

1 EXECUTIVE COMMITTEE MEETING TO CONSIDER
2 HEALTH CARE REFORM
3 FRIDAY, SEPTEMBER 25, 2009
4 U.S. Senate,
5 Committee on Finance,
6 Washington, DC.

7 The meeting was convened, pursuant to notice, at
8 9:54 a.m., in room 215, Dirksen Senate Office Building,
9 Hon. Max Baucus (chairman of the committee) presiding.

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

14 Also present: Democratic Staff: Bill Dauster,
15 Deputy Staff Director and General Counsel; Russ Sullivan,
16 Staff Director; Elizabeth Fowler, Senior Counsel to the
17 Chairman and Chief Health Counsel; Cathy Koch, Chief Tax
18 Counsel; Kelcy Poulson, Tax Research Assistant; Toni
19 Miles, Fellow; Kelly Whitener, Fellow; Andrew Hu, Health
20 Research Assistant; and David Hughes, Senior Business and
21 Accounting Advisor. Republican Staff: Kolan Davis,
22 Staff Director and Chief Counsel; Mark Hayes, Republican
23 Health Policy Director and Chief Health Counsel; Sue
24 Walden, Health Policy Advisor; Andrew McKechnie, Health
25 Policy Advisor; Rodney Whitlock, Health Policy Advisor;
26 Kevin Courtois, Health Staff Assistant; and Becky Shipp,
27 Health Policy Advisor.

1 Also present: Yvette Fontenot, Professional Staff;
2 David Schwartz, Professional Staff; Shawn Bishop,
3 Professional Staff; Josh Levasseur, Deputy Chief Clerk
4 and Historian, Athena Schritz, Archivist; and Thomas
5 Barthold, Chief of Staff of the Joint Committee on
6 Taxation.

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

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4 The Chairman. The committee will come to order.

5 A few short announcements. When we left yesterday
6 evening, I announced that we would vote on the Grassley
7 GPCI amendment, or a side-by-side of that same subject.

8 Over the evening, there has been further discussion
9 between Senators on both sides, including Senator
10 Grassley and myself. We are trying to work out, and we
11 have in principal worked out, an agreement. We are
12 writing up that language now and I hope to get that
13 modified Senator Grassley up, and I think it will be
14 agreed to on both sides. It is basically addressing the
15 allocation of dollars under Medicare to doctors under
16 GPCI, the geographic disparities, in terms of cost of
17 living in different parts of the country.

18 It is very important, obviously, to certain parts of
19 the country who feel that the formula works very much to
20 their disadvantage, and of course those other parts of
21 the country do not want any significant reductions to
22 dollars that already go to those areas. So we will work
23 that out, and hopefully bring that up soon.

24 Next, there was some discussion that perhaps this
25 morning we would take up a public option amendment.

1 There are a couple of public option amendments. It is
2 also somewhat related to the co-op provision that is in
3 the bill.

4 On further discussion, we have decided that we are
5 going to try to work out in combination how we vote on
6 them and how we deal with them, so we are going to bring
7 up public option amendments when we get back, that is,
8 next week. Because Monday is a holiday, when we adjourn
9 today we will not go back in session until Tuesday
10 morning.

11 So sometime Tuesday, I expect--and hopefully earlier
12 rather than later on Tuesday--we will bring up the public
13 option amendment. I want to take that up soon. It is an
14 extremely important amendment. But I also want to do the
15 best I can, and we as a committee want to do the best we
16 can, to work out the series, the order in which
17 amendments are offered and what nature of public option
18 amendments, just in the most expeditious way. We do not
19 have time today to do all that, but we are going to bring
20 it up when we get back Tuesday.

21 This will not be a long session today. We will
22 recess today about noon and not come back until Tuesday
23 morning, next week. I expect to go into session about
24 9:30 next Tuesday morning.

25 The first amendment now will be --

1 Senator Roberts. Mr. Chairman? A question, if I
2 might, sir.

3 The Chairman. Senator Roberts? Absolutely.

4 Senator Roberts. There are five CER amendments by
5 Mr. Kyl and myself. We would like very much to have them
6 considered at the same time so that we could have some
7 continuity.

8 The Chairman. I appreciate that.

9 Senator Roberts. If you are looking for something
10 on Tuesday morning, why, that --

11 The Chairman. Right. I am just curious. If there
12 are five CER amendments between the two of you, is there
13 any thought that maybe you can kind of combine?

14 Senator Roberts. Well, there were 10 and we got it
15 down to 5. We had another 5, but there was some
16 bellowing in there and we thought that was not
17 permissible. So, I am just giving you a hard time.
18 Happy Friday, Mr. Chairman.

19 [Laughter].

20 Senator Roberts. No. There are five and we can
21 talk about that on Tuesday. I just thought it would be a
22 good time Tuesday morning, if there was some time there
23 where there would be some continuity to it, I think it
24 would be helpful rather than bouncing around.

25 The Chairman. Well, again, I do not know if you

1 are serious or not, but if there is any way to combine
2 those five, that would --

3 Senator Roberts. I am always serious of intent,
4 sir.

5 The Chairman. Yes, you are.

6 Senator Roberts. But these are five very
7 important --

8 The Chairman. How are you feeling this morning?

9 Senator Roberts. Here, feel me. It seems I am
10 feeling pretty good.

11 [Laughter].

12 The Chairman. Good. All right. All right.

13 The first amendment is an amendment offered by
14 Senator Ensign.

15 Senator Ensign. Good morning, Mr. Chairman. My
16 amendment, I believe, is an important amendment, whether
17 you are a Republican or a Democrat, simply on the idea
18 that the Congress--once again, hearkening back to the
19 Constitution--has a very, very serious role to play when
20 it comes--especially the U.S. Senate, the advice and
21 consent clause--to oversight of the administration. That
22 process, I believe, over the years -- by the way, this is
23 Amendment Number C10. It has to do with transparencies
24 and czars.

25 We are now facing a situation where there is almost

1 a shadow cabinet that is being developed and it is
2 thwarting the authority of the U.S. Congress. These
3 czars in the various positions -- you know, we have the
4 Secretary of Health and Human Services, but yet we have a
5 health care czar who is not subject to being called
6 before the U.S. Senate to testify. We cannot compel her
7 to come up here and testify because they are not part of
8 the confirmation process because the administration
9 claims about this executive privilege, their
10 communication.

11 So we have somebody with tremendous power and yet is
12 not subject to the confirmation process. I think that
13 this is something that the Congress, whether we have a
14 Republican President or a Democrat President, we have got
15 to get a handle on. It started slipping in there with a
16 czar here and a czar there, but it is completely out of
17 control now. This committee at least should assert its
18 authority, saying that a health care czar ought to be
19 part of the Senate confirmation process.

20 So, Mr. Chairman, earlier this year President Obama
21 even said, "My administration will take appropriate
22 action, consistent with law and policy, to disclose
23 information rapidly and inform so the public can readily
24 find and use."

25 Well, part of that information is having people from

1 the administration come here and testify. This is, once
2 again, about sunshine. This is about letting light in
3 and open government. If we have administrations, because
4 of the use of executive privilege, trying to get around
5 the balance of powers between the administration and the
6 legislative branch, I think that this is out of line.
7 President Obama has created 18 new czars. These are
8 political appointees with broad powers to create and
9 coordinate policy. Once again, they are not accountable.

10 The Chairman. Could we be in order, please, so we
11 can hear the Senator from Nevada?

12 Senator Ensign. Thank you.

13 The Chairman. There are too many side
14 conversations.

15 Senator Ensign. I appreciate that, Mr. Chairman.

16 According to Article 2 of the Constitution, the
17 President is empowered in relevant part to "nominate, and
18 by and with the advice and consent to this Senate, public
19 ministers, consuls, judges of the Supreme Court, and all
20 other officers of the United States whose appointments
21 are not herein otherwise provided for and which shall be
22 established by law." So we clearly have the authority to
23 do this and I think that it is really important.

24 Once again, this is not a question of going after a
25 Democrat President. We probably should have done this.

1 We probably should have gotten together and done this
2 before. It is just that it has gotten 18 new ones on top
3 of the ones that were already there. It is just getting
4 out of hand.

5 I think that we as the Congress need to say to the
6 President, we are not allowing this any more. We are
7 going to take back the power that is rightfully in the
8 legislative branch because the balance of powers is
9 getting out of balance. The Constitution clearly
10 outlined, to keep that balance of power, we need to step
11 up and do the right thing. That is what this amendment
12 is really stating.

13 The Chairman. Senator, I have a question to ask.
14 I am a little unclear what you have in mind and what this
15 amendment covers. The description I have of the
16 amendment, it would require that czars be subject to
17 Senate confirmation. Does this mean all czars?

