling that in this process. I would like to see the industry be able to finish this negotiating process. I do not support the offset in this. So I cannot support going backwards in terms of that offset.

So I hope, Mr. Chairman, in the next days—we are going to have a breathing spell here while we wait for the CBO figures. We are going to have a breathing spell as we know the bills. This I think is an important issue to try to resolve, and I hope that we can do that, and I think Senator Kyl for raising it.

The Chairman. I might say, Senator Kerry, you make some very good points. This matter has not yet been resolved, and there are efforts to resolve it. One key point here is that the DRGs go to the hospital procedures, which includes medical devices in many respects, and there is not a separate DRG for medical devices, which makes this a different animal. And we want to be fair about that.

As I said, we are continuing to work on this issue. I do not want to say much more, but I hear what you are saying and am very respectful of your comments.

Senator Conrad. Mr. Chairman, just one sentence.

The Chairman. Senator Conrad.
Senator Conrad. I would just like to associate myself with the remarks of Senator Kerry.

The Chairman. Thank you.

Senator Cantwell. Mr. Chairman, if I could echo that as well.

The Chairman. Okay. Thank you. Thank you,

Senator Cantwell.

Senator Kyl, do you want to conclude? Or do you want to vote?

Senator Kyl. Let us just have votes.

The Chairman. Okay. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

Senator Kerry. No.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

The Chairman. No by proxy.
The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

Senator Menendez. No.

The Clerk. Mr. Carper?

Senator Carper. No.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Grassley. Aye by proxy.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.

The Clerk. Mr. Roberts?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Ensign?
Senator Ensign. Aye.

The Clerk. Mr. Enzi?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Cornyn?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Chairman?

The Chairman. No. The clerk will tally the vote.

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

The Chairman. The amendment is not agreed to.

Senator Grassley?

Senator Grassley. Mr. Chairman, I probably should have called for a roll call on the Wyden amendment, but since I did not and it did pass, but I need to be recorded as voting no on that amendment, so I ask unanimous consent to do that.

The Chairman. Senator, you make a good point. Frankly, I moved the vote quickly. I probably should have given more notice and let it sink in a little more. And I appreciate your effort to want to vote no, and I also appreciate your implication that we would have taken more time with that amendment.

Okay. I would like the Committee now to recess for about 10 minutes. We will be back in 10 minutes.

[Recess.]

The Chairman. The Committee will come back to
First, I thank all the Senators for this delay. Sometimes you have to go step backward before you can go two or three steps forward, and let us hope that the delay is going to allow us to go forward.

I will recognize the Senator from West Virginia, Senator Rockefeller.

Senator Rockefeller. Thank you, Mr. Chairman. I want to thank you and I want to thank all Senators and I want to thank staff. I made that speech the other night. I want to thank you, Mr. Chairman, for working with me to protect the health care needs of kids currently enrolled in the Children's Health Insurance Program. What would happen if we did not pass this amendment that I am offering tonight is the kids would go into the exchange, which is where they are in the market, and the defined--

The Chairman. Please talk into your microphone, please.

Senator Rockefeller. The defined benefits that are so crucial for kids, which is zero through the end of the 18th year, would disappear. They would disappear. And the program we voted this overwhelmingly--I think it was--we got 69 votes three times, twice in the Bush administration, once in the Obama administration. And it
was a bipartisan walk because everybody wants to do the right thing by kids.

I do not believe that we can force vulnerable kids into private coverage. That is what we would be doing. They would lose that special kind of defined benefit that comes under Medicaid, which is you can argue, I guess in some cases, but you cannot argue it on kids, and particularly young kids. You cannot do that. They have requirements that you have to meet and that can only be met through Medicaid, not in the exchange where they are at the mercy of people that will have them for lunch.

So a lot of people here--Senator Hatch, Senator Baucus, Senator Snowe, Senator Grassley--you know, we all worked and we spent hundreds of hours actually in the Finance Committee room--Senator Baucus, myself, Senator Grassley, Senator Hatch, every afternoon. Was it this year or last year? I cannot even remember. From 5:00 to 7:00 every day discussing how to work this one program through. And we did, and it passed three times with 69 votes, something of that sort.

I do not think there is any reason to dismantle a program that works. They are getting the protection. Please be reasonable. Vulnerable people are reasonable. We should do our work to reauthorize this vital program for this period.
Again, Mr. Chairman, I want to thank you and so many others for the very hard work on this bipartisan amendment, and I hope that my colleagues will vote for this amendment.

Senator Conrad. Mr. Chairman?

Senator Grassley. Mr. Chairman?

The Chairman. Senator Grassley.

Senator Grassley. I know that when I speak against Senator Rockefeller's amendment, he will think I am against everything he is for, and that is not true, but it is happening over the last 2 days. So I speak in opposition for this amendment. I do not think we want this debate to take a long time.

Do you want me to wait?

Senator Rockefeller. Senator Grassley, can I make--

Senator Grassley. That is okay.

The Chairman. Senator Rockefeller, go ahead.

Senator Rockefeller. Mr. Chairman, I want to modify this amendment at this point to provide that any savings from this amendment—and it is scored that way—will go into something called the Health Improvement Fund. That is the amendment. I hope it will be accepted along with the amendment.

Senator Grassley. Mr. Chairman.
The Chairman. Senator Grassley is recognized.

Senator Grassley. This is why I think this amendment is very bad. And I start with a premise that for a long period of time, and of course now it is the Chairman’s mark and it’s not a bipartisan mark, but for a long period of time I can say what at least six of us are working for. This is contrary to everything we’ve been working for.

Number one, it moves kids from private coverage to public coverage. It reduces benefits available to kids. It expands public coverage beyond what the House would do, and that’s quite a movement. And it cost-shifts from the public sector to the private sector. So that’s why this amendment should be defeated.

Senator Conrad. Mr. Chairman.

The Chairman. Senator Conrad.

Senator Conrad. Mr. Chairman, I was in the Group of Six for the 61 odd meetings that we had. And I understand Senator Grassley’s perspective. But I also understand Senator Rockefeller’s passion. And I understand his absolute dedication to kids all across the country and his determination that those kids have a fair shot. And I believe when the history of this period is written that there will be a handful of people that really will stand out as heroes to kids. And there are a
number of them on this committee.

None has put more of an effort, more of himself on
the line on kids across this country than Senator
Rockefeller. And I hope out of respect for that
commitment and for what it will mean to children that we
can support Senator Rockefeller’s amendment tonight.

Senator Kerry. Mr. Chairman?

The Chairman. Senator Kerry.

Senator Kerry. Mr. Chairman, I am pleased to be a
cosponsor of this amendment, and I am just a deep
believer in it. Working with Senator Kennedy, I had the
privilege of introducing the initial bill back in 1996,
and then in 1997 Senator Kennedy, Senator Hatch, Senator
Rockefeller and others worked, and we brought it into law
subsequently. In 2005 when I returned to the Senate
after the campaign of 2004, the first bill I introduced
was children’s health care, the Kids Come First Act, to
cover all children. We haven’t done that yet. But we
have talked in a number of our meetings about the
criticality of not taking this valuable program out of
its current status where we guarantee a certain set in
standards in care and put it in the exchange where we do
not know what kind of care or quality it is going to be
and subject kids to that competition. That would be a
huge step backwards for us. And I will tell you, if
Senator Kennedy were here you would hear that booming voice going about as loud as it could right now about what is at stake in this amendment. So I strongly support what Senator Rockefeller is doing. I congratulate him for his approach in this. And I thank him for his leadership on it.

The Chairman. Is there further discussion?

Senator Ensign. Mr. Chairman.

The Chairman. Mr. Ensign.

Senator Ensign. Mr. Chairman, I would like to ask a few questions of the staff.

Mr. Schwartz, does this amendment take children who are in the Chairman’s mark who would get private health insurance and move them into public coverage?

Mr. Schwartz. Yes, it does, Senator.

Senator Ensign. Does this amendment take children who are typically healthier and cheaper to insure out of the private coverage pool?

Mr. Schwartz. Children generally are healthier and cheaper to insure, so, yes, it removes them from that pool.

Senator Ensign. Okay. Does moving children into government run coverage make the private coverage pool more expensive to cover then?

Mr. Schwartz. I believe it does.
Senator Rockefeller. Will the Senator yield for a question?

Senator Ensign. As soon as I am finished my questions. Thank you.

Does this amendment take the Medicaid EPSDT benefit away from kids who would get it under the Chairman’s mark?

Mr. Schwartz. The Chairman’s mark provides EPSDT to all children below 250. The amendment would provide EPSDT only to those states that run their CHIP programs as Medicaid extensions, so, yes, there are some children that would not get that.

Senator Ensign. And so this amendment does extend the CHIP program?

Mr. Schwartz. This amendment extends the CHIP program.

Senator Ensign. And does this amendment provide funding allotments equal to the current CHIP program?

Mr. Schwartz. This amendment as I understand it leaves the current reauthorization alone, so it is good for four years from yesterday. But it is silent as to what happens after that. The assumption is that it moves forward with allotments.

Senator Ensign. So is it funded or is it under-funded?
Mr. Schwartz. The allotments after September 30 of 2013 are not funded in the amendment. But CBO’s assumption in scoring this is that current baseline will continue.

Senator Ensign. Will states be able to cover as many children as they do under current CHIP? There will be fewer children covered through CHIP in 2019 than 2013; is that correct?

Mr. Schwartz. We have not seen coverage numbers, but I think that is correct, based on CBO’s assumption of roughly $6 billion in the baseline for the allotments. And so that is constant. So it is probably not enough to provide the same level of coverage in the out years.

Senator Ensign. Thank you. So in summation, this amendment increases the number children in government-run health care at the expense of the private market. The bill is trying to reform while taking away critical EPSDT benefits from many children and under-funding the program the amendment alleges to extend.

Thank you, Mr. Schwartz.

Mr. Schwartz. My pleasure. (laughter)

The Chairman. Very civil. (laughter) Okay. Is there discussion? If not, the motion is on the amendment. All in favor of the amendment, say aye?

(chorus of ayes)
Senator Ensign. Mr. Chairman, I think we need to have a roll call vote.

The Chairman. Okay. Call the roll.

The Clerk. Mr. Rockefeller?


The Clerk. Mr. Conrad?

Senator Conrad. Aye.

The Clerk. Mr. Bingaman?

Senator Bingaman. Aye.

The Clerk. Mr. Kerry?

Senator Kerry. Aye.

The Clerk. Mrs. Lincoln?

Senator Lincoln. Aye.

The Clerk. Mr. Wyden?


The Clerk. Mr. Schumer?

The Chairman. Aye by proxy.

The Clerk. Ms. Stabenow?

Senator Stabenow. Aye.

The Clerk. Ms. Cantwell?

Senator Cantwell. Aye.

The Clerk. Mr. Nelson?


The Clerk. Mr. Menendez?

Senator Menendez. Aye.
The Clerk. Mr. Carper?

The Clerk. Mr. Grassley?
Senator Grassley. No.

The Clerk. Mr. Hatch?
Senator Grassley. No by proxy.

The Clerk. Ms. Snowe?
Senator Snowe. Aye.

The Clerk. Mr. Kyl?
Senator Kyl. No.