18 Senator Ensign. No. This actually says "any czar
19 handling health care issues."

20 The Chairman. Oh.

21 Senator Ensign. It is under the --

22 The Chairman. That must be a modification.

23 Senator Ensign. Yes. Sorry. Sorry. Yes.

24 The Chairman. And that would be in this
25 committee's jurisdiction.

1 Senator Ensign. Yes.

2 The Chairman. The problem I have with this
3 fundamentally is, the job title "czar" does not exist.
4 That is, those are not officers --

5 Senator Ensign. Well, this is a --

6 The Chairman. I am sorry, Senator. I have the
7 floor.

8 Senator Ensign. Sorry.

9 The Chairman. That these are not officers
10 established by law. Any administration can informally
11 designate any name for any person not established by law.
12 The Cabinet Secretaries are established by law, Assistant
13 Secretaries, et cetera. For example, the administration
14 could say, this is the chief, this is the superintendent,
15 this is the captain.

16 We could make up all kinds of examples, and they are
17 not established by law, they are just designated by the
18 administration. We already, in this committee -- I
19 daresay, about 40 different officers established by law
20 appear before this committee for Senate confirmation, and
21 those are not all health. Those are not all health. I
22 am talking about tax and health and so forth.

23 But the HHS Secretary clearly does appear before
24 this committee for Senate confirmation, as do Assistant
25 Secretaries. I think this committee has a pretty good

1 handle on the confirmation process with those officers
2 that are established by law and named by law to be
3 subject to Senate confirmation.

4 Senator Ensign. Well, Mr. Chairman --

5 The Chairman. I have a hard time, frankly, of
6 coming to the conclusion that this Senate should require
7 a confirmation process, Congress should require a
8 confirmation process of people within the administration
9 that have job titles not established by law.

10 Senator Ensign. Mr. Chairman, we have a conceptual
11 mark before us. That conceptual mark, we all know what
12 we are talking about here as far as czars are concerned.
13 Everybody calls them czars. I mean, we know who the
14 czars are. So as a conceptual, we can come up with the
15 legal language in the actual drafting of the amendment
16 when we get to the legal language. But we all know what
17 that is. We cannot call Nancy up here. We cannot compel
18 her to testify right now. She has broad powers.

19 Most of these czars are not confirmed today. They
20 should be confirmed. If they have broad powers -- this
21 is a question of balance of powers. This is not a shot
22 at the administration. This is a question of any
23 administration, that the Congress should take back its
24 power under the Constitution on this balance of powers.

25 If we do not step up, you can get more and more

1 power concentrated in the administration. That, I
2 believe, is something that we should not do. We should,
3 as the Senate, stand up and say this is rightful under
4 the Constitution for us to have the advice and consent
5 clause and to be able to compel folks to testify. If
6 they are under the advice and consent clause, they cannot
7 refuse to testify up here.

8 The Chairman. Well, I might say, too, that first
9 of all, I totally agree with transparency. I mean, this
10 whole process is probably the most transparent
11 legislative process this Congress has seen, as we are
12 trying to pass health care legislation. I mean, no
13 legislative process has been more transparent than the
14 one we have undertaken here in our committee.

15 I want every Cabinet Secretary, Assistant Secretary
16 that is relevant to this committee's jurisdiction to come
17 up and testify, and when we call them, they do. Now, we
18 could go down the administration -- I do not know what
19 the book is, the executive directory, whatever it is, and
20 look for somebody like Nancy-Ann Min DeParle and say,
21 well, she is the czar, so we will make her subject to
22 Senate confirmation.

23 Well, let us say we do that. What is the next step?

24 The next step is--and all administrations do this,
25 Republican and Democrat--they will say, fine, we will get

1 somebody else who is sort of the President's private
2 advisor on health care matters that is not subject to
3 Senate confirmation. They will accomplish, with somebody
4 else, the purpose that they all pursue. It gets close to
5 executive privilege. It gets close to separation of
6 powers issues between the U.S. Congress and the executive
7 branch.

8 I think that we would be wasting our time to try to
9 track down every czar or czar-like person in the
10 administration and say that person is subject to Senate
11 confirmation. We should rather spend our time, frankly,
12 working with the great people we have now that are
13 subject to Senate confirmation we can bring up here, and
14 also just talking informally to Nancy-Ann. I mean, she
15 has given us lots of good information and she is good to
16 work with, but I do not know that having her testify here
17 would really advance the cause of health care reform.

18 Senator Rockefeller. Mr. Chairman?

19 Senator Ensign. With all due respect, Mr.
20 Chairman, I do not believe that it is a waste of time for
21 the Congress to assert its authority in this idea of --
22 there is a constant struggle between the branches of
23 government. There is a constant struggle between the
24 Judiciary, the Congress, and the President. There has,
25 throughout the history of our country. If you do not

1 fight for each branch of power, you can get more and more
2 power concentrated into that branch.

3 That is the reason that our founders even set up
4 this idea of separation of powers and splitting of the
5 powers, but they did not want all the power concentration
6 or too much power concentration in the executive branch,
7 in the legislative branch, or the judicial branch. This
8 is a way for the administration to skirt that balance of
9 power, and if they are doing it and we are not asserting
10 our authority, then we are allowing them to get away with
11 it.

12 Senator Rockefeller. Mr. Chairman?

13 Senator Ensign. That is why this is worth the
14 fight.

15 Senator Rockefeller. Mr. Chairman?

16 The Chairman. Senator Rockefeller?

17 Senator Rockefeller. Mr. Chairman, I would say to
18 my friend from Nevada two things. One, is that Nancy-Ann
19 is not, and was not, appointed as a czar. That has been
20 created by people trying to push the idea that everything
21 belongs to the government and there is no private sector.
22 But if you want to take somebody who is available to all
23 of us to facilitate, who is a director -- when I was
24 governor, I appointed people like that. They were not
25 cabinet-level, director-level.

1 But if you want to create that czar that is in your
2 mind, then go to the Senate confirmation process and then
3 you will elevate that person to a level of power that
4 that person, in the case of health care, certainly, does
5 not have. That person is a facilitator, available to you
6 and to all of us. She does not have the "czar" powers
7 that you presume her to have. But if you want to give
8 them to her, then put her through the Senate confirmation
9 and then she will be right up there with Sebelius. I
10 just do not think that is what you want to do.

11 Senator Conrad. Mr. Chairman?

12 The Chairman. Senator Kerry sought recognition.

13 Senator Kerry. Well, one of the reasons that the
14 chief executive is forced to try to create a coordinator
15 is because the Senate confirmation process is such that
16 we do not confirm a lot of people on time. There are a
17 lot of empty positions right now and Senators ought to
18 probably investigate the hold process in that regard.

19 I am trying to break some people out right now, any
20 number of nominations, two in Treasury right now, and
21 other places. So if you are the chief executive, you
22 say, how am I going to get this coordinated? I cannot
23 get the person in I want to have coordinate it. That is
24 number one.

25 Number two, in principle, the concept of a czar is a

1 term of fiction and it has been created in places where
2 very legitimate internal coordination efforts are under
3 way. People have dubbed it as "czar", but really it is
4 perfectly within the rights of a chief executive to try
5 to figure out how to do that.

6 If we all of a sudden create this confirmed position
7 that goes through the normal confirmation process here,
8 you are just going to have someone else designated to be
9 the person who can get things done. A whole bunch of
10 things would simply not have gotten done in the first
11 months of this administration if somebody was required to
12 be confirmed or if they had not been given authority to
13 try to get the job done. Part of that is our fault
14 because we do not get the confirmations done fast enough.

15 A third point. I happen to believe there are too
16 many "coordinators" and there are too many special
17 envoys, and there is discussion of even more of them. I
18 think what it does, is it strips the people who have been
19 given that kind of authority within many of these places
20 of the ability to get things done. So we have got these
21 layers of add-on government today, which is a lot of
22 people's fault.

23 I think the better way to proceed, rather than to
24 have this sort of one-shot, we-are-going-to-do-this-on-
25 health-care-now amendment, would be for all of us to

1 agree to review the overall connection between the
2 confirmation process and the ability of government to
3 govern, and us to have accountability. If we did that in
4 a competent, comprehensive way, we would be a lot better
5 off.

6 And I absolutely agree, I think there are too many
7 folks running around doing some of this. I know that in
8 the State Department, where I have a special interest,
9 there are Assistant Secretaries of State, Deputies, and
10 others who are totally stripped of any legitimacy in
11 their effort to do things because there is a special
12 envoy who does the whole thing. So I think we have got
13 to look at this very, very carefully, Senator Ensign. I
14 think you raise a very good point. But I would like to
15 see us do it in a more comprehensive way, where we come
16 at it more effectively.

17 The Chairman. Is there other debate? I might add,
18 too -- this is a sideline. It is kind of interesting:
19 there is now a whole on all health confirmations. If we
20 make this health czar is subject to Senate confirmation,
21 I will bet there will be holds on her, too. All these
22 holds that current exist on current health nominees is a
23 problem. It is really interesting to me.

24 Not interesting, but I would just tell you: many
25 Secretaries and the administration has complained

1 mightily to me about how much they need their Secretaries
2 or their Assistant Secretaries for this position or that,
3 they have just got to get their work done. But because
4 the confirmation process is so slow -- now, in some
5 respects that is the administration's fault, in some
6 respects we are holding it up. But many, many, many
7 times the administration has complained that they do not
8 have their people so they cannot get their work done.