The Clerk. Mr. Bunning?
Senator Grassley. No by proxy.

The Clerk. Mr. Crapo?
Senator Crapo. No.

The Clerk. Mr. Roberts?
Senator Grassley. No by proxy.

The Clerk. Mr. Ensign?
Senator Ensign. No.

The Clerk. Mr. Enzi?
Senator Grassley. No by proxy.

The Clerk. Mr. Cornyn?
Senator Grassley. No by proxy.

The Clerk. Mr. Chairman?
The Chairman. Aye. The clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is 13
ayes, 9 nays and one pass.

The Chairman. The amendment is carried.

Senator Rockefeller. Mr. Chairman?

The Chairman. Senator Rockefeller.

Senator Rockefeller. I just want to continue some remarks while discussions are going on about Medicaid and about the absolute necessity to make sure that these people on Medicaid for the most part in spite of common parlance, through no fault of their own, and it is where they happen to be born. Some of us are wealthy. Are we better? No. We were just lucky. They are unlucky.

But they are people. And they deserve to have Medicaid coverage. And that is why I think every single Democrat in the entire United States Congress voted against that DRA Amendment in 2005 because that would have just put them into another category of coverage.

And that is a great loss. And I do not think I have to explain the reasons why particularly. People understand it.

Again, this is Medicaid like CHIP coverage. It is a responsibility that we have. Yes, it costs. Is it a government program? Yes, it is. Is it entitlement? Yes, it is. If it wasn’t an entitlement and they were in the exchange somewhere or whatever, governors had free will, Medicaid waivers and all the rest of it, they wreak
havoc because their states do not have money. And for a
couple of years they are not going to have money.

And I think the recession is going to begin to
change in about 2011 or 2012, something of that sort.
But it has not yet. So if we pass something that allows
governors to do their will, exercise their will, they
will do that, and they will dump Medicaid patients, they
will dump CHIP patients. And I can say that on
experience from my own state.

It is a bitter experience, and it is not one that
should be repeated elsewhere. People can say what they
want about Medicaid, but Social Security was not set up
for no reason at all. Medicaid and Medicare which passed
at the same time were not set up for no reason at all.

So it is important, and that is why I think the
Deficit Reduction Act is not good.

I am rereading my statement here, folks. This is
tactical. This is at the summit. This is at the summit.
Criticality of this moment and the pressure, the
psychological ramifications are stunning. So I am going
to read my entire Medicaid statement all over again so
that you will not miss a single nuance. That is
important to me, that is important to America, and that
is important to David Schwartz. (laughter)

The Chairman. I think that is right. It is
probably important to him as much as anybody. (laughter)

Senator Rockefeller. And so here we go. Over the
last two weeks –

Senator Nelson, do I have your full attention?

(laughter)

I have heard a lot of talk about old people,
disabled people, vulnerable populations, pregnant women,
the elderly, et cetera. But again you just do not hear
people talking, public officials or people, about
Medicaid, because it is something they had rather not
hear about, something they had rather not have in their
communities.

Now my experience was different because I was reborn
in a secular sense by becoming a VISTA volunteer when I
went to West Virginia, not expecting to stay, and then
finding after one year living with people, none of whom
had work, none of whom had health insurance, none of whom
went to school because there was no school bus. And you
have heard this speech before. And I could not leave.

And it was because I became so devoted to those
people and the unfairness. And I will tell you the story
of Eddie. The story of Eddie is an 18-year-old boy fully
capable and prepared to work, terrific physical, mental
specimen, great attitude, leader in our youth movement in
our VISTA community. And I lined up a job interview at
Union Carbide for him. And I took him with me in my Land Rover, whatever it was, and we went down to Union Carbide.

Well, that meant we had to go to Charleston. He had never been to Charleston, which is only 45 minutes away, and he had never crossed a street, never seen a red light. So he was confused by that, but I was with him. And then we went into the Union Carbide Building. It is a big company, had a lot of elevators. He had never been in an elevator. A lot of people get claustrophobic. He got claustrophobic in the elevator. But I was with him, and he was steady.

So we came out on the third floor and we walked into the interviewer’s office. He was a very nice man, but the room was set up so that Eddie and I, sitting side by side, were facing a big window with sunlight streaming directly into our eyes, which did not bother me but made Eddie understandably nervous.

So the plant interviewer who was sensitive to Eddie said, Why don’t you let the blinds down, son, and the sun will not be in your eyes? (choking up) Well, it happened that the blinds were Venetian blinds, two ropes that do not meet on one side and one rope which does on the other. There are no blinds in that district community. Eddie fiddled with that for awhile, but he
was humiliated, embarrassed, and so what he did was he reached up and took the bottom seven or eight slats on the blind and he just hung his full weight on those slats, which did not move. (choking up) I am sorry.

So then he sat down, and we proceeded with the interview. (long pause) But he could not give his name. He had been stripped of all self-worth. What I had done to him was substantially damaging to him. And a year later he was gone from Emmons, and I have no idea where he is today.

But he had Medicaid. He had me by his side, and it did not work. He had Medicaid by his side, and it did work.

So I like to keep poor people where they have health care benefits. I do not wish to see them handed over to the tender mercies of a private exchange, or whatever. And I think you will understand the spirit in which I tell this story.

It is interesting. I took 500-- remember in those days back in '64 and '65, the big rage was Olivetti typewriters? They were slim, they were modern, they were chic? You could say dude about them, they were cool? And I had one of those, and every night I would sit down and I would write pages and pages and pages of what went on during that day, psychologically, to me when things
went well, when things didn’t go well, to individual parts of our community. There were only 356 people in this whole community, but it was a huge community in terms of the implications of people.

And I have that in my office at home. And in the 43 years since I have left Emmons, I have never opened that diary to read it. (choking up) I can’t do it. And now I am embarrassed. Have I talked enough, Mr. Chairman? I was trying to cover for you. This is off the request of The Chairman. I just had to talk so he could work some things out. (laughter) It is a little bit more painful for me, and I hope not for him.

But actually I do not care about that because I feel the way I feel, and I am who I am. Thus ends the reading of the evening lecture. (laughter and applause)

The Chairman. The applause is a testament, as is often said, of your passion. I do not know a Senator with a deeper sense of purpose and conviction, a passion for his state and especially for lower income people, than you. And it is clearly a transformative experience when you saw Eddie. And it is wonderful what you have gone through, and even though Eddie may have felt at that moment a bit embarrassed, I will bet Eddie very much appreciated what you were trying to do. And you have done so much for West Virginia at so many levels, at so
many capacities, first as a VISTA volunteer and then
working your way up until you became governor of West
Virginia. West Virginia is lucky and we are lucky and
our country is lucky to have a Senator such as you. And
we just deeply appreciate you. I think I can speak for
my colleagues.

Senator Rockefeller. Thank you, Mr. Chairman.

Now, showing that all people are not consistent at
all moments of the hour of the day, I withdraw my
Medicaid, not my CHIP amendment but my Medicaid
amendments for the purpose of later consideration before
the Floor or on the Floor.

I call up FFI, Rockefeller FI modified to America’s
Healthy Future Act. This amendment makes various changes
to the modified Chairman’s mark.

The Chairman. This amendment is now being
distributed.

Mr. Sullivan, could you explain this, please?

Sorry? Would the proper staff explain this modification?

I don’t know who it is.

Mr. Sullivan, who do you want to explain this?

Mr. Sullivan. Mr. Dawe.

The Chairman. Mr. Dawe, are you there?

Mr. Dawe. Okay. There are various provisions in
this modification. Mr. Dawe, you are probably there to
explain at least the first part, about the Medicare commission. Why do you not proceed and explain the modification?

Mr. Sullivan, why do you not give an overview first?

Mr. Sullivan. Mr. Chairman, members, if I could just briefly explain the overall structure of the amendment? The amendment contains three major sections. The first section has to do with modifications of the Medicare commission and we will have Mr. Dawe and Ms. Eisinger explain.

The second section of the bill actually will include some policy initiatives that will cost money and will be off-set by the savings derived in the previous CHIP amendment. Those components include some changes to streamlining entry into certain programs under the bill. Mr. Schwartz will describe those. Those are a modification of a previous Bingaman amendment.

In addition, it will include some changes to the high cost insurance excise tax. For those portions, Mr. Barthold will explain those. And it includes a provision regarding a bio tax credit, modified from an amendment by Mr. Menendez.

And then the final section includes some technical changes that are necessary to make this bill conform and work under CBO’s analysis of the bill. And Ms. Fontenot
will explain those.

The Chairman. Mr. Dawe, proceed.

Mr. Dawe. The amendments with regard to the Medicare Commission in Title III (E) are as follows. The amendment clarifies that the commission and by extension the Secretary of HHS may now propose changes to beneficiary premiums under Sections 1818, 1818(A), and 1839 of the Social Security Act. The amendment also inserts the following into the commission and the Secretary’s Scope of Proposals. As appropriate, the commission will include recommendations to reduce expenditures under parts C and D of Medicare. The amendment also clarifies that in proposals to Congress prior to the end of 2019 the commission may include supplemental nonbinding recommendations regarding providers who are not otherwise included in the scope of the commission’s proposals.

Also it clarifies the rulemaking process with regard to the proposals recommended to Congress by the commission. And it also sunsets Clause 6 on page 156 of the mark, related to providers who will experience payment reductions in excess of productivity.

The Chairman. Are there any questions on this portion any Senators might have? Okay.

Why do you not proceed to the next section, Mr.
Schwartz?

Mr. Schwartz. Thank you, Mr. Chairman. The next section is a modification of Senator Bingaman’s C-1 Amendment which was discussed a couple of hours ago earlier this evening. The modification is that in Senator Bingaman’s modified C-1 that was discussed earlier, there were eight numbered paragraphs. And this modification would remove what was number 7, which related to the filing of Federal Income Tax returns and the ability to apply for programs based on that. And of course the offset that was in C-1 has been removed in this modification.

Senator Ensign. What was that change again? What was that elimination? What does that paragraph do?

Mr. Schwartz. Senator, that paragraph, it was number 7 on the modified version that Senator Bingaman distributed, and it said, “Taxpayers filing federal income tax returns may use such returns to apply for tax credits, Medicaid and CHIP if the taxpayer affirmatively authorizes disclosure of tax return data.” And that was removed in the large modification you just got.

Senator Ensign. And everything else is the same except for the offset?

Mr. Schwartz. Correct.

The Chairman. I’d like to recognize Senator
Rockefeller so he may further modify his amendment.

   Senator Rockefeller. I further modify my amendment
to strike the paragraph on page 4 that begins “A
taxpayer.”

   The Chairman. If I might help clarify, that was a
typographical provision that was in the earlier
provision. The modification corrects that mistake.

   All right. Are there any questions from the
Senators?

   Senator Schumer. Mr. Chairman?

   The Chairman. Senator Schumer.

   Senator Schumer. Yes. I just have a question. I
guess it is for Mr. Barthold. In the dangerous work?

   Mr. Barthold. Yes, Senator.

   Senator Schumer. High risk work category,
construction work is one of those. So would lineman for
a phone company be in that category, and line women, line
people?