9 I might say, just 49 presidential nominees come
10 before this committee. Lots of opportunities for holds,
11 but we have an opportunity to grill these people as much
12 as we want. All right.

13 Senator Ensign. Senator Carper was seeking
14 recognition.

15 The Chairman. All right. Senator Carper, do you
16 want to speak?

17 Senator Carper. Just very briefly. In my old job
18 as governor, we had the secretaries of Education, we had
19 secretaries of Health and Social Services. But among the
20 priorities in our administration, one was to raise
21 student achievement. I had an education advisor, not
22 confirmable by the legislature, but someone who worked
23 with me and actually worked very closely with the
24 legislature to develop our standards and accountability
25 and measurement process.

1 Another major priority of my administration was to
2 strengthen families. We focused on welfare reform, we
3 focused on teenaged pregnancy, and focused on recruiting
4 thousands of mentors in our State. I had a person, not
5 confirmed by the legislature, who worked within the
6 governor's office who helped me on all of those and
7 worked very closely with the legislature.

8 Another priority was land use reform, to make sure
9 we did not use up all of our open space. Again, not a
10 confirmable position, but somebody who worked from within
11 our administration with the legislature and, I think, to
12 very good effect.

13 I want to just back up what I think I heard the
14 Chairman saying, and maybe some others saying. I think
15 we have too many confirmable positions. They take too
16 long to get confirmed. If you or I were President, we
17 would be going crazy, trying to get our people confirmed
18 even this late into the first year of an administration.
19 There are a lot of vacancies, a lot of holds on positions
20 that need to be filled. I would just urge us not to
21 create another confirmable position. I think we need
22 fewer rather than more.

23 Thanks. Thanks, Mr. Chairman.

24 The Chairman. Senator Ensign?

25 Senator Ensign. Yes. If I could just conclude

1 here. Senator Kerry, I think you were exactly right when
2 you said that the Cabinet-level people are having their
3 power usurped. They are. There is no question about
4 that. Who is in charge? Is it Secretary Sebelius or is
5 it Nancy-Ann? We do not know. I mean, from what I
6 understand, you had a meeting, briefed this last weekend
7 with Democratic staff, not with the Secretary, but was
8 with Nancy-Ann.

9 So, I mean, the bottom line is that it is about
10 accountability. It is about establishing, according to
11 the Constitution--let me read it again--"nominate, and by
12 and with the advice and consent of the Senate, public
13 ministers, consuls, judges of the Supreme Court, and all
14 other officers of the United States whose appointments
15 are not herein otherwise provided for, and which shall be
16 established by law." So we have the authority to do
17 this, and this is a question of establishing the balance
18 of powers between and making sure that we are fighting
19 for that balance of powers which is rightfully ours.

20 Thank you, Mr. Chairman.

21 Senator Schumer. Would my colleague yield for a
22 question? We find ourselves between a rock and a hard
23 place. As the Chairman mentioned, every health care
24 nominee has been put on hold. We cannot debate them on
25 the floor. Each one is filibustered. You say, bring

1 more before us, but the ones who have the actual line
2 authority to do things -- would my colleague be willing
3 to talk to his leadership about lifting the holds so we
4 can stop debating some of these health care nominees?

5 Senator Ensign. And I would say to my friend that
6 I do think that the nomination process has been broken,
7 and that is something that maybe this debate is going to
8 bring out for us to fix. I believe that it was broken in
9 the last Congress. Remember, this happened when you guys
10 were putting holds on the last administration as well.

11 We heard from them, every administration, whether it
12 is Republican or Democrat, the nomination process is
13 broken up here, it takes too long, it is too cumbersome,
14 and things like that. But to get around that and to give
15 huge powers on people who then cannot be called and
16 forced to testify, to have that open accountability, I
17 believe is the wrong solution for it. The right solution
18 is to fix it, but we should not allow the administration
19 to get around the laws that are in place and give vast
20 powers to people who are not accountable to the U.S.
21 Congress.

22 The Chairman. All right. Are you ready to vote,
23 Senator?

24 Senator Ensign. Yes. Roll call vote.

25 The Chairman. A roll call vote is requested. The

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

1 The Clerk. Mr. Grassley?
2 Senator Grassley. Aye.
3 The Clerk. Mr. Hatch?
4 Senator Grassley. Hatch, aye by proxy.
5 The Clerk. Ms. Snowe?
6 Senator Snowe. Aye.
7 The Clerk. Mr. Kyl?
8 Senator Kyl. Aye.
9 The Clerk. Mr. Bunning?
10 Senator Grassley. Aye by proxy.
11 The Clerk. Mr. Crapo?
12 Senator Grassley. Aye by proxy.
13 The Clerk. Mr. Roberts?
14 Senator Roberts. Aye.
15 The Clerk. Mr. Ensign?
16 Senator Ensign. Aye.
17 The Clerk. Mr. Enzi?
18 Senator Enzi. Aye.
19 The Clerk. Mr. Cornyn?
20 Senator Cornyn. Aye.
21 The Clerk. Mr. Chairman?
22 The Chairman. No.
23 The Clerk will tally the vote.
24 The Clerk. Mr. Chairman, the final tally is 10
25 ayes and 13 nays.

1 The Chairman. The amendment does not pass.

2 The next amendment is the Senator from
3 Massachusetts, the age rating amendment, as I recall.

4 Senator Kerry. Mr. Chairman, I am going to just
5 talk about this very briefly. I want to raise this
6 issue. Hopefully we can work on this between now and the
7 floor. I am confident the position that I am advocating
8 on this amendment, which is Amendment 240, Kerry C15,
9 will be part of the melding of the two bills. I think it
10 is an important one for us ultimately to confront on the
11 floor of the Senate.

12 That is the question of, what is the appropriate age
13 rating band? My amendment is designed to put a 2:1
14 rating band, which is what is in the HELP bill. So we
15 are going to have to confront this issue at some point in
16 time. Allowing insurers to charge older Americans vastly
17 higher premiums--5:1 is what we have in the bill now--
18 simply because they are older is a step in the wrong
19 direction of health reform. It is an arbitrary status,
20 if you will, that automatically treats everybody
21 similarly and can wind up in major unfairness and
22 discrimination.

23 I think insurers ought to be forced to compete on
24 the basis of price, value, and customer satisfaction and
25 not by avoiding the sick and the elderly. So I

1 appreciate the modification that you have already put in
2 the mark. You have moved it from 5:1 to 4:1, and that is
3 a good step, but I really strongly believe that that is
4 not enough.

5 I am concerned that the current mark will allow
6 insurers to charge older Americans four times more for
7 premiums than younger people. It just does not make
8 sense. We have people, 65, 70, 80 years old who are
9 healthier than some younger people and who exercise more,
10 and who lead a better lifestyle et cetera. I do not
11 think it is fair, just because of their age, to say you
12 are going to pay four to five times more. It will make
13 insurance unaffordable for more than 7 million Americans
14 who are aged 50 to 65 who now lack health insurance
15 altogether.

16 Allowing a 4:1 age gap is excessive. I prefer 2:1.
17 We operate that way in our State, and other States do
18 too. If age rating is not seriously constrained, then
19 insurers are likely to charge older people higher rates
20 as a way of circumventing the prohibition on rating that
21 is based on health status, and in a reformed system you
22 cannot rate based directly on that, obviously. So with
23 strong risk adjustment and reinsurance provisions
24 contained in the mark, we are creating a very safe
25 environment, I think, to eliminate discriminatory rating

1 practices.

2 In many States, age differentials are actually 600
3 percent or more. This puts insurance completely out of
4 the reach of many Americans over the age of 50. It is
5 particularly a problem for older women, where uninsured
6 rates are high because coverage is not affordable. I am
7 glad we eliminated gender rating that I had suggested
8 earlier.

9 In Massachusetts, Mr. Chairman, we already have a
10 guaranteed issue and renewal requirement to prevent
11 insurers from denying coverage based on preexisting
12 conditions. For small businesses and individuals,
13 insurers may vary rates on a limited number of factors,
14 but rate variation based on age is, as I said, limited to
15 a 2:1 ratio. Seniors cannot be charged more than double
16 the premiums that are charged to younger people. I think
17 that true health reform ought to end the discrimination
18 based on health or age once and for all. This is an
19 important first step, Mr. Chairman.

20 Senator Wyden. Would my colleague yield on this
21 point?

22 The Chairman. First, Senator, I would like to ask
23 Ms. Fontenot, just educate us a little bit here about
24 rating bands and tell us what the practice, in general,
25 of States is in terms of bands and the wide variation.

1 It is all over the lot, basically. As we are moving
2 toward health insurance reform, it is not only asking
3 insurance companies, especially the individual and small
4 group market, to not only not be able to deny coverage
5 based on preexisting conditions, health status, et
6 cetera, but also a second layer or level of reform in
7 this bill is the rating bands.