   Mr. Barthold. I was not questioning the thinking
about the gender choice. As we conceived of it for
trying to estimate the proposal on behalf of the
sponsors, we looked at general industry definitions, and
the building trades my understanding is generally do not
include linemen who would be an indication --

   Senator Schumer. I know. But many of us are
hearing from that particular group pretty loudly. And I was wondering, Mr. Chairman, if there is a way, at least in report language, that that could be considered as part of the high risk area? I know that several of my colleagues would be interested in that as well as me.

The Chairman. I see no reason why not. It sounds pretty high risk to me, to be a lineman.

Senator Schumer. Yes.

Senator Ensign. Mr. Chairman? Is the logic behind the high risk, it would seem to me that most of the high risk health care would be covered under Workmen’s Comp. I mean, these are high risk jobs. They get injured on the job, their health care is covered by Workmen’s Comp, isn’t it? So I guess I am just, what was the logic going behind covering high risk versus other kinds of plans?

The Chairman. Frankly, Workmen’s Comp and health insurance are two entirely separate. Workmen’s Comp compensates persons who are injured and they get paid benefits, sometimes lifetime benefits.

Senator Schumer. Yes, but their health care is also through Workmen’s Comp.

The Chairman. No, no. Health care is, these are generally policies that are high value policies. And they work at a high risk job, you tend to have a high value policy. And all kinds of things could happen to
you as a worker that is not directly related to work; that is, injured on the job. Workmen’s Comp is injury on the job.

Senator Ensign. No, I know what it is.

The Chairman. And so health insurance here is other insurance. It could be Medicaid. Who knows what it is? It is not directly related to injury on the job. They have high value policies because it is a high risk profession.

Senator Conrad. Mr. Chairman, might I take a stab at this? In the Group of Six when we were -

Senator Schumer. Oh, not that again.

(Laughter.)

Senator Conrad. Yes. I’m sorry. When we were discussing this, one of the things that came out is that a whole series of workers have higher health insurance premiums because of the nature of their jobs. So our police, our firefighters, other first responders, and then as we broadened out in examination we found other categories of people who have higher premium policies because of the risk profiles of their jobs.

And this is an attempt to respond to that concern.

The Chairman. I wonder, Mr. Reeder, if you might be able to comment on this?

Mr. Reeder. What Senator Conrad said is correct.
There is a higher incidence of on-the-job injury and it is true, and Senator Ensign is correct that those particular injuries would be addressed through Workers Comp. But there is also a correlation between health insurance costs and high risk occupations. It is not only Workers Comp.

Senator Ensign. That just kind of surprised me that the reason is because we heard last night about discrimination, about some kinds of behavior and things like that. And it is interesting that that is allowed because of a high risk. But I was pretty sure about the Workmen’s Comp issue, by the way. I worked in the private sector and had a lot of Workmen’s Comp claims that paid for all the health care costs and things like that. So I appreciate the correction.

The Chairman. Are there further questions?

Senator Stabenow.

Senator Stabenow. I don’t have a question but I do want to respond.

The Chairman. Sure.

Senator Stabenow. And I am pleased to be cosponsor of this amendment, and there are a number of very important provisions in here. But I do want to particularly speak to the issue of the thresholds of the excise tax.
And thank you, Mr. Chairman, for working with me and working with others to be able to address this.

As you know, this has been of particular concern to me, and to be able to move from what was a positive step in the modified mark of the Chairman moving to $750 individual coverage or an additional $2,000 for both high risk or retirees. But now we have been able to do even more, which is very, very important to be able to move the threshold up above the $21,000 threshold, to move it to $1,850 for an individual or to $5,000 above the $21,000--$5,000 for families.

And what this addresses is the fact of not only high risk jobs have more expensive policies, but we have many retirees that are of their own volition or being forced to retire at much earlier ages. So we have people at age 55, 60 still buying insurance, not on Medicare, more expensive because they use more health care because of age rating and so on. So it is very important that we make sure that they are not adversely affected by the excise tax threshold in the bill.

So I think this is a critical step, and I am still committed to raising the overall threshold and look forward to working with you, Mr. Chairman. I think it is very important overall that we are able to move from $21,000 and move that threshold up. But I think we have
set a standard here now of focusing on those who are most
at risk are retirees and those in high risk jobs.

And this is a critical step. We have set a new
threshold, and I am looking forward to being able to
address the broader issue as we move to the Floor. So
thank you, Mr. Chairman.

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

Senator Grassley. Yes. I have questions on the
modification of the Rockefeller Amendment as it deals
with the Enzi Amendment and the Bunning Amendment. Now I
was here yesterday, or maybe it was two days ago, when
these were adopted. And they were adopted, I think just
accepted. Now we have these modifications that go from
these amendments putting a condition into place with just
now a report to Congress. And I remember the Chairman
saying yesterday that in accepting the Bunning Amendment
that he did not want to do anything to hurt veterans.

Now we have a conditional amendment with just a
report here. Now this, I need to know why, but besides
knowing why it seems to me like this is kind of a
situation where you can be for an amendment before you
are against it, or you can be for an amendment before you
know you are going to have a chance to modify it; and you
can have the best of both worlds.
I would think that this is a terribly intellectually dishonest thing to be doing, particularly at the last minute.

The Chairman. Senator, the whole point of this is about total respect, one my very good friends. The whole point of this is to fulfill a statement, a commitment we made earlier, and that is to clean up some mistakes. That is the Veterans Amendment. But we found out it has a modest score, correct? Is the score enough? And this is in recognition of that score.

Senator Grassley. Because it has a score, all of a sudden it becomes a nonentity as far as the policy is concerned, the conditions? So you just have a report then?

The Chairman. I think somebody else can explain this better than I.

Ms. Fontenot?

Ms. Fontenot. With regard to the modification to the Enzi Amendment, in our conversations with the Department of Labor they were uncertain that such a certification could take place. And additionally, the Health Committee expressed some concerns that this is potentially in their jurisdiction. So we modified that to be review and report by the Secretary to Congress.

Senator Nelson.
Well, I’m not sure if Senator Grassley is finished or not?

Senator Grassley. Well, for right now, yes. I’ve got another question.


Senator Nelson. So by my addition here, the new threshold for individuals will be $9,850 for retired and high risk folks, and the family new threshold will be $26,000. Is that right?

Mr. Barthold. Senator, that is not correct. The amendment base Chairman’s mark as the thresholds of $8,000 and $21,000, and then had an additional increase in the thresholds for possibly two groups, the retiree group or the high risk occupation group. And in the Chairman’s modified mark, the increase in those thresholds for those two groups would have been $750 and $2,000.

The amendment before us now retains the base threshold amount of $8,000 singles, $21,000 family; and for the retiree group, high risk group, it increases the additional amounts to $1,850 for singles, $5,000 for families. So for example, in a high risk occupation the family threshold would be $26,000 under the mark.

Senator Nelson. Well, that is what I said.

Mr. Barthold. Okay. Then I misunderstood. I
apologize.

Senator Nelson. It is $9,850 for an individual and $26,000 for families in high risk and retiree.

Mr. Barthold. Correct. I am sorry. I misunderstood you, sir.

Senator Crapo. Mr. Chairman. First, could I ask a question? Do we have a CBO score on this amendment?

The Chairman. We do in the sense that the CBO scored savings of $15 billion in Senator Rockefeller’s amendment. And this is essentially the allocation of those funds.

Senator Crapo. So the offset here is tied to the scoring of the previous Rockefeller Amendment?

The Chairman. Yes, the previous Rockefeller Amendment, as I understand, approximately $15 billion. And this is allocation of those funds.

Senator Ensign. Mr. Chairman, do we know though what the rest of the amendment, not the offset, but what the rest of the amendment scores so that we know it is completely offset? Has CBO scored the rest of the amendment?

The Chairman. Well, let me just consult.

Let me ask --

Senator Ensign. And could we get like a line item how much each one costs?
The Chairman. First Mr. Sullivan can answer and then Mr. Barthold.

Mr. Sullivan. Mr. Chairman, there are three components to this. One is scored by CBO and two scored by the Joint Tax Committee. The provision regarding streamlining, Mr. Schwarz has a score for that component. Mr. Barthold will have the component for the high insurance excise tax and the bio tax credit. So those would be the three that score.

Mr. Schwarz. So the modification of Bingaman C-1 scores we believe the same way that the modified version of his amendment as a standalone that he offered, and that was $4.4 billion.

The Chairman. That might be, but that is not quite the question asked by the Senator from Nevada. He wants the whole, the rest of it.

Mr. Sullivan. Yes. I think I we are answering his question. That is one component is $4.4. The next two components are tax.

Mr. Barthold. The modification to the high premium excise tax we have estimated as adding an additional $5.9 billion. And the allocated investment tax credit to biotech at about $950 million.

Senator Crapo. Mr. Chairman, are we still asking questions, or is it appropriate for debate on the
amendment at this point?

The Chairman. Well, you can debate, you can ask, you can do whatever you want to do.

Senator Crapo. Then I would like to use my time to make just a couple of comments --

The Chairman. Sure.

Senator Crapo. -- on the modifications to the Enzi and to the Bunning Amendment.

First of all, I understand that neither Senator Enzi nor Senator Bunning were consulted on these modifications. Is that correct?

The Chairman. I cannot answer that question. I do not know.

Senator Crapo. Well, I do not believe they were. And the explanation that I understood the chair to give for why these modifications were made is that after these amendments were adopted--and by the way, the Enzi Amendment was not just accepted, but it was voted on and the vote was 21 to zero I understand. And the Bunning Amendment I believe was accepted.

But my understanding is that the Chairman’s explanation as to why they are now being modified in this amendment is that it was determined that they had some kind of a score impact that would cause difficulties with the bill.
But if you look at these amendments, what that means is, in the case of the Enzi Amendment it would have suspended the employer mandate if it was determined that the impact of it was to reduce wages, if I understand the amendment when it was presented.

And so I assume that what is being said now with this amendment is that it has been determined that that in fact will occur, that in fact wages will go down and that the employer mandate would thereby be suspended and that that would have a budgetary impact on the bill.

And with regard to the Bunning Amendment, the Bunning Amendment provided that none of the fees or taxes in Title VI of the mark would go into effect unless the Secretary of the Department of Veterans Affairs made certain certifications about the availability of services to veterans and their access to medical devices.

Does the fact that it has been determined that this amendment now is going to have a score, does that mean that it has been determined that in fact veterans services and access to medical devices is going to be lost and that therefore the taxes and fees in the title will be suspended?

It appears to me that two very important principles were recognized by the committee in the adoption of these two amendments. first, the impact on wages and, second,
the impact on veterans, and that the effort to amend them
now is an outright acknowledgement that in fact the mark
will have a very negative impact on veterans and on
wages.

Senator Conrad. Mr. Chairman.


Senator Conrad. Mr. Chairman, my understanding is
somewhat different than Senator Crapo has described. And
I can understand Senator Crapo why you would be concerned
that your interpretation might be what has occurred here.
That is not my understanding.

My understanding is, Bureau of Labor Statistics on
the Enzi Amendment just said they cannot make a
certification. It is not that they know there will be
that effect; it is that they cannot make a certification
to the contrary.

Senator Crapo. So does that then therefore cause a
cost increase in the bill?

Senator Conrad. I do not know. It apparently
causes some effect that CBO is concerned about. So it is
not that they are believing there will be an effect on
wages. It is that they cannot make a certification given
the timing that it won’t. My understanding, and this I
get secondhand to Senator Crapo but I think on pretty
good authority, that that is also the case in the Bunning
Amendment.

So in good faith, I voted for the Enzi Amendment, and I think all of us present voting did. But it turns out that when you talk to the agency that is given the responsibility to make the certification, they have come back and said they could not.

Senator Crapo. And yet we turned it into a study which they can do.

Senator Kerry. Well, it is a study to find out what can be done. It seems to me if you want to operate in bad faith once they told you that it does not work, you could just sit there and it will not work. I think what the Chairman has done is to come back in good faith. Now maybe it is late at night or early in the morning actually, and so maybe all the communication necessary with Senator Bunning is not here. We are.

Senator Crapo. Senator Enzi is not here.

Senator Kerry. And Senator Enzi is not here, and we are. And I think this is a good faith effort by the Chairman to try to keep the spirit of doing something so we can find out if we can do it, and then if they come back and say it is terrific, we can do it.

The Chairman. This may be repetitious, but we adopted the amendment and there was an assumption the Secretary could certify. And we found out from talking
to the committee of jurisdiction, basically the Health Committee, that the dataset just would not work, and that therefore had made the amendment unworkable.

So what we are trying to do here is, all right if that is the case let us get a report and try to figure out what the proper data is. It is like the GPCI Amendment, frankly, because the data off it is inaccurate. It just does not fit. And so the thought here is that if we could, like you say with respect to Enzi, the Secretary of Labor can report to Congress -- otherwise frankly it was just unworkable.

Senator Crapo. Mr. Chairman, could I make an inquiry of the staff about the CBO scoring on these portions of the amendment?

The Chairman. No. We have just done that already.

Senator Crapo. Well, the question I have though is, has the staff checked with CBO on the original form of these two amendments? And has CBO given them any kind of preliminary indication that these amendments would score?

The Chairman. Ms. Fontenot, you can answer that. I don’t know if the right person is at the table.

Ms. Fontenot. In terms of the Enzi Amendment?

Senator Crapo. Both the Enzi Amendment and the Bunning Amendment.
Ms. Fontenot. All right. I will have to defer to Mr. Reeder on the Bunning Amendment.

The Chairman. Mr. Barthold, perhaps you can answer that question with respect to scoring.

Mr. Barthold. On the Bunning Amendment relating to the Department of Veterans Affairs, I have communicated with the Congressional Budget Office, but can’t say they have a determination one way or the other. I think there was a concern about what certification would mean in a particular sense as has been discussed, that potentially prices may move in all sorts of different directions, so what would the Secretary feel that he could make a certification that was in any way reflective of the committee’s intent.

Senator Crapo. So CBO did not give a preliminary indication that it would score?

Mr. Barthold. No. They did not.

The Chairman. We made the good faith effort, asked CBO. They came back and said, We don’t know.

Senator Crapo. Well, maybe Mr. Chairman, let me ask the question of you then.

The Chairman. Frankly, it can’t be very large anyway.

Senator Crapo. Because I am a little confused now as to what the reason was. I understood initially that
you had indicated the reason for these amendments was that there was a concern on the impact on the score of the bill that needed to be corrected. Senator Conrad indicates that my understanding was incorrect there. What is the reason that these two amendments need to be modified?

The Chairman. Mr. Barthold, can you?

Mr. Barthold. Senator Crapo, just at a real technical level, the way the provision was if the Secretary can’t certify then there is no provision. And so if there is no provision, then there would be no revenue from the provision. But I think the concern that the staff is addressing is, well, what does it really mean to certify? What did the Secretary think he could do a certification that was in the spirit of what the committee was seeking? And if he says, No, I sort of cannot answer, I do not know how to answer, then there is no certification. If there is no certification, then there is no revenue from the provision.

So I think that is what the Chairman is saying about there then being a score from no certification. It did not necessarily mean that it is a negative finding. It was saying that there is no certification itself. If the report were delivered after an effective date, the report had to be delivered by the effective date, it would fail.
Senator Crapo. Well, Mr. Chairman, I will just conclude by saying, it seems to me that if they can study and make a report to Congress, that they could certify the results of their study and their report.

Senator Conrad. Mr. Chairman, might I just say that this may be a circumstance late at night that there is an excess of caution, but my understanding, Senator Crapo is, when they checked with the agencies they were supposed to make the certification. They came back and said, “We do not know how to make a certification for,” technical reasons I don’t pretend to understand at this moment.

I understand with the Enzi Amendment the Bureau of Labor Statistics said, given the timing of when they would be asked to make the certification, that did not fit with their databases or the timing of the databases. It is frankly a little murky to me, but my understanding is that the answer came back, We could not make any such certification.

So then we are sort of left with a nullity. If we were not here at 1.00 in the morning, we could go back to Senator Enzi and Senator Bunning and have them connect with these certifiers and maybe come up with a different answer. And maybe part of the answer here is, before we get to the floor, before we get to the merger of the
bills, the Chairman could consult with Senator Bunning
and Senator Enzi and those who have told the staff that
they cannot make these certifications and see if they
cannot work out something.

Senator Crapo. Mr. Chairman, I was just going to
suggest that perhaps that would be a way to solve this
because on other amendments what we have done is, we have
instead of coming in without the authors of the amendment
here even, changing their amendments, we have had
agreements between members and you to work out the
details. Because if the problem is just the timing of
the dates of the datasets that they are working on, it
seems to me that those kind of issues can be worked out.

Senator Kerry. Mr. Chairman.

The Chairman. Senator Kerry.

Senator Kerry. I think rather than chew up a lot
more time, I think we should accept that concept and I’m
confident, Mr. Chairman, you would be willing to work in
these next days. It does not make sense to churn around
this, particularly without Senator Enzi and Senator
Bunning here. I think if we get the parties, we can do
it. I just wanted to speak very quickly, Mr. Chairman,
to the ---

The Chairman. No, that is a good point. They are
not here tonight and I will work with them.
Senator Kerry. If I could just say, Mr. Chairman, there is a component of this amendment that I just want to emphasize and I will be very quick. Senator Stabenow was talking about how we have been working since day one to try to address the perception, and I say "perception" because the excise tax goes to the company and not to an individual. But we are trying to make certain that nobody is going to be necessarily impacted in any pass-on.

And so I think the increase in the high risk jobs and early retirees is an important and consequential step forward in terms of the efforts to try to adjust that. And I thank you for that and Senator Rockefeller. And what I hope now, I just want to make sure the record is clear, that you have made it clear to us that we are going to continue to work on the lower end of those thresholds over these next days.

The Chairman. Absolutely.

Senator Kerry. I thank you for that very much.

Senator Grassley. Mr. Chairman?

The Chairman. Senator Grassley.

Senator Grassley. Say, I have a question about the commission. Does this remove the carve-out that exempted hospitals from any cuts? And secondly, were any other carve-outs added for any other providers?
The Chairman. Ms. Eisinger.

Ms. Eisinger. To answer the second question first, there were no additional carve-outs as you called them added. In terms of what you refer to as the “hospital carve-out,” to be clear the exemption that is provided in this bill is for providers who are cut at a certain level. It does not just apply to hospitals. It applies to some other providers who are cut in excess of the productivity adjustment in a given year. That exemption and criteria remain.

Senator Grassley. Then another question, it may be something you can comment on. This change in the Medicare Commission would appear to give explicit authority to reduce the federal subsidy for the Medicare drug benefit. And if so, this would result in increased prescription drug plan premiums on seniors and the disabled in Medicare. Is that the way you see that change working out?

Ms. Eisinger. No, sir. The clarification in the modification is that the intent of this provision was to apply this commission’s scope of recommendations to all parts of Medicare. And what this simply does is to clarify that not only parts A and B are subject, but also parts C and D.

Senator Grassley. Yes, but it refers to Part D
premiums.

Ms. Eisinger. I am going to defer to my Part D colleague on how to answer the rest of that.

The Chairman. Ms. Bishop.

Senator Grassley. See, it says “Federal premium subsidies to MAPD and PDP plans.” So it is going to have the effect of an increase in premiums.

Ms. Bishop. Well, so the point of the clarification was to suggest that there are ways of reducing the Federal spending for Medicare’s part C and D. It is not directing the Commission to do that, but it is suggesting that there are ultimate ways of reducing spending.

Senator Grassley. Well, if you reduce subsidies you are going to increase premiums. Is not that right?

Ms. Bishop. If the Commission were to choose that route of reducing spending in part C and D through the Federal subsidies, that would be the effect. But it is not directing the Commission to do that.

Senator Grassley. All right. And then the other point and last point I want to make, the amendment waives notice and comment rulemaking by the Commission and by doing that you remove the requirement of publishing a proposed rule that then would be open for review and comment means that the Commission can now proceed to make
major changes in Medicare with no public comment period or any notice before these changes go into effect.

And why would you want to hide these from public discussion or public notice? I mean the public’s business ought to be made public. I mean, you assume that in a democracy, in a representative government. I mean that is what the 1946 law was passed for.

The Chairman. Mr. Dawe.

Mr. Dawe. Senator, the proposals from the Commission will be made public as of January 1 of that year. So these proposals will be in the public sphere for much of the year. And what this provisions says is that with respect to the payment changes and other changes that there would be, the Secretary would have the authority of using interim final rulemaking and not be required, but have the authority. And my understanding is that also requires public comment during that rulemaking period.

Senator Grassley. So I read the amendment wrong? It is subject to the Administrative Procedures Act?

Mr. Schwartz. Senator Grassley, it is not “notice and comment” the way there is an NPRM or proposed rulemaking and final. But there is an opportunity for public comment with an interim final. Comments are still solicited from the public.
The Chairman. Senator Snowe.

Senator Snowe. I just want to be clear on the total cost of all these modifications. What is the total number?

The Chairman. Mr. Sullivan, why don’t you address that?

Mr. Sullivan. Mr. Chairman, the total cost of the modifications included here would be $11.2 billion in terms of the individual provisions. That would not include any interaction effects. One reason we kept the number below $15 billion was because of that, the possibility CBO would score interaction effects at a higher number.

Senator Snowe. So on this total modification through all these provisions ---

Mr. Sullivan. I am sorry, those were the three that cost money. And then there is $15 billion in savings from the previous amendment that were in the Health Improvement Fund that are drawn down. So the cost provisions are the $4.3 for the streamlining, the $5.9 billion for the excise tax, and the nearly $1 billion for the bio tax credit, for a total of $11.2. The offset is F15 billion from the Health Improvement Fund, which reflects a savings from the previous CHIP amendment. So the net effect would be to reduce the overall cost of the
bill by approximately $3.8 billion, pending CBO review of interaction effects.

   Senator Snowe. I just have another question, the Medicare, back to that provision?

   The Chairman. Right. Senator Snowe.

   Senator Snowe. It clarifies “the Commission may not propose changes to beneficiary premium” under certain sections, inserts the following, so it says “shall include recommendations to reduce expenditures under parts C and D, such as through reductions in Federal premium subsidies.”

   So is that not a semi-requirement? Is that not a change from the mark, in terms of benefits? That was one of the issues we discussed in our Group of Six that it would not be beneficiaries affected by the recommendations.