8 Could you just tell us a little bit about what
9 States do and what variation there is among States, and
10 just a word or two about the trade-off between the young
11 and the old and the need to get the young in the system,
12 and just some of the considerations that we have to face
13 in striking that balance.

14 Ms. Fontenot. Sure. The current marketplace,
15 particularly in the individual market, is that the
16 majority of States have no restrictions whatsoever in
17 terms of the rating. There are a handful of States
18 that --

19 The Chairman. And what does that mean? If there
20 is no restriction, what is the practical effect of that?

21 Ms. Fontenot. The practical effect of that is that
22 the insurance plan can ultimately charge each individual
23 a separate premium that is based on whatever they deem
24 reasonable. So what has resulted in the market is that
25 the majority of insurers rate based on health status; if

1 you have been sick in the past you will pay significantly
2 more. They rate based on age at an unlimited extent.
3 They rate based on gender. Women often get charged more.
4 In the small group market they will rate based on your
5 group size, so if you work for a smaller employer you
6 will pay a higher premium. If you work in a more risky
7 industry you will pay a higher premium. It is virtually
8 unlimited, the number of factors.

9 The Chairman. All right. And in the mark, what
10 have we done about all that?

11 Ms. Fontenot. So in the mark, what we have done is
12 we have limited rating in both the individual and small
13 group market to the fact that you can only rate based on
14 family composition, so if you have more people in your
15 family you can pay a little more; age, but only to 4:1,
16 so we have compressed that to 4:1; and tobacco use, so if
17 you smoke you can pay 1.5 times more than a non-smoker.

18 The Chairman. And what is the trade-off between
19 the young and old, and what is the importance of that
20 trade-off?

21 Ms. Fontenot. So the trade-off between the young
22 and old is that the more you compress the age rating, so
23 the difference between, say, 5:1 and 2:1, is that it
24 forces younger individuals in the marketplace to pay a
25 little more to subsidize the older individuals that are

1 coming in.

2 So the trade-off is, as much as we want to make it
3 affordable for older individuals to purchase insurance,
4 it is critical to have what we call the "young immortals"
5 or "young invincibles" purchase coverage and come into
6 the marketplace, because without them premiums are going
7 to go up for everyone.

8 If the insurers anticipate that they will not have a
9 risk pool that is balanced between the older/sicker and
10 the younger/healthier, then they will charge a premium
11 that reflects the fact that they anticipate getting a
12 sicker risk pool, which also goes back to the personal
13 responsibility requirement and the need for that
14 requirement. So we have tried to strike a balance in the
15 mark between making it affordable for older people and
16 making it more attractive for younger people to make sure
17 that they get into the marketplace.

18 The Chairman. All right. So right now the mark is
19 4:1.

20 Senator Wyden?

21 Senator Wyden. Mr. Chairman, I think Senator Kerry
22 is making an extremely important point. If you look
23 today at the countryside as it relates to health policy,
24 the people that are getting hammered the hardest in
25 America are the people between the ages of 55 and 64.

1 These are folks that are essentially a decade away from
2 Medicare and they also are, in a bad economy, feeling
3 some of the most direct pain of getting laid off, because
4 they are not in a position to get additional economic
5 opportunities.

6 One additional area I would like us to look at as we
7 go forward is trying to reduce this discrimination
8 against older people. I had filed an amendment--Senator
9 Kerry and I have worked together on this--to try, as we
10 get into the exchanges, to get as many of the people
11 between 55 and 64 into large groups, because if they are
12 in large groups, that is where you are likely to see the
13 least age discrimination.

14 Mr. Chairman, you and your staff have been very
15 helpful in working with us on this issue. I just agree
16 with Senator Kerry. It is going to take a lot more work,
17 because to have the people between the ages of 55 and 64
18 getting hit this hard in a bad economy, we just need to
19 stay at it and find some additional relief for them.

20 The Chairman. Thank you.

21 Senator Grassley?

22 Senator Grassley. Yes. I think what I would try
23 to do is just emphasize some of the things that Ms.
24 Fontenot brought up, but with some specifics I had and
25 some remarks I was going to make. This would be in

1 regard to being against the Kerry amendment. So I am
2 kind of asking a question of you. At one time in our
3 discussion of the group of six, it seems to me I remember
4 that we were talking about some States having a division
5 of 28:1. So, there are some really extreme differences.
6 So what we are trying to do is modify it, but do it in a
7 way where it is not too harmful to young people coming
8 into the system and not too bad for older people as well.

9 So I thought I would quote Oliver Wineman, a highly
10 regarded actuarial. He concluded that moving to 5:1
11 would result in a 48 percent price increase for the
12 youngest/healthiest, one-third of individuals, in the
13 year 2013. So we have already exacerbated that situation
14 a little bit for younger people when we move to 4:1 in
15 the Chairman's modification. Now we are debating this
16 further increase. Then Oliver Wineman concluded that
17 tightening the rating bands down to 2:1 would result in
18 yet another increase of almost 50 percent.

19 So I think they have made it very clear that as
20 these prices increase, more young people will choose not
21 to buy coverage. Getting them into the system is the
22 goal that the Chairman's mark wants to accomplish, so I
23 hope that we will not move in the direction that Senator
24 Kerry wants us to move.

25 Senator Conrad. Mr. Chairman?

1 The Chairman. Senator Conrad?

2 Senator Conrad. Mr. Chairman, if I can inquire of
3 the staff, because, Senator Grassley, you and I remember
4 the discussions in a very similar way, that there is this
5 tension and balance--I think the Chairman was getting at
6 that in the questioning of the staff--between being fair
7 to all age groups.

8 The fact is, there is a difference in risk, the
9 older you are. If you do not reflect that in some way,
10 you are going to put tremendous upward pressure on the
11 premiums of young people. That will create a
12 disincentive for them to buy insurance. That will keep
13 healthier people out of the pool. That will raise the
14 risk premiums for everyone who is left in the pool and
15 raise rates for everyone. I just hope that we think
16 about the balance.

17 I would ask Ms. Fontenot, I remember during the
18 group of six deliberations that we had a series of charts
19 that showed an analysis of what happens to the premiums
20 of younger people if you go from, I think we were then at
21 5:1 on an age variation, to 2:1. Do you have those
22 tables available to you?

23 Ms. Fontenot. Yes.

24 Senator Conrad. And what do they tell us about
25 looking at a younger cohort? What would happen to their

1 premiums if we were to shift from the 4:1 that is in the
2 Chairman's mark to 2:1?

3 Ms. Fontenot. So the move from 5:1 to 4:1, at a
4 certain actuarial value, results in an increase for the
5 young immortals of probably a little under \$150. So if
6 you were to move to 2:1, you would probably exacerbate
7 that three times or so.

8 Senator Conrad. How much?

9 The Chairman. Is that per month?

10 Ms. Fontenot. That is per year.

11 The Chairman. Per year. One hundred fifty dollars
12 per year?

13 Ms. Fontenot. Yes.

14 Senator Conrad. And you would increase that by how
15 much if you went from 4:1 to 2:1?

16 Ms. Fontenot. There would probably be a doubling.
17 About a doubling.

18 Senator Conrad. So, \$300.

19 Ms. Fontenot. You would have to ask an actuary.
20 But I would say that this was all done before we added
21 the young immortal plan that is now in the Chairman's
22 mark. The addition of that plan, which makes coverage
23 more affordable for younger individuals, is the reason we
24 were comfortable then moving to 4:1 in the mark.

25 Senator Conrad. Yes. And could I just end on this

1 question, Mr. Chairman? In terms of adding the young
2 immortals--and I do not know how we ever got that
3 terminology--the idea is that young people are reluctant
4 to buy insurance because they do not think they are going
5 to get sick.

6 Ms. Fontenot. Right.

7 Senator Conrad. Or some awful thing is going to
8 happen to them.

9 Ms. Fontenot. Right.

10 Senator Conrad. But, of course, unfortunately,
11 awful things do happen. They know that if they are in a
12 car accident, they are going to go to the emergency room
13 and they are going to get treated at a hospital.

14 Ms. Fontenot. Right.

15 Senator Conrad. Maybe you could share with us the
16 tables that you are referencing, because I think it would
17 be useful for all members to see those because there is a
18 price to be paid, is there not, for those who are in the
19 younger cohorts, if we change the rating bands further
20 from what has already been done?

21 Ms. Fontenot. Yes. Absolutely, there is. We can
22 get you those tables. We have had actuarial firms who
23 have run numbers for us on them.

24 The Chairman. Senator Nelson?

25 Senator Nelson. Thank you, Ms. Fontenot, for your

1 explanation. I want to ask you, the larger that the pool
2 is of which the insurance is spread over, does that or
3 does that not affect the charges that you have just been
4 talking about with regard to the differential in age?

5 Ms. Fontenot. Absolutely. I mean, if you have a
6 larger pool, there is going to be more risk to spread
7 across.

8 Senator Nelson. Aha! So, to protect elderly
9 people that Senator Kerry wants to do, you can do that by
10 making your pools much larger, so that if you are doing 9
11 million Federal employees and Federal retirees, you have
12 got a much better chance of having that differential a
13 lot less. So why do we not consider making these pools
14 instead of just organized around a State?

15 If it is a State like mine, it has got lots of
16 millions of people. But if it is a State like Senator
17 Conrad's, it is a very small State and he does not have a
18 lot of people that are going to be in that health
19 insurance exchange. So why do we not address this
20 problem by making those health insurance exchanges much
21 larger?

22 The Chairman. Well, Senator, the mark allows that.
23 It provides for that.

24 Senator Nelson. All right. It would be necessary
25 to do that, but you could even force that if you brought

1 the differential between old and young down, as Senator
2 Kerry is suggesting. That would even force a small State
3 to make that a much larger pool of people, millions of
4 people, instead of a few hundred thousand.

5 The Chairman. Well, there are a lot of factors
6 that would encourage States to get larger pools. This
7 would be one factor. There are many factors. But we
8 have changed the mark, though, to do two things to help
9 address this contention that we have been discussing
10 here.

11 One, is to reduce the 5:1 to 4:1 wraps, as Senator
12 Kerry is suggesting, to go still further. We also add
13 the younger invincibles in too to help them get
14 insurance, because the more you compress, the more
15 pressure there is on them. So we take some of the
16 pressure off to buy it for the young invincibles.

17 Senator Kerry. Mr. Chairman?

18 Senator Nelson. I think you have done steps in the
19 right direction. I think what Ms. Fontenot has taught us
20 here is that you can correct a lot of this problem by
21 making the pools a lot bigger. Now, you know there are
22 other things in here that are discriminating against the
23 elderly. One of them is that we are putting that excise
24 tax on Cadillac plans. Well, guess who the biggest
25 portion of the population is that has the Cadillac plans?

1 It is those that are the elderly.

2 What we want to do is to reverse that differential
3 of 5:1--you have got it 4:1 here--even more. As you go
4 forward over the years and expanding the pools, the
5 health insurance exchange side is certainly a way.

6 Senator Kerry. Mr. Chairman?

7 The Chairman. Senator Kerry? Go ahead, Senator
8 Kerry.

9 Senator Kerry. Well, I want you to be able to also
10 hear me.

11 The Chairman. I am sorry.

12 Senator Kerry. I am sorry.

13 The Chairman. I am sorry.

14 Senator Kerry. But I want to put this in the
15 context of what we are trying to do here. The whole
16 theory of this effort is to deliver better quality care
17 to Americans at lower cost. I guarantee, this is a
18 balance. Also, part of delivering better quality care to
19 Americans is to get people to be able to be covered who
20 cannot be today. So we are trying to make insurance
21 affordable so you can include more people.

22 Now, we subsidize young people to buy. A number of
23 the older people will be less subsidized because they
24 earn more, but they do not earn enough to be able to pay
25 400, 500, 600 percent on the premium. So if the whole

1 theory here is to be more inclusive and create a bigger
2 pool of people covered and therefore have better health
3 in America, we want to try to even out what it costs.
4 The HELP Committee--Senator Enzi is on it, Senator
5 Bingaman is on it--came to a 2:1.

6 Now, I have recommended 2:1 because we do that in
7 Massachusetts. We have a mandate that everybody is
8 covered. Young people have had to buy in in
9 Massachusetts, and we subsidize them. We have a subsidy
10 up to 300 percent of poverty to help people buy in.

11 But we have also provided a 2:1 restraint on what
12 could be charged to the elderly, which is, in a sense,
13 discrimination too, folks. We are already allowing them
14 to charge twice as much as you have charged the younger
15 person, which is a reflection of risk. Now, in our mark,
16 Mr. Chairman, you have \$20 billion of reinsurance. We
17 also have risk adjustment in this mark, correct, Ms.
18 Fontenot?

19 Ms. Fontenot. Yes.

20 Senator Kerry. That risk adjustment takes into
21 account the very thing we are talking about, which is the
22 differential between older people--who may be more prone
23 to being sick, et cetera. To some degree it also takes
24 into account younger people who engage in more
25 adventuresome activities of sports, for instance, and

1 wind up in more catastrophic accidents.

2 Senator Conrad. Kite surfing.

3 Senator Kerry. There you go. Kite surfing, for
4 instance. I am being teased here.

5 [Laughter].

6 The Chairman. That was a little low there.

7 [Laughter].

8 Senator Kerry. Actually, it is not.

9 So my point, Mr. Chairman, is that if we were to
10 work at -- I would take 3:1. I will tell you that right
11 now. I am not going to ask for a vote on this now. We
12 are going to get to this when we get into the melding
13 with the HELP Committee. But we need to think about
14 this, because there is a dynamic here that we must
15 consider. Also, I appreciate that you put in the piece I
16 was trying to get on the early retirees. There is \$5
17 billion in here to provide reinsurance for early
18 retirees. That is helpful. And eliminating gender
19 discrimination is helpful too. I had a bill to eliminate
20 gender discrimination, and I appreciate that that is in
21 there. That helps reduce some of this pressure. But the
22 age piece still remains a problem.

23 The final comment I would make, Mr. Chairman, we are
24 trying to create a sort of legitimate insurance concept
25 here, which I talked about a little bit yesterday. In

1 the insurance of homes, you do not discriminate based on
2 age. You look at sort of the events, and you look at
3 what the insurance is going to have to pay out, and
4 people pay the same premiums based on a different
5 calculation.

6 We are trying to create a similar kind of risk
7 assessment calculation here. I believe the current
8 gender discrimination leaves us open to gross distortions
9 in how insurance is available to people and who gets
10 charged what for it.

11 The Chairman. Senator Stabenow?

12 Senator Stabenow. Mr. Chairman, if I might just
13 add, I wanted to --

14 The Chairman. Senator Kyl, did you seek
15 recognition?

16 Senator Kyl. Yes. I have been seeking
17 recognition.

18 The Chairman. I am sorry.

19 Senator Stabenow. Please. I would be happy to.

20 The Chairman. Senator Kyl? Senator Kyl? I
21 apologize. I did not see you.

22 Senator Kyl. We are on a parallel and you have got
23 Senator Grassley between us, so I know it is not easy.

24 The Chairman. He is a big man.

25 Senator Kyl. He is, indeed.

1 [Laughter].

2 Senator Kyl. I would like to just make about three
3 quick points here. First of all, to the last point that
4 Senator Kerry made, with all due respect, I do not think
5 it is correct. In comparing this to car insurance, you
6 said we do not use age, but rather events. Well, that is
7 not true. Age is one of the biggest determinants in car
8 insurance; I know, because I had a car that, when my son
9 turned 16, was going to quadruple my insurance payments,
10 so I sold the car.

11 The Chairman. We have all gone through that.

12 Senator Kyl. Exactly. And go to the older
13 citizens' type of car. Second, basically, age is about
14 the only proxy for health status left, since we have
15 taken out all of the things like preexisting conditions
16 and so on. There really is not, except for tobacco, any
17 other proxy here to evaluate a person's condition. There
18 is no question, as Ms. Fontenot said, without young
19 people in the pool, premiums will go up for all. That is
20 a point that we have been trying to make for a long time.
21 Insurance premiums, under this bill, are going up, not
22 down.

23 With respect to young people, with the kind of
24 issues we're talking about here, there is no question
25 that they will go up. So to the notion here that somehow

1 people are going to see a reduction in their insurance
2 premiums, that is just not going to happen.

3 Let me give you some very specific examples. I have
4 just gotten four here from people on the committee who
5 happen to be here right now. This is from the Council
6 for Affordable Health Insurance and their insurance
7 actuary, Mark Littau, who made a study of this. Here is
8 a chart. These are actual plans. I will start with the
9 one in Phoenix. It is a Cigna plan, a \$2,000 deductible
10 PPO. It should be a pretty inexpensive plan. The
11 current cost is \$512, with the 2:1 age band application
12 it would go to \$998. That is a 95 percent increase.

13 In Florida--Senator Nelson is here--a United policy,
14 with a \$1,500 deductible network, would start at \$432,
15 pretty good, but it would double to \$842. In Des Moines,
16 Iowa, United, the same kind of \$1,500 deductible PPO
17 would go from \$369.15 to \$719.84. And in Topeka, Kansas,
18 a \$1,000 deductible United network plan goes from \$601 to
19 \$1,172. Those are substantial increases.

20 So let us do not deceive ourselves, that adjusting
21 these percentages will make a huge difference. I
22 appreciate the fact that the 2:1 is what exists in
23 Massachusetts, but remember, Massachusetts has the
24 highest premiums in the country. I do not think that is
25 where we want to go.

1 The last point that I would make, Mr. Chairman, is,
2 I am just astounded, when I read through the mark, at how
3 our constituents must look at us. Here we are in the
4 U.S. Senate, writing these kind of details into insurance
5 policy. I mean, we are regulating every aspect of
6 insurance here. On page 2 of the Chairman's mark in this
7 particular section, in our great wisdom we have decided
8 that for tobacco use, it should be 1.5:1 That sounds a
9 bit arbitrary to me, but that is our collective wisdom.