   Ms. Bishop. That is correct. The intent of this clarification is not to change the substance of what was included in the mark. It is to merely clarify and to provide, if you will, sort of more detail of the scope of what the Commission would be able to do. But the words “as appropriate” here provide that the Commission does not have to include recommendations for C and D.

   But if they do, they could include such things as Federal premium subsidies or changes in the bonus
payments to Medicare Advantage plans. But those would be available because the mark had broad authority to change payments to providers in the Medicare program, not to change co-payments as you said, or beneficiary premiums under A or B.

But these payments here, these Federal premiums are premium subsidies to the plans, and that that would be something that would be within the scope.

Senator Snowe. But would not that result in increases as Senator Grassley asked? I mean, could not that result in increased cost to the beneficiary?

Ms. Bishop. If the Commission chooses to reduce federal premium subsidies, it could have an effect on beneficiary premiums.

Senator Snowe. So it is a departure from what is in the original mark?

Ms. Bishop. It is not a departure. What was intended in the original mark was always that the Commission would have available to it payment changes, and that these payment changes are the primary effects of the Commission’s recommendations.

Senator Snowe. I do not recall, in our discussions that was not the case. Thank you.

The Chairman. All those in favor --

Senator Crapo. Mr. Chairman, do not we need to
clarify, if we are about to vote, that the Enzi and Bunning modifications are being removed from this modification?

The Chairman. They are not being removed.

Senator Crapo. What was the understanding we reached earlier then?

The Chairman. We are going to work with the two Senators, but we just, for the sake of good government we have got to make these changes. Then we will work with the two Senators as to further clarification. But it is just wrong to have the earlier provisions when the relevant agencies say they cannot do it. It is just wrong. We are just trying to clean it up, make it fair, make it right, make it appropriate.

Senator Crapo. Well, my last comment then and we can vote is, that from what I understand and I understand more now that we’ve had information about this, the fix is to the concerns that were raised can be much more minimal than the changes that are being made to their amendments.

The Chairman. I am sorry. Say it so I understand.

Senator Crapo. I think the concerns that were raised can be fixed with much smaller corrections than simply totally gutting their respective amendments. And so I think the cure here has gone way past the problem.
The Chairman. I would not characterize it that way, but I pledge to work very closely with both Senators regarding any concerns they may have.

Senator Crapo. Thank you.

The Chairman. Thank you.

Senator Snow. Mr. Chairman, I just want to get clear on this.

The Chairman. Sure.

Senator Snow. I want to get back to that provision. In the Chairman’s mark unless it has changed since that time it said, “The Commission would be prohibited from presenting proposals that would ration care, increase revenues or otherwise change Medicare cost sharing benefits or eligibility standards.”

Senator Grassley. Pretty darned clear, is it not?

The Chairman. Yes, Senator. Do you have a question?

Senator Snowe. Yes, I do.

The Chairman. And the question is?

Senator Snowe. Well, this modification changes that. I want to be clear on it, because that is a departure from what it was originally.

Senator Grassley. In other words, a little more than a clarification.

The Chairman. Ms. Bishop. I think Senator Snowe
has a point. As I recall our discussions with the Group of Six, this is a fairly significant point, and I think it is important that this be cleared up. And if it goes beyond the prohibition that was understood with the Group of Six, then I think we have to address that.

Mr. Dawe. The prohibitions that Senator Snowe refers to remain in place. The first clarification states that the Commission may not propose changes to beneficiary premiums. So it adds an additional prohibition, premiums under Sections 1818, 1818(A) and 1839 of the Social Security Act. So this in no way changes the prohibition on rationing care, benefits, cost sharing, or eligibility.

The Chairman. I think the point is that modification does not have to restate everything that is in the modified mark either. If I understand you correctly, Ms. Snowe and I don’t want to put words in your mouth, the prohibition is still in the modified mark.

Mr. Dawe. Right, and this adds clarity in terms of beneficiary premiums.

The Chairman. That is the intent. I agree with you that it has loosened up compared to what we discussed.

Senator Conrad. Can I follow up? Can the Senator
just yield? Can you assure us that when this language of this amendment is added to the mark that the prohibitions that previously applied that we had agreed to in the other discussions will still be in effect?

Mr. Dawe. Yes.

Senator Snowe. All right.

Senator Conrad. All right.

The Chairman. All right? All in favor of the modified amendment, say aye?

Senator Grassley. No, we want a recorded vote.

The Chairman. All right. Clerk, call the roll.

The Clerk. Mr. Rockefeller.


The Clerk. Mr. Conrad?

Senator Conrad. Aye.

The Clerk. Mr. Bingaman?

Senator Bingaman. Aye.

The Clerk. Mr. Kerry?

Senator Kerry. Aye.

The Clerk. Mrs. Lincoln?

Senator Lincoln. Aye.

The Clerk. Mr. Wyden?

Senator Wyden. Aye.

The Clerk. Mr. Schumer?

Senator Schumer. Aye.
The Clerk. Ms. Stabenow?  
Senator Stabenow. Aye.

The Clerk. Ms. Cantwell?  
Senator Cantwell. Aye.

The Clerk. Mr. Nelson?  

The Clerk. Mr. Menendez?  
Senator Menendez. Aye.

The Clerk. Mr. Carper?  

The Clerk. Mr. Grassley?  
Senator Grassley. No.

The Clerk. Mr. Hatch?  
Senator Grassley. No.

The Clerk. Ms. Snowe?  
Senator Snowe. No.

The Clerk. Mr. Kyl?  
Senator Grassley. No by proxy.

The Clerk. Mr. Bunning?  
Senator Grassley. No by proxy.

The Clerk. Mr. Crapo?  
Senator Crapo. No.

The Clerk. Mr. Roberts?  
Senator Grassley. No by proxy.

The Clerk. Mr. Ensign?
Senator Ensign. No.

The Clerk. Mr. Enzi?

Senator Grassley. No by proxy.

The Clerk. Mr. Cornyn?

Senator Grassley. No by proxy.

The Clerk. Mr. Chairman?

The Chairman. Aye. The clerk will tally the vote.

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

The Chairman. The amendment is agreed to.

As my understanding, there is only one potential amendment remaining, and that is the amendment offered by the Senator from Oregon.

Senator Wyden. Thank you, Mr. Chairman. Am I recognized to offer C-1?

The Chairman. Right. You offer it.

Senator Wyden. Thank you, Mr. Chairman. Mr. Chairman, at this late hour our committee is about to deny our constituents something that we as members of Congress take for granted, and that is choice of health care coverage. Members of Congress have more than a dozen good quality plans to choose from. Under the Finance bill, more than 200 million Americans are going to have no choice of health care coverage at all.

Now all of us have heard the President’s pledge,
“You can keep the coverage you will have today,” and that’s what “free choice” is all about. This amendment builds on that pledge by saying that if you do not like the coverage you have, if your insurance company is giving you a raw deal, you are going to have something else to choose from.

Now as we heard on Tuesday during about eight hours of discussion, members of this committee on both sides of the aisle understand the importance of choice in competition. Choice is what generates competition, and competition holds down health care costs for our people. But yet we have stripped this bill, colleagues, of choice and competition. A typical American who works for a midsized company, if they are getting hammered by their insurer, they are stuck.

If you are unemployed, if you are uninsured, you are going to have some choices. But if you work at a typical American business and you don’t like the health plan you are getting, you do not feel you are getting a square deal and you are getting crummy service, getting exploited, you have nowhere to turn.

I do not think that is what real health care reform is all about.

So I want to see us put the consumer in the driver’s seat. Put the consumer in a position to turn the tables
on the insurance industry. That is what we do in every
tother corner of the American economy. We put the
consumer in charge, and if the consumer makes a wise
investment the dollars they save go directly in their
pocket.

Here is how the free choice proposal works. If your
employer already offers two choices and one of them is a
low cost option, then the worker gets choice within the
employer based system. If the employer is offering only
one health plan, the worker can either keep the
employer’s plan or take the same amount the employer
spends on the worker’s coverage to go out and buy another
plan in the marketplace.

And we make sure that employers win under this
approach as well. If the employer wants more choices, if
the employer’s insurer is not giving the business a good
deal, we say that the employer can bring the entire
business to the market to the exchange and get a
discount.

Economists of all philosophies, liberal,
conservative, all across the political spectrum, have
argued that giving Americans choice is the single most
powerful way to save money in the American health care
system. It is one of the reasons the President
identified guaranteed choice as one of the three bedrock
requirements for real health reform.

Now in the proposal that I offer tonight, the Congressional Budget Office has found that the taxpayers would save at least a billion dollars. But the real savings go to the private sector where independent experts have found that $360 billion would be saved as businesses and consumers shop for the best possible deal.

Small and mid-sized employers in particular like it because they recognize it would not only help their employees but their bottom line.

So with this provision, all Americans would have the opportunity to benefit from health reform. That stands in sharp contrast to what is in the mark, which says as written today, “if you are a working family and your insurance company abuses you, you are stuck. You have no other options.

So I would like to see all Americans have some choices, like we do as members of Congress. And I realize that some of the most powerful interest groups in this country do not want this provision in the bill, and they have been out and about talking to you and saying that if Americans have choice like we as members of Congress pretty much Western civilization is going to end.

It is all about control. These big interest groups
like the system the way it is, and frankly if legislation
like what we are talking about in the Finance Committee
passes where Americans are forced to go out and buy
health insurance, the insurance companies are going to be
able to increase their market share without having to
face any additional competition that would give the
consumer a better deal.

Also some big businesses like having leverage over
their employees. They can use this leverage to hold down
wages, and frankly it also keeps some workers locked into
their jobs. If Americans had choices and premiums went
down, well maybe employees might end up getting a raise.

We’ve got some Labor folks who are saying that they
don’t want this as well. The fact is, if people get
choice, if people get choice in the marketplace, maybe
they would say, “We would rather have that kind of
opportunity” rather than to have labor call all the shots
for their future healthcare coverage.

And the fact is, a lot of insurers do not want to be
held accountable either. So I understand that these very
large interest groups have campaigned hard. They
certainly are very powerful here in the Washington, D.C.
area. But I think when we talk to our constituents about
what happened during this debate about health reform and
we say to them that while we have more than a dozen
health care choices, while we benefit every week from a system that is competition-driven based on choice, they are not going to have even one choice. They are going to say, “What in the world were you all thinking?”

Now the President said at the beginning of this debate that there would be well-funded efforts that loudly proclaim that reform is not possible, and it is going to be eager to mislead people about what real reform means.

He certainly was right, and this amendment frankly illustrates the correctness of his concern about the power of special interest groups. This amendment is an opportunity for us to inject real reform in the bill. This is a transformational amendment because it says we can find a sweet spot in between blowing up the employer-based system and saying workers should have no choice at all.

So I am very hopeful that colleagues will say that what we ought to do in wrapping up the consideration of this legislation is that we ought to stick to what the President said when he came before us for the address to the Congress. He said his guiding principles were choice and competition. But I would ask colleagues as we wrap this up, Where in this bill does it give consumers choice? Where in this bill does it allow the typical
American family to have the kinds of choices that produce competition that hold down health care cost? I can’t find it, colleagues, in this legislation. I would hope that we in wrapping up this bill come to the conclusion that it is not right to deny our constituents something that we take for granted as elected officials.

Consumer choice and competition are the fundamental principles that constitute real health reform. They are regrettably lacking from this legislation. And I want to hear from colleagues, make the case about why all Americans should not have choice. And Mr. Chairman, if I could yield at this time and be in a position to respond to colleagues, we can wrap up in a bit.

The Chairman. Is there discussion?

Senator Bingaman. Mr. Chairman.

The Chairman. Senator Bingaman.

Senator Bingaman. Mr. Chairman, let me just say that the general idea that the Senator has is one that is attractive to me, the idea that employees should be able to leave their employer coverage and obtain their insurance elsewhere if they choose to do so.

However, I do think we have a circumstance today where we are hopefully in the next several days or week, whatever, going to pass out a bill here that requires folks to obtain fairly meager coverage. And in fact, I
think because of the Snowe Amendment an awful lot of folks can obtain coverage that has an actuarial value of 50 percent.

Now as I understand what you are suggesting is that the employee who is in a plan now that is covered by their company would be able to take the funds that the employer is putting into that, would be able to go outside and buy something cheaper, and pocket the money.

And I think the end results of this would be, you would have an awful lot of folks, of course, with a tremendous financial incentive to do that, to essentially trade down in their coverage to obtain coverage that is much less adequate to their health care needs, and we would be contradicting what I think is one of our main purposes in the legislation, which is to try to get adequate coverage.

I do not think we want to pass legislation that winds up with a whole lot of under-insured Americans out there. We want to have everyone insured, and we want to have them adequately insured, and I fear that as I understand what you are proposing you would have a very substantial financial incentive for folks to take reasonably good coverage which their employers are currently providing and trade that in for something substantially less and pocket the difference.
And I think that would be unfortunate, and I think it would not serve the interests of the country well.

Senator Wyden. If I could just respond, Mr. Chairman?

The Chairman. Senator Wyden is recognized.

Senator Wyden. There are two points. How does it happen that we decide what is best for the workers? We envision, under this approach, one very high quality plan, in effect the gold plan, and the second the bronze plan with the actuarial value of 65 percent I believe. But ultimately the question becomes why should not the worker be in a position to make their own call? They are going to have a choice of coverage. Both of these choices by the way are part of the menu of health plan choices that are specified in the bill.

And I think first it ought to be the worker’s judgment rather than ours as elected officials. And second, I would say with respect to whether people leave employer coverage or not, the Congressional Budget Office found that would not be the case. That was a specific finding of the Congressional Budget Office.

And Counsel, could you read that portion of the Congressional Budget Office analysis? It is just about a sentence or two, but it responds to this argument that somehow there would be this doomsday spiral of people
leaving employer coverage and particularly young people leaving. Counsel, could you just read that section from the CBO analysis, making it clear that they do not see this amendment as destabilizing to the employer based system?

Ms. Fontenot. Senator, you are talking about the CBO analysis of your amendment specifically?

Senator Wyden. Right.

Ms. Fontenot. I do not have that available. I apologize.

Senator Ensign. Would the Senator yield for a question?

Senator Wyden. Yes. Let me just see if I can put my hands on the – got it? The Congressional Budget Office analysis indicated that our proposal would not have substantial effects on the number of people covered or the source of their coverage. And I am going to find the exact language.

Senator Ensign. Would the Senator yield?

Senator Wyden. Of course.

Senator Ensign. Let us say they did not like the coverage they were getting and it was not adequate, not a Cadillac plan and less than a bronze plan. It was one of those kind of cheap plans. They really were not crazy about it. Could they take that voucher, put a little of
their own money in, and then buy a plan that was more expensive? Is that something they could do?

Senator Wyden. They could certainly in effect buy up if that is what you are talking about. I think, Senator Bingaman, both of you are raising questions. Senator Bingaman wants to make sure that folks who perhaps have modest incomes would not suddenly sacrifice health care decisions. I think the minimum standards that we have in this amendment, and in this bill, should set a minimum floor for coverage. Given that, it is really appropriate that the consumer have a choice. But certainly the choice ought to extend to what you are talking about as well, and that is the possibility of in effect buying up and people using their own dollars for purposes of purchasing a better health plan.

Senator Ensign. Mr. Chairman, may I be heard on the amendment?

The Chairman. Go ahead.

Senator Ensign. Let me first say that Senator Wyden is a new champion for freedom around here, and I am glad to hear that. I know some employer groups are not crazy about this thing, but I have a tendency to agree. I have not completely maybe totally thought through all of the consequences of the amendment, but I like the idea. I like the idea of individual choice. I like the
idea of putting that competition in.

And what he said earlier is that, Do you trust the individual? Are you going to put personal responsibility back in health care? Can people make informed choices?

And I think what Senator Wyden is saying, that he trusts the individual to be able to make the best choice for their family if they don’t feel for their family that their employer is making the best choice for them.

So they want to go out in the marketplace in these new exchanges and buy. I think that is not necessarily a bad idea that Senator Wyden has come up with. I think my staff is probably going crazy behind me that I am talking like this, but I think he raised some really very valid points today, and I think it is something we all should consider.

Senator Kerry. Mr. Chairman.

Senator Kerry. Mr. Chairman, first of all let me just say that I have huge respect for Senator Wyden’s commitment to this issue. He has been one of the people who has put a huge amount of time into it. He has been very creative, he has reached across the aisle, and he’s had really good ideas and interesting ideas along the way. There is nobody who works harder on this issue, and
he asked me to sort of take a look at it the other day,
and I told him I would.

And I talked to some of our employers up in
Massachusetts, a big company like Raytheon for instance,
and others. They are dead set against this. And I want
to remind my colleagues, last year at the Library of
Congress when we had a day-long session and we were
listening to experts from all over the country, out of
that day-long session came a consensus, really out of all
of the sessions. A consensus. Was everybody in
agreement? No. But there was a strong consensus that
one of the strengths of our health care system that we
need to build on is the employer based system.

The HELP Committee did exactly that. Senator
Kennedy believed in it, Senator Harkin, Senator Mikulski
and others have spent a lot of time on this. So we have
built on the notion that employers are going to deliver
health care.

Now one of the strengths that comes with that is
their numbers. It gives them purchasing power. It
allows them to negotiate, particularly a larger company,
lower rates across the board. And if you take a look at
employer-based plans (including fully insured and self-
insured plans) even when they go out and underwrite, they
offer really good quality care, lower care, and people go
to work at many of those companies because of the quality of the care and because they like it.

So here is what happens. It sounds, you know it’s very appealing and you can understand, wow, I can choose between anything. But all of a sudden the “anything” gets dumbed down in the process, and you wind up with healthier, younger workers who can opt for a different pool because you can have different pools out there.

So they are going to go out and all of a sudden you’ve got a kind of cherry-picking that begins to take place in the system. You lose the strength that comes from the shared responsibility of a company having all kinds of different ages and people with different health issues which they have built their plan specifically around.

We have 160 million Americans who love that coverage today and want that. One of the problems in this whole debate has been the whole issue of the 80 percent of Americans who already have coverage. And they are sitting there really worried that what we are going to do is somehow shift the cost to them and make it more difficult for them to keep the coverage they have.

I am personally convinced listening to a lot of different players who offer plans on which our system is built--some self-insured, some large companies---but they
are really worried that they are going to have people shifting in and out of their plans, and they are going to lose the current stability they have for the purchasing process and for the bargaining process, and they are going to wind up not being able to offer the quality of plan they have today. And that is the spiral that people talk to, that the Senators appropriately talked about.

But I have come to believe that is real. I think human behavior is such that if people can choose, and you’ve got some universe out there of younger, well people who happen to be part of a particular plan, you are going to lose the strength of the shared responsibility that we get from what we decided was the core of the American system, which is the employer based system.

Senator Wyden. Mr. Chairman, can I just respond to that quickly?

The Chairman. Senator Wyden.

Senator Wyden. Senator Kerry has raised a couple of very important issues. I do have the CBO language to give my colleague that does go into the specific concern that Senator Kerry is worried about CBO believes would not take place. My amendment would not result in destabilizing of the employer-based system.

Specifically, CBO found there would not be
substantial effects on the total number of people with insurance coverage or the sources of that coverage relative to the Chairman’s mark. That is the finding of CBO on this argument that these lobbies are advancing, that there would be a destabilizing change if my amendment was adopted. That is number one.

Number two, I would say to my colleague, let us talk about the worst case analysis, that what you are saying happens even though CBO says they don’t believe it will happen. What we have put in this mark to the Chairman’s credit is very robust risk adjustment and reinsurance.

So what that means, Senator Kerry and colleagues specifically, is that if you were to have something CBO believes won’t happen, young people leaving in great numbers, in effect periodically the exchange would make a payment, for example to an employer who had the older, sicker workers left at the worksite, if the young people left their employer’s coverage to buy their health care through the exchange.

So CBO says they do not believe it will happen. If it were to happen, we do believe with risk adjustment and reinsurance, and you happen to be one of our experts I know on reinsurance, that is how you adjust for risk.

Finally, colleagues --

Senator Kerry. But we are not putting enough money
into it.


Senator Kerry. So we are not going to do that.

Senator Wyden. Well, again, CBO says it is not going to happen. I think we can talk about additional funding. I support you on that.

Colleagues, the last point I would make, I think we ought to wrap this up, is this is not blowing up the employer-based system. This is not even close to my original legislation. This is taking the chairman’s mark and in effect importing the concept of choice into the employer-based system. As I said, colleagues, if an employer offers two choices and most of them in this country do not offer choice, then the worker gets choice within the employer-based system.

It is only if there is no choice within the employer system that you go to the next level through this choice approach that I believe empowers the consumer through a voucher in the marketplace. This amendment does not raise taxes a dime, not a dime. This is about creating consumer choice for the American people, for all of us not just folks who are unemployed, uninsured or happen to hold an election certificate here in the United States Congress.

Senator Conrad.
The Chairman. Senator Conrad.

Senator Conrad. Mr. Chairman, first of all, I want to say to my colleague Senator Wyden, I do not know of anybody other than the Chairman who has made a more dedicated sincere commitment to reforming the health care system than the Senator from Oregon.

I think one of the great tensions that exists here is the system that we currently have is an employer-based system, and the Senator from Oregon’s concept, larger vision if you will apart from this amendment but going back to his bill, is based on a different concept really. And if we were starting from scratch, I am not at all sure the Senator from Oregon does not have a better concept of how to build a system if we are starting with a blank page.

But we have a circumstance in which we have an employer-based system, and the questions that Senator Bingaman, who is also an extraordinary, thoughtful member, and Senator Kerry have raised are in my mind – Senator Kerry. I don’t need any adjectives though. I’m joking.

Senator Conrad. Yes, you are good too. Let me ask the Senator this. Do the CBO scores, the CBO analysis that the Senator referenced, was that a CBO score of this amendment, or was that a CBO analysis of the bill?
Senator Wyden. It was an analysis of just this amendment. And I would say to colleagues, it’s an analysis of this very amendment. And look, I wrote a piece of legislation. I was interested in a different approach, and yet what I said when the chairman chose a different route is, I was going to work within that framework. And I have done that. And we have had many amendments. I have supported ideas from both sides of the aisle, and spent a better part of 10 days here and did not once mention the original bill I authored.