10 On family composition, it should be 1:1, but an
11 adult with a child, it should be 1.8:1. What on earth
12 leads us to believe that we have the perspicacity--to
13 repeat that word, the wisdom, the judgment--to make all
14 of these decisions and write them into law? And remember
15 what we are doing: we are controlling the prices of
16 insurance policies.

17 When the American people appreciate the full extent
18 to which we are meddling in everything that has to do
19 with health care, I think they are going to rightly
20 conclude that the composite of this bill, two big
21 notebooks' worth here, provides for the government take-
22 over of insurance, and therefore, because of the way that
23 insurance is delivered and providers are paid for, the
24 way that health care is delivered as well. That is what
25 we mean when we say there is too much government

1 intrusion, that we do not have the wisdom to get all of
2 these things right.

3 The private sector is much more agile and adept at
4 adapting at conditions and, at a minimum, leaving these
5 kind of decisions to the State, which has a better handle
6 on that situation than here at the Federal Government,
7 and is more agile to respond to them as well and makes
8 more sense. This is one of the reasons why we are very
9 skeptical of the degree of detailed meddling in the
10 marketplace that this bill represents, and would even be
11 exacerbated with the amendment of Senator Kerry.

12 The Chairman. Senator Stabenow?

13 Senator Stabenow. Thank you, Mr. Chairman.

14 First, to respond to my friend from Arizona, I have
15 a very different view about how the private marketplace
16 has worked for families, for people in America. We
17 compare insurance company profit increases of 425 percent
18 in the last 8 years with a 200 percent increase in
19 premiums, and wages, on average, during that period going
20 up 25 percent, and certainly less in my State.

21 I think the public is asking us to intervene and do
22 something about a product that is not optional. If you
23 do not want to have car insurance, you can not buy an
24 automobile. If you do not want to have house insurance,
25 you do not have to buy a house. But you do not have a

1 choice as to whether or not you have a body and you might
2 get sick, and you probably will get sick, or somebody in
3 your family will get sick.

4 So health insurance is different. I believe that,
5 in fact, the public is asking us to create a system that
6 is more fair and that gets rid of the abuses. We have
7 made a decision in this framework to do it within the
8 context of maintaining private insurance, but you cannot
9 say to folks, you are going to have to participate in the
10 private insurance marketplace and not make sure the rules
11 are fair for them, and they are not right now, for too
12 many people. So I just have a very different view, and I
13 believe this legislation comes at this from a very
14 different view about whether or not this works right now.

15 Mr. Chairman, on the amendment in front of us, I
16 just want to lend my voice to Senator Kerry. I believe
17 the mark moves in the right direction. I appreciate
18 that. I would like very much to see it move farther. I
19 think when it is coupled with what is happening around
20 ratings for older people, particularly retirees--early
21 retirees--and then you couple it with what Senator Nelson
22 spoke about in terms of the excise tax on what have been
23 called Cadillac plans--I think there are a lot of Chevys
24 in there, and I like both of those, by the way, and hope
25 that everyone will go buy one of those two vehicles.

1 [Laughter].

2 Senator Stabenow. But the reality is that pre-
3 Medicare retirees, folks that are being forced to retire
4 at 52, 55, 57, 62 years old, are paying more just because
5 they are in a marketplace where they are rated
6 differently because they are older. In fact, when we
7 compare it to active workers and retirees, their
8 benefits, in many cases, are actually less. What they
9 are getting is actually less and they are paying a lot
10 more.

11 So I will, at a later point, have an amendment. I
12 have offered the amendment, but will exempt retirees,
13 those early retirees, from that excite tax. I think we
14 have to look very, very carefully at that. The mark,
15 again, moves in the right direction, but we have got a
16 lot of people, because of what is happening in this
17 economy, that have had to make the choice to retire
18 early, and I am concerned about them, Mr. Chairman.

19 Senator Wyden. Mr. Chairman, just very briefly.

20 The Chairman. Senator Wyden?

21 Senator Wyden. On Senator Kyl's point, because
22 Senator Kyl knows that I am very sympathetic with this
23 argument about creating a market in American health care,
24 my sense is that you start this discussion by looking at
25 the evidence that indicates that when you get people into

1 big pools, the marketplace will deal with much of this.
2 That is one of the reasons that the Federal Employees
3 Health Benefit Plan is so good for people, particularly
4 in this age group that we are concerned about in the
5 private sector, the 50-64 group.

6 These people come to us at our town hall meetings
7 and say, I am just praying that I can hang on until I am
8 65 because if I do not have coverage, I go into this
9 broken individual marketplace, I get hammered, I get
10 discriminated against on the basis of age. I think, in
11 response to Senator Kyl's point, there are a lot of us
12 who want to create a new working marketplace in health
13 care. I will be offering an amendment later on to get as
14 many people in big pools as possible in a fashion that
15 will help both employers and employees. Then I think we
16 get to where Senator Kyl wants to go, which is a larger
17 role for a genuine working marketplace in American health
18 care.

19 Thank you, Mr. Chairman.

20 Senator Kyl. Mr. Chairman, may I respond directly
21 to what Senator Wyden just said?

22 The Chairman. Senator Kyl?

23 Senator Kyl. Thank you.

24 I absolutely agree with Senator Wyden, of course.
25 The Republicans have a different approach to expanding

1 the pools. We have mentioned two of them here. One is
2 the association health plan, or small business health
3 plan, or other methodologies for allowing groups of
4 individuals, organizations, small businesses to combine
5 together and have the same marketing power as big
6 business does because they have a larger pool.

7 Second, not restricting sales to a particular State,
8 particularly in the low population States. Argument has
9 been made earlier, and it is correct, if you can combine
10 the populations of States through compacts, the sale of
11 insurance across State lines, you have a much bigger
12 pool. Those are free-market solutions to the problem of
13 increasing the risk pool. But I just go back to
14 something that I said earlier--nobody has refuted this--
15 we are not helping people when we increase their
16 insurance from 75 to 95 percent.

17 That was exactly the result of the study here by the
18 Council for Affordable Health Insurance, which took into
19 account the provisions of the mark on universal coverage,
20 guaranteed issue, modified community ratings and these
21 rating bands, and they concluded that these "reforms are
22 going to increase the cost of insurance from 75 to 95
23 percent" for small business workers, the self-employed,
24 early retirees, we talked about, millions of Americans
25 who buy their own coverage.

1 And so when they looked at the capital city of all
2 of the different States with a representative plan and
3 did these calculations, this is what they came up with.
4 I am not making these numbers up. Almost every one of
5 them are almost a doubling of the price of the premium.
6 I just ask my colleagues again: how are we helping our
7 constituents when we are mandating conditions which
8 result in a doubling of the price of the premium?

9 Now, the doubling does assume Senator Kerry's 2:1
10 ratio here, but that is what we would get under the Kerry
11 amendment. It just does not seem to me that we could,
12 with a straight face, say to our constituents that we are
13 helping them when we are putting in policies that double
14 their insurance costs.

15 Senator Kerry. Actually, Mr. Chairman?

16 The Chairman. Senator Kerry?

17 Senator Kerry. Mr. Chairman, as I mentioned
18 earlier, I wanted to have this discussion. It is
19 important. I am going to ask to withdraw the amendment.
20 But I would just say two things to Senator Kyl. If you
21 do not have the 2:1 restraint, you are going to wind up
22 with older Americans having to pay prohibitively high
23 rates for insurance policies in various parts of the
24 country. This is actually a limitation, number one.
25 Number two, I will show you that we do not have the

1 highest insurance rates in the country.

2 Number three, you are correct that there is an
3 automatic presumption made about young people with
4 respect to auto insurance. In fact, there is a
5 discrimination between boys and girls. But they also get
6 points for good behavior, good driving. You can reduce
7 the rates in a number of different ways, which we do not
8 even entertain here.

9 Second, it is about a 2:1. That is exactly what we
10 are permitting, or what I sought to permit. The HELP
11 Committee permits a 2:1. We ourselves in this mark are
12 at 4:1. I am just trying to drive it down to a level
13 where you have a fairer distribution of the risk and
14 cost.

15 I am convinced that because we subsidize younger
16 folks as they purchase insurance when they are healthy,
17 we are spreading the risk, as true insurance should do.
18 Indeed, it will cost more to insure older people. We all
19 understand that. But those younger people will one day
20 be those older people and they will appreciate that
21 younger people are paying in to help equalize the cost so
22 everybody can afford to buy in over a longer period of
23 time.

24 Now, with that said, Mr. Chairman, this debate, I
25 know we are going to have it on the floor. Hopefully we

1 can work the ratio and the melding with the Help bill. I
2 ask unanimous consent to withdraw my amendment.

3 The Chairman. The Senator has that right.

4 Two things, frankly. I would not be averse to
5 trying to work this out in this committee, frankly. We
6 have got next week. Let us see if we can work it out.