But I do believe it is possible to import choice into the employer-based system. There is something in between, colleagues. There’s a sweet spot between blowing the system up and saying we are going to tether people to what they have even though it is a crummy product. And that is what we are saying. We are saying that even if you think you’re getting lousy service and it is a crummy product, we are going to tether you to it. You are not going to be able to get any additional choices.

And given what CBO said in the document I have given to colleagues, that they do not believe that this amendment will be destabilizing and we have this safety valve of risk adjustment and reinsurance should this doomsday scenario occur, it would be something that would
be dealt with under my amendment. That’s why I think it warrants colleagues saying 2009 is different than the 1950s. Does keeping the original employer-based system make sense in 2009 when people change their jobs 11 times by the time they are 40? I think we can do better. I think we can do better in terms of portability and choice, and that there is something in between blowing the system up and saying, we cannot improve it.

That I what this seeks to do, and I hope my colleagues will vote for choice, vote for competition, vote for principles that make the American economy work in every other sphere and ought to be applied to health care as well.

Senator Kerry. Mr. Chairman.

The Chairman. Senator, I really appreciate your work here. You have come to me many, many times, probably every Senator here, many, many times, (laughing) working to try to improve our health care system. I remember you talked to me over a year ago, two years ago if I recall correctly.

And I really appreciate that.

One thing that struck me is, we look around the world at countries trying to address health care reform, a lesson learned is that almost every country, although tempted to institute something radical, no country that I
am aware of did so. Rather, every country finally
realized if they are going to enact health care reform
that works, they have to build upon their country’s
systems, organizations, and make it work a lot better.
That is, it is kind of akin to the devil you know
versus the devil you don’t know. People in different
countries know what they have, they know what their
employers do or do not do and so forth, and that has
generally worked in countries. It has worked in Britain
for them, it has worked in Switzerland for Switzerland.
That is the Swiss culture. It has worked in France with
the French system, and that has worked for them.
Now there are people who say, and in fact I have
been tempted to think along these lines too, that if we
in America were to do this all over again, start from
scratch, that we may not have an employer-based system
today—if we were to start all over again from scratch.
But back in the 1960s under wage and price controls,
the employer-based system starts to take form, basically
because of employee exclusion was not within the wage and
price controls with respect to employer deduction and so
we got going. Various organizations and unions,
negotiating contracts were very interested in health care
benefits as well as wages, and we in America just fell to
an employer-based system. That is what we are, that is
where we are as a country.

And to move away from an employer-based system I think would be destabilizing. It would cause such consternation in what we know as a country.

Now the fact is, CBO has not scored this amendment. CBO has not analyzed this amendment. I just checked a few minutes ago with CBO. And so one has to just look at it and see what probably would happen.

Under this amendment, an employee would take the voucher worth I guess the value of the plan. The employee could then shop around. And who would tend to do the shopping more than others who might not shop? Those who would shop would probably be younger, maybe healthier employers. They would shop around and they could get a better deal. That’s what they would probably do and maybe pocket some of the voucher.

And then what is left? What is left is the rest of the employees that work for the company. And that means two things. It means the pool is diminished, which causes a destabilizing strain on the company’s health insurance system. And second, those remaining will be probably comparatively a little less healthy, which further destabilizes the pool.

And I don’t think that is something that we really want to do here. Again, I just, with all respect to my
good friend from Oregon, CBO has not analyzed this
amendment. They have not scored this amendment. One has
to look to see what the probable consequences would be.

Now we should not throw the baby out with the
bathwater here. The effect then of this amendment would
be you probably cannot keep the insurance plan you have
if you like it because the companies are going to start
dropping employees. They are going to start dropping
them. They are going to say, hey, I got a smaller pool
here, I got sicker people, and I am just going to start
dropping.

And one of these persons who is left in the pool
initially, left with coverage by the company initially,
will find they do not have it anymore.

It is very destabilizing. I cannot think of a major
amendment so opposed by both business and labor, both.
Both.

Now we are trying to get more choice here in this
bill, and we are certainly doing it through the
exchanges. That is true. And we are also trying to
improve the market by reforming the health insurance
system. We are doing that too. Delivery system reform.
Just think of all the good things that are in this bill,
the underlying bill. It is transformative.

It is delivery system reform as well as insurance
market reforms.

But I also do think it would be transformative in the wrong direction, the amendment, by causing such destabilization which will diminish the pools, make the pools sicker and tend to cause companies to drop coverage.

And again, so opposed by both business and labor. And there must be some wisdom there if they are both opposed, and I just think you have done a lot, Senator, but I do not think this amendment really is the right thing to do.

Senator Conrad.

Senator Conrad. Mr. Chairman, we have checked with CBO, and I think there is confusion, and here is what we just got back from CBO. Yes, all we scored was giving employers the option. We have not scored the voucher piece.

The Chairman. Right. It’s the employer portion, not the voucher portion that is scored. That is correct.

Senator Conrad. Yes. So reference that the Senator gave is absolutely correct with respect to giving employers the option, but they have not analyzed the voucher piece. And this is what I would say to my friend. This is what, and I would love to find a way to get that part of the Senator’s amendment which has been
analyzed added to this mark. That is, giving employers
the option.

But the voucher piece, my analysts tell me does have
the risk of undermining the pool, because if you have a
voucher, just as the Chairman described, who is most
likely to take that voucher and go outside the pool?
They are the younger, healthier workers, and the concern
of employers in my state, and I have now been contacted
by a group of them who say if you do this we believe our
pool will be destabilized. And they are not talking about
your first part, the employer choice part. They are
talking about the voucher part.

So we are in an awkward position here at 1.30 in the
morning, or whatever time it is, 10 to 2.00, because
there is a part of your amendment I am very attracted to.
There is a part of it I am nervous about. Part of it we
have got a score to, and part of it we do not. And I do
not how we resolve this.

Senator Wyden. Would the Senator yield?

Senator Conrad. Yes.

Senator Wyden. I think it is very important we
clear this up. I sent one version and one version only
to CBO, and it included the voucher. It is what this
amendment that we are discussing is all about. One
version, sent to CBO, and I will quote it here, “Relative
to the Chairman’s mark the amendment as modeled would reduce the net impact on Federal deficits by about $1 billion over 10 years. There would not be substantial effect on the total number of people with insurance coverage or the sources of that coverage relative to the Chairman’s mark.”

And I understand colleagues have differences of opinion, but I want colleagues to know that I sent one version there, the version had the voucher, and I am reading verbatim what the CBO analysis was. And unless CBO sends up a different version with respect to what was actually submitted, I think that ought to count for something.

Senator Conrad. Can I just respond to my colleague and say, this is a note from CBO. This is a note from Phil Ellis who has the responsibility of CBO. And this is just moments ago.

“Yes, all we scored was giving employers the option. We have not scored the voucher piece.”

So I absolutely believe you that you submitted the whole thing to them. For whatever reason I would say to you, colleague, they are telling us we did score giving the employers the option. We did not score the voucher piece.”

And that is directly from Phil Ellis.
Now, I do not know what to say to my friend, but I absolutely believe you that you submitted the whole thing. For whatever reason, they are telling us now they did not score the voucher piece.

Senator Wyden. Mr. Chairman, could I close at this point?

The Chairman. Yes. Unless there are other comments, yes.

Senator Kerry. Just one comment, only.

The Chairman. Yes. Senator Kerry.

Senator Kerry. I don’t want to nitpick, but I am concerned about the words here where it says there would not be a “substantial” effect. I do not know what their definition of “substantial” is. But there are effects, because they say they are not substantial.

And number two, it does not say anything about quality. All it just says is, the number of people with coverage. It does not say what that coverage should be. And the whole theory of this is, the bargaining and the quality of the coverage that people get. And that is what we have to look at.

Senator Wyden. Mr. Chairman, the hour is late, and I won’t take but a couple of minutes to wrap up.

The Chairman. Briefly, Senator. I am looking around and there are some pretty tired Senators here.
Senator Wyden. We are not going to have to bring in breakfast --

The Chairman. All right. Thank you.

Senator Wyden. Mr. Chairman and colleagues, we are wrapping this up. And the bottom line is millions of Americans will have no choice in the health system of the future. That is a fact. We can go back and forth about CBO’s score and we submitted the whole package. We have been through that.

What is indisputable, however, is over 200 million Americans, 200 million Americans, if they are getting hammered by their insurance company, if they are getting crummy coverage, if they are getting lousy service, we are saying, you are stuck. You do not get to get out in the marketplace like somebody who is unemployed or somebody who is uninsured. I think that is indefensible.

I think it is especially indefensible when people are going to say, Mr. or Ms. Senator, if you are taken advantage of in September of 2009, January of 2010 you get access to more than a dozen good choices.

So I understand, Mr. Chairman, where this is going.

I understand the power of these enormously influential special interest groups. I understand that this is transformational change. I think we will regret greatly denying hundreds of millions of Americans consumer
choice. We’ve had a good debate. I appreciate the time, Mr. Chairman, and at this point I would withdraw the amendment.

The Chairman. The amendment is withdrawn.

Senator Ensign. Mr. Chairman.

The Chairman. Senator Ensign.

Senator Ensign. Mr. Chairman, I have an amendment, Ensign Amendment Number F-1, as modified. It is a very simple amendment. It should not take long to debate, and we should be able to have a vote on it fairly quickly, and I would not have had this amendment except that you all were generous enough to find us some revenue that was not spent tonight. So I believe very strongly in the flexible --

The Chairman. That is the last time we will do that.

Senator Ensign. I believe very strongly in the flexible spending accounts. Folks use this, especially folks with chronic conditions that have to go to the doctor a lot, put braces on their kids. Having three kids with braces is something I can relate to. But the Chairman’s mark lowered the cap down to $2,500 for a flexible spending arrangements. And what this amendment would do is just take whatever the amount is that is left over after CBO does its final score from the Health
Improvement Fund that you all set up. Whatever that is, we raised the flexible spending account to that amount, so it is dollar for dollar whatever that is. And so we can give back to the American people something that they have been having, those who have had the flexible spending accounts in the past, and they can continue to buy things like eyeglasses, dental care, prescription drugs, various other things that they have.

The Chairman. Thank you, Senator. Just a very brief comment and then we can vote on it. Number one I think it is important to have reasonable caps, and the $2,500 I think is reasonable.

Second, I think it’s important to keep that $4 billion for adjustments because we want to make sure this bill is deficit-neutral over 10. And I think it is nice to have a little cushion to help make sure we can accomplish that goal. So I would urge we do not adopt it.

Can you suspend for a moment?

Senator Rockefeller. Mr. Chairman?

The Chairman. Senator Rockefeller wishes to be recognized before the vote.

Senator Rockefeller. Just a formality. My understanding is that Senator Bingaman, Kerry, Stabenow, Schumer, Menendez and Nelson would like to cosponsor my
modified amendment. And without objection, I hope that
will be the case.

The Chairman. Without objection. Senator has a
question? I have a question. The question is, whether
you are willing to modify your amendment, to index it to
inflation. If so, we can accept the amendment.

Senator Ensign. Index the $2,500 to inflation? Is
that what you are saying?

The Chairman. Yes.

Senator Ensign. And to do that, use the –

The Chairman. Use a portion.