7 Senator Kerry. Well, I think if we could, I would
8 be delighted.

9 The Chairman. Second, there may be a budget
10 consideration here, because the more we compress the
11 band, the more upward pressure on the younger.

12 Senator Kerry. Mr. Chairman, CBO said there is no
13 budget consideration.

14 The Chairman. Well, I would like to talk to CBO
15 about that. But just, logically --

16 Senator Kerry. I will try to help you find the
17 same person we talked to.

18 [Laughter].

19 The Chairman. All right. That would be helpful.

20 Senator Cornyn. Mr. Chairman?

21 The Chairman. All right. The amendment is
22 withdrawn. Thank you.

23 Senator Cornyn?

24 Senator Cornyn. Thank you, Mr. Chairman.

25 Mr. Chairman, I am back with heeding the Chairman's

1 admonition about my earlier amendment, C23.

2 The Chairman. C23.

3 Senator Cornyn. This is as modified in order to
4 try to address the Chairman's concern. You will recall
5 previously we had asked that the scoring on any
6 amendments that were rejected due to a point of order, or
7 that were accepted where the score turned out to be
8 erroneous, that there be an opportunity to come back and
9 correct those later on. The Chairman pointed out how
10 difficult it would be to post those on the Internet for a
11 period of time, 24 hours and the like.

12 What I have done is omit that requirement, but to
13 retain the ability to come back and fix our inadvertent
14 mistakes. This requires that all amendments accepted or
15 ruled out of order during the committee's proposal be re-
16 scored by the Congressional Budget Office and Joint Tax
17 for accuracy before the committee can vote to report the
18 bill.

19 If the initial score is found to be inaccurate or an
20 amendment is found to have been incorrectly ruled out of
21 order, the committee shall debate and reconsider the
22 amendment. I hope that comes close to addressing the
23 Chairman's concern about unnecessary delays, but also
24 gives us a mechanism to correct inadvertent errors.

25 The Chairman. Is there discussion?

1 [No response].

2 The Chairman. Senator, I appreciate your concern
3 about transparency. It is a concern we all have,
4 clearly. I take great pride in the great transparency
5 within which we have conducted our deliberations here.
6 Let me begin by saying I committed to get a CBO score of
7 this bill. After all amendments have been adopted, I
8 will get a score. I am committed to get a score after
9 all amendments are adopted. We need to get that score.

10 Second, I am committed that the bill will be paid
11 for as budget neutral over 10 years. That is a strong
12 commitment of mine. I will not agree to a bill that is
13 not deficit neutral over 10 years. I am also committed
14 that the bill reduce Federal deficits significantly in
15 the second 10 years to bend the cost curve.

16 We are going to report out a bill that has that
17 effect, and that is not going to be easy to do. There
18 are a lot of amendments we are talking about here post-
19 modification. The modification itself is going to put
20 additional strain on those principles, but some of these
21 amendments here are going to put additional strain on
22 those principles and it is going to be difficult for us
23 to get a bill through this committee that meets those
24 objectives. I daresay that, just as I just enunciated,
25 are those shared by a large majority of this committee,

1 if not virtually every member of this committee.

2 The mark-up, I think, has been conducted with
3 unprecedented transparency. The mark was available
4 almost a full week before mark-up, publicly available on
5 the web site. Before that, the basic ideas of this mark
6 were in the November white paper. There is not a lot of
7 change from the ideas and the options paper that we put
8 out last November. As you know, all the days we have
9 had, with roundtables, walk-throughs, and the
10 unprecedented number of hours this committee has
11 deliberated over all of this.

12 My concern is that your amendment, on the other
13 hand, even given these commitments that I have
14 enunciated, would create an unworkable set of delays in
15 the mark-up process. The vast majority of mark-ups in
16 this committee have been concluded in one day, the vast
17 majority. Recently, the CHIP bill, the economic recovery
18 bill, those are examples of one day. But this amendment
19 requires additional scoring by CBO of amendments that
20 this committee has disposed of before the committee can
21 come to closure on any measure.

22 As our experience has shown, many, many times CBO
23 often requires multiple days to score any single
24 proposition. Requiring them to score multiple amendments
25 simultaneously just multiplies those delays. I wish you

1 could be on telephone conversations I have had with CBO--
2 it would be quite an experience, maybe even educational--
3 to get CBO to move to score more quickly.

4 So I urge my colleagues, let our process work. We
5 know we are not going to report a bill out that is, as I
6 said, not deficit neutral. So we are going to get a
7 final score and all that, so let the process work. When
8 we dispose of amendments, let us put those amendments to
9 bed. I urge my colleagues not to build up a system of
10 constant repetition and delay, which will be the
11 consequence of this amendment.

12 Senator Cornyn. Mr. Chairman, may I respond?

13 The Chairman. Sure.

14 Senator Cornyn. Mr. Chairman, I appreciate the
15 steps that you have outlined that have let the public
16 know what we are doing here. I think this is about
17 fundamental fairness in the committee process and making
18 sure we get it done right. The delays that you are
19 concerned about, I would just note again that the
20 spending in this bill does not start until 2013, so there
21 does not need to be any rush, at least one that would
22 cause us to make unnecessary mistakes.

23 The Chairman. Senator, I just want to make sure we
24 have the right amendment here. You said 2013. I want to
25 make sure we have the right amendment.

1 Senator Cornyn. C23, as modified.

2 The Chairman. All right. Thank you.

3 Senator Cornyn. Yes, sir.

4 The Chairman. Thank you.

5 Senator Cornyn. As you will recall last night,
6 there was a \$600 million mistake made. CBO initially
7 said there was no score to Senator Stabenow's amendment,
8 later came back and said there was a mistake and it cost
9 \$600 million. There was no offset offered subsequently,
10 so we know the cost of this bill went up \$600 million as
11 a result of that mistake. Again, I am not blaming
12 anyone. I am saying it was inadvertent.

13 Earlier, you will recall, I offered an amendment
14 that had not been scored by CBO because not all the
15 amendments have been able to be scored by CBO because of
16 the number, and the Chair ruled it out of order because
17 you said you believed there would be a cost, even though
18 there was no CBO score. Of course, the appeal of the
19 Chair's ruling was unsuccessful.

20 So I do not understand how a documented \$600 million
21 mistake is glossed over, where my amendment, which was
22 not scored by CBO, was ruled out of order. So this is a
23 matter of fundamental fairness. Plus, I do not know how
24 you ultimately determine what the score of these
25 amendments are, and we can intelligently do our business

1 with any sense that it is accurate, unless we have the
2 capacity to go back and to correct our errors. I have
3 tried to eliminate the delays that I know you are
4 concerned about, with the posting and the waiting for 24
5 hours in order to address this. But I think this is a
6 way for us to get it done right and to be fair in terms
7 of the amendments offered by various members, and I would
8 urge you to accept it.

9 The Chairman. Well, looking at this again, I have
10 got a couple of thoughts. One, is it is even more
11 pernicious than I thought because the amendment provides
12 that all amendments accepted during the consideration be
13 re-scored. I mean, I do not get that. What if CBO has
14 given us a score on an amendment and we accept it? As I
15 read your amendment, it has to be re-scored again. I do
16 not quite understand the need for that.

17 Senator Cornyn. Well, I do not know that that
18 would entail any more work if it has already been scored
19 once or if it is adopted. It would incrementally add to
20 the bill. Or if there is some dynamic or interplay
21 between various amendments which would cause the need to
22 re-score the overall bill, I mean, I do not think, when
23 we are talking about trillions of dollars, that this is
24 unnecessary or unreasonable to ask.

25 The Chairman. Senator, I think we are

1 accomplishing the purpose that you are seeking when you
2 say we will wait for the final bill. For example, let us
3 say an amendment which is scored by CBO passes this
4 committee. As I read this amendment, it has to be re-
5 scored. Let us say another amendment comes up, initially
6 scored by CBO, and we adopt the amendment. Under this
7 amendment--yours--it has to be re-scored again. We know
8 that there is some interaction among amendments.

9 Frankly, we pushed CBO away from silo scoring. Very
10 often in the past, when we ask CBO for an estimate, they
11 will look at just the narrow aspect of one part of it,
12 but not look to see how it scores in relation to some
13 other parts of, say, this bill. We finally got CBO to
14 score the interrelationship of different provisions in
15 the underlying bill, and they started to do that.

16 So by the end of the process, that is, we get to
17 final passage and we then get the final score, we will
18 have done what you want. Namely, CBO will have gone
19 through all amendments again, by definition, and looked
20 at the interaction among all amendments, by definition,
21 because it is looking at a final number.

22 What we really want, I think, is the final number
23 here: is it correct or is it incorrect? Unfortunately,
24 this is not precise. Look at the discussion we had
25 yesterday with Senator Enzi, and I have forgotten who

1 else--with Senator Conrad--on the Medicaid numbers runs.
2 We get different runs, and so it is not precise. We just
3 do the best we can.