Senator Ensign. Use whatever portion that is to
index it?

The Chairman. To accomplish that objective.

Senator Ensign. Index it? If we can index it to
medical inflation, I will agree to it.

The Chairman. All right. This we will do, medical
inflation.

Senator Ensign. All right. I still want to a roll
call, just to make sure it is in.

The Chairman. Well, that is what it is. And do
you still want a roll call? All right. Will the clerk
call the roll? And again, to make it clear to everybody,
we are just using a portion of it to pay for the
indexing. Otherwise, we are leaving the rest.
Senator Conrad. Can I just make sure that we have the money to do that?

Mr. Barthold. Senator Conrad, we have not. We have prepared some estimates of some different options related to the flexible spending account caps. But indexing for the CPI medical index we have not.

Senator Ensign. How about if we do it this way. We do it for as many years as we have left in the Health Improvement Fund.

The Chairman. No, cannot do that, because again we have to use the money. We need a substantial portion to help make sure this bill works. I want some surplus.

Senator Kerry. Mr. Chairman, can I ask a question also?

The Chairman. Sure.

Senator Kerry. Are we sure we really want to index it to the medical inflation, because that’s –

Senator Ensign. Well, that is what you use this for, is for medical expenses.

Senator Kerry. I do not think so necessarily.

Senator Ensign. Yes, this is what you use this for. Have you ever had a flexible spending account? That is what you use this for. You use it for prescription drugs, you use it for braces, you use it for eyeglasses, you use it if you have an autistic child that
needs a lot of things. You use it for wheelchair repairs, all those kinds of things are allowed under a flexible spending account, and it is for medical expenses. That is what it is there for. So why would you not do it for --

Senator Conrad. Well, can I just get back to the point that we don’t have a score on that.

Senator Ensign. All right. Let us just do the original amendment then. I was willing to compromise, but we can just do the original amendment and vote on it.

The original amendment just said that we will raise it to whatever amount is left that was not taken up by the Rockefeller amendment, whatever is left over. That is what we will use it to raise to whatever, raise the cap on the Flexible Spending Accounts in an amount necessary to absorb the surplus funds within the Health Improvement Fund.

We cannot vote on that?

Senator Conrad. That is fair. I mean it is fair to have a vote. The problem is, some of us will be constrained to oppose it because we have got to have some room to make certain that the overall mark is not under water.

The Chairman. That is correct. Let me ask you, Senator Conrad—I don’t think Senator Ensign would agree,
what if it is indexed to CPI, not medical inflation but to CPI?

Senator Conrad. I just do not know.

The Chairman. All right. Let us vote on the original amendment, not indexed. And I urge my colleagues to remember that the reason why we have a cap, it is a very high cap. It is not used by many. And second, we do need the revenue to help make this bill work.

Senator Schumer. Mr. Chairman.

The Chairman. Senator Schumer.

Senator Schumer. I understand the need to look at this more carefully, but there will be an opportunity as we move to the floor to try to deal with this.

The Chairman. That is a very good point.

Senator Nelson. Mr. Chairman. We need to hold the integrity of your bill together.

The Chairman. Yes. That is exactly right. Call the roll.

The Clerk. Mr. Rockefeller.

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.
The Clerk. Mr. Kerry?
Senator Kerry. No.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. No.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Nelson?
Senator Nelson. No.
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Grassley. Aye by proxy.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Grassley. Aye by proxy.
The Clerk. Mr. Bunning?

Senator Grassley. Aye by proxy.
The Clerk. Mr. Crapo?

Senator Crapo. Aye.
The Clerk. Mr. Roberts?

The Chairman. Aye by proxy.
The Clerk. Mr. Ensign?

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

Senator Grassley. Aye by proxy.
The Clerk. Mr. Cornyn?

Senator Grassley. Aye by proxy.
The Clerk. Mr. Chairman?

The Chairman. No.
The Clerk. Senator Lincoln?

Senator Lincoln. Aye.
The Chairman. The clerk will tally the vote.
The Clerk. Mr. Chairman, the final tally is 11 ayes and 12 nays.
The Chairman. The amendment is not agreed to.

Senator Grassley. Before you break up I want to ask you a question.
The Chairman. Senator Grassley is recognized.

Senator Grassley. Are we done with the amendments
then? All right.

For my 11 or 10 Republican members, and I think I can speak for all of them, but if I say something wrong you folks over there correct me. We are done now. And then next week sometime we are going to meet and vote on a final product that we have had here.

And I hope I am expressing what you have already expressed to us in colloquy that we had for a long time last week. I assume that with all these amendments they are going to be incorporated and you have a document that you are going to vote on, CBO is going to score that. And when that document is put together that we have a period of time, and I hope it is 72 hours for members to be able to read it.

The score is available either during that period of time or at the end of that period of time, whenever CBO gets it. Is that fair?

The Chairman. Essentially, but that is not quite exactly what I said when we had this conversation before. When we finish tonight, this is it. There are no more amendments. Then we send the completed bill over to CBO. CBO will then give us a preliminary score, and my expectation is that will take several days--I don’t know maybe Tuesday, Wednesday, and so forth.

Then they will report back to us, and I can remember
the conversation I had here with Senator Snowe and Senator Snowe asked, How much time will there be? And some were concerned, we don’t want to get this in the dead of night and have to vote on it the next day. I don’t want to commit to 72 hours, but as I said, I will in good faith make sure there is a reasonable time within which Senators and staffs and the public can review the score by CBO.

In the meantime, frankly, all these other days, being between today and forward, to analyze the bill, we know what the bill is. But I do think it is fair, it is proper to get a CBO score, score the bill, and then it is also proper that the Senators have a sufficient period of time within which to examine that CBO.

Senator Grassley. Well, I think we can do what I said and what you just said, and maybe I did not make myself very clear. But you are going to have a document you send over to there.

The Chairman. Correct. This is it, this bill, yes.

Senator Grassley. Yes, the bill. And the amendments are worked into it, and you’ve got a final document.

The Chairman. That is correct.

Senator Grassley. Well, if we can have that
document at that time, we can be reading it while CBO is scoring it.

The Chairman. Absolutely.

Senator Grassley. So if it is going to take CBO 72 hours to score it, we have got it for 72 hours. If it takes them 96 hours, we’ve got for 96 hours.

The Chairman. I probably did not say it very well, but that is my intention. Obviously we have the bill, and make it available to everybody and examine it the next couple of days while CBO is scoring it, and then we will get a reasonable period of time after that after we get the score before we then meet and vote on it.

Senator Crapo. Mr. Chairman?

The Chairman. Yes, Senator Crapo.

Senator Crapo. Can I clarify then, that once we receive that document --

The Chairman. From CBO.

Senator Crapo. That you send to CBO, it will not be changed or amended at all after that?

The Chairman. That’s correct.

Senator Crapo. That is the end point at which it cannot be modified?

The Chairman. No, no, no. Once we send the document to CBO, it is not going to be changed before it goes to CBO. But when CBO gives its score back to us, we
will have to see what the score is. If the bill scores, then we vote on the bill, if it scores well that is, if we have a surplus or it is deficit-neutral. But on the other hand, if we have a problem --

Senator Crapo. Then the committee would reconvene.

The Chairman. Then indeed, we come back and have to make some adjustments. That is correct.

Senator Snowe. Mr. Chairman.

The Chairman. Senator Snowe.

Senator Snowe. Could I inquire what you would consider to be a sufficient period of time just so we have some idea?

The Chairman. As soon as possible, Senator, we will get the document to you. And then I just present it, and we will have to exercise our best judgment. I am not going to rush anybody, but at the same time we also have to act on it.

Senator Grassley. A second point you have made throughout all this period of time is that your mark and we agree with you on this, has always been a goal of bending the cost curve. And I assume that their CBO will be making an assessment of that?

The Chairman. Well, I hope so. We are certainly going to ask them to.

Senator Grassley. Okay.
The Chairman. Yes. And I imagine if they do not there will be a lot of questions asked and a lot of concern by a lot of Senators.

Senator Grassley. Okay. That takes care of it.

The Chairman. Well, I want to just thank all my colleagues here. We have been working on health care for more than a year. We are acting. Now is the time to act. We have had umpteen hearings and roundtables. We have a product here that accomplishes our objectives, health care reform. It is fiscally responsible, and I think we can all be very proud of what we have achieved here. We have lowered taxes, (unclear) Americans, protected Medicare benefits for seniors, expanded health care coverage. It builds on the employer-based system that a majority of Americans know and most can keep what they have. It helps our most vulnerable. Senators, I think we can be very proud of what we are doing. And I want to thank my colleagues for their help. Together we have worked very well together. We can be very proud tonight of what we have done.

And I especially thank my colleagues for all your efforts. As we have discussed, next week we will vote on the final product after we get the score back from CBO, and so together we can achieve the key goals of health care reform that lowers cost, expands coverage, and is
very significant health insurance market reform.

The one point I wanted to make here too which I think is particularly critical, and that is delivery system reform. We are starting here in this bill to finally reform our system, our delivery system, so it is based much more on quality and patient focus, it is coordinated care on patients, moving away ever so slowly but inexorably from a fee-for-service which tends to cause a lot of the waste that occurs in our system. And we are not going to see the savings here, the benefits for a while. This could be a few years. But after four or five or six years from now, we are going to see real benefits here because of delivery system reform.

And I see my colleague from Washington nodding her head because she has been a real pioneer in pushing quality in delivery system reform. And I am just very, very proud of you, Senator, for your efforts there. And the same can be said for every member here. We sense what needs to be done, and we’ve made some major decisions here.

This is also a strategic bill. It is not just a piece bill, do something this year, something next year. It is a strategic plan to address our health care delivery system, not only the delivery system but the other components I mentioned. I am just very proud of
our mutual efforts to accomplish what we’ve done here.

Senator Grassley. Thank you to you, Mr. Chairman.

Are you done?

The Chairman. Well, no, I am not.

Senator Grassley. All right. Go ahead.

The Chairman. I am looking at people here who are about ready to drop off their chairs, who have worked so hard and behind us all around.

[Applause]

One reason I want to finish tonight is so they can begin the week and get some rest, which they more than deserve.

Senator Grassley. Like he said to my staff after the Medicare Modernization Act, I was supposed to give my staff a long time off. So you folks can take a long time off.

[Laughter]

But what I wanted to say, Mr. Chairman, is, you know there is a product here that most of the people on my side and maybe all of the people on my side may not vote for next week when we work on it. But I do want to applaud you for the fair process you had. There were just a few moments of tension. But for the most part, this was conducted in a very gentlemanly and ladylike way, and I want to thank you for that.
The Chairman. Thank you very much. Thank you.

[Applause]

So the Committee will stand in recess until 10:00 Tuesday.

[Whereupon, at 2:20 a.m., the committee was recessed.]
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 majority of this bill will be administered and the cost to administer 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.
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


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:

[The 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

• "evidence[] Congressional intent to punish, as reflected in the legislative record."⁷
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").

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., (holding—in a heavily criticized decision—that a tax on income from real estate is a direct tax).

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, 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.

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.  

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).
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.  

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 McCaughen v. Williams, 23 F.2d 840, 841 (3rd Cir. 1928).

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


A tax on a person who chooses not to act is precarious 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


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 flittered 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.
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.