4 These are economists. This is not precise stuff.
5 We just do the very best we can with what we have got. I
6 think they work hard, very hard. They are honest, they
7 are objective. They are economists, they are academics.
8 They are so committed to this public process and they
9 work so hard. They do not get their names in lights,
10 they do not get credit for all they do. They get a lot
11 of criticism, but they get very little credit for what
12 they do. I probably should compliment them more than I
13 actually do. But you are going to accomplish your
14 purpose when we get that final score at the end.

15 Just one final point here. Over the night, we found
16 another mistake. This other mistake is not CBO this
17 time. Alas, it is the Joint Committee on Taxation. It
18 is about a \$1.6 billion mathematical error, last night,
19 in our favor. My thought was, we would use some of that
20 money to pay the \$600 million mistake with respect to the
21 Stabenow amendment, so that is scored. Then we also use
22 the balance of it to help with this GPCI question that
23 Senator Grassley is so ardently working on. But at the
24 end of the day, we will push CBO to get a precise result.

25 Senator Snowe. Mr. Chairman?

1 Senator Cornyn. Mr. Chairman, I share your
2 admiration and respect for the professionals at CBO and
3 the work that they are doing. Obviously they are being
4 put under tremendous pressure to try to score amendments
5 in this legislation. I think they are doing the best
6 they can, but they are only human. I do not understand
7 the rush, when the spending is not going to occur for
8 four years. If they did the job correctly in the first
9 instance in scoring it, then I would not expect it would
10 take much to confirm the accuracy. But, in fact, there
11 was a \$600 million mistake.

12 I appreciate you are going to try to accommodate
13 Senator Stabenow with the other \$1.2 billion mistake in
14 the committee's favor to try to find a pay-for. In the
15 meantime, my amendment was ruled out of order because it
16 did not have a CBO score. Frankly, due to the Chairman's
17 ruling, I do not see that I get an opportunity to get a
18 score. So I just think it is a double standard when it
19 comes to deciding on --

20 The Chairman. Well, Senator, if you want to get a
21 score, fine. That is fine. Re-offer the amendment with
22 a score. That is fine. That would be more than
23 copacetic.

24 Senator Conrad. Mr. Chairman?

25 The Chairman. Senator Snowe is seeking

1 recognition.

2 Senator Snowe. Mr. Chairman, I just would like to
3 pose a question regarding what the ability of the
4 committee will be with respect to making any adjustments
5 in the event that there are changes in those numbers, in
6 the bottom line or with respect to various provisions.
7 You cited Medicaid, and that is a good example. We have
8 had several reevaluations and the bottom line keeps
9 changing on that with respect to what the States'
10 contribution will be over the next 10 years, or 6 years
11 within that budget window.

12 So any time that there is a miscalculation or a
13 variation in those numbers, I think that the committee
14 ought to have that opportunity to respond, make
15 adjustments, contribute to any changes in policy
16 regarding those numbers, whether there is a plus or minus
17 in that.

18 The Chairman. Well, frankly, Senator, I think you
19 raise a very good point. The traditional process might
20 not be sufficient. The traditional process is we report
21 a bill. We do not pass legislation, we report
22 legislation out to the floor, and there is a budget
23 score. If it turns out that it is not what we thought it
24 was, traditionally then we delegate the staff the
25 authority to make changes and adjustments so it does

1 score.

2 Now, I think we need to get a better, more evolved
3 process of Senators. This is an extraordinary situation,
4 this bill, and we have got to find some way to deal with
5 that.

6 Senator Conrad. Mr. Chairman?

7 The Chairman. I do not want to gloss that point
8 over at all.

9 Senator Snowe. Thank you. I appreciate it.

10 Senator Conrad. Mr. Chairman?

11 The Chairman. Senator Conrad?

12 Senator Conrad. Mr. Chairman, could I just say to
13 the Senator from Texas, who I admire, and he has got a
14 concern here that has legitimacy. Senator Stabenow's
15 amendment was adopted. Subsequently, CBO changed their
16 score, but the Chairman has indicated that he is going to
17 attempt to address that.

18 On the gentleman's amendment that the Chairman ruled
19 out of order, I did not speak on it, but having dealt
20 with CBO for 20 years, there is no question. There
21 really was no question that your amendment would have
22 scored, would have cost money. There really is no
23 question that that is the case.

24 The Chairman has said that if you get a score that
25 shows that it does not cost money, that you have a chance

1 to re-offer that amendment. That is eminently fair. But
2 let us be square. There is no question: your amendment
3 costs money. The solution that you are offering here
4 would just create chaos on this committee and it would
5 create chaos at CBO.

6 Requiring that all amendments accepted or ruled out
7 of order be re-scored by CBO, my goodness, I mean, we
8 will have CBO chasing their tail endlessly. At some
9 point, you have to make a decision here. I think the
10 Chairman has been absolutely fair in his conducting this
11 mark-up. He has indicated there was an inadvertent
12 mistake, and you have graciously said you are not blaming
13 anybody. I do not think there was anybody to blame. I
14 think you are right about that, but he is going to do his
15 best now to fix it. And with respect to your amendment,
16 if you could demonstrate that it did not cost money, that
17 you would have a chance to re-offer.

18 I think it is that spirit that infuses this
19 committee, and always has. You are a relatively new
20 member of this committee. I have been on here a long
21 time. Whether it was Republicans or Democrats running
22 this committee, it has not been anything other than
23 professional, collegial, as bipartisan as one can make
24 it, as fair to members as one can make it.

25 I would say that through the leadership of every

1 Chairman, Republican or Democrat, that has been on this
2 committee. This committee has not operated in a kind of
3 "gotcha" mentality that exists on some committees around
4 here that are hyper-partisan. So, I just feel compelled
5 to say that.

6 Senator Cornyn. Mr. Chairman, if I can just close.

7 The Chairman. Senator Cornyn?

8 Senator Cornyn. I accept your offer to get my
9 amendment scored. And the one thing that I would say to
10 my friend Senator Conrad, is if there is a cost, it gives
11 me an opportunity then to point out a pay-for, an offset,
12 right, so it would be revenue neutral? That is the
13 opportunity I am asking for, and I appreciate the
14 Chairman giving me that opportunity.

15 The Chairman. Senator, you have got it. Score it,
16 offset, then it is germane.

17 Senator Cornyn. I do think that the safety net
18 provision of this amendment is important, and I would ask
19 for a roll call vote.

20 The Chairman. All right. And I urge my colleagues
21 to vote not in favor of this amendment.

22 The Clerk will call the roll.

23 The Clerk. Mr. Rockefeller?

24 The Chairman. No by proxy.

25 The Clerk. Mr. Conrad?

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

1 The Clerk. Ms. Snowe?
2 Senator Snowe. Aye.
3 The Clerk. Mr. Kyl?
4 Senator Kyl. Aye.
5 The Clerk. Mr. Bunning?
6 Senator Hatch. Aye by proxy.
7 The Clerk. Mr. Crapo?
8 Senator Crapo. Aye.
9 The Clerk. Mr. Roberts?
10 Senator Roberts. Aye.
11 The Clerk. Mr. Ensign?
12 Senator Ensign. Aye.
13 The Clerk. Mr. Enzi?
14 Senator Enzi. Aye.
15 The Clerk. Mr. Cornyn?
16 Senator Cornyn. Aye.
17 The Clerk. Mr. Chairman?
18 The Chairman. Senator Lincoln?
19 The Clerk. Mrs. Lincoln?
20 Senator Lincoln. Aye.
21 The Clerk. Mr. Chairman?
22 The Chairman. No.
23 The Clerk will tally the vote.
24 The Clerk. Mr. Chairman, the final tally is 11
25 ayes, 12 nays.

1 The Chairman. The amendment is not agreed to.

2 Senator Kerry seeks recognition. Before proceeding
3 to the Senator, I just want to say, the next amendment
4 will be the Cantwell Amendment Number C2. But Senator
5 Kerry would like to be recognized.

6 Senator Kerry. Senator Kyl, for colleagues,
7 because of the time we took on the last discussion, I
8 just want to make one point that I think is important.
9 We were talking about the 2:1 age rating band in
10 Massachusetts. Senator Kyl asserted that we had the
11 highest premiums in the country in Massachusetts. I
12 think it is important that people not think that that is
13 the consequence of what happens here. We have a very
14 high cost of living.

15 There are cost of living differentials all across
16 the country. We have high real estate costs, we have
17 high energy costs because we are at the end of the
18 pipeline, et cetera. When you adjust for the
19 differentials, just of cost of living, we are in the
20 bottom half of premiums in the Nation. I want that
21 impact to be understood with respect to the 2:1. Thank
22 you.

23 The Chairman. Thank you, Senator.

24 Senator Cantwell?

25 Senator Cantwell. Thank you, Mr. Chairman. I

1 would like to call up Cantwell Amendment Number C2, as
2 modified. This amendment, Mr. Chairman, deals with
3 pharmacy benefit managers and transparency. Now, we are
4 obviously trying to get health care reform because we are
5 trying to cut down the cost of health care to Americans.
6 One of the biggest aspects of health care bills that
7 Americans have today is the prescription drugs that they
8 are receiving.

9 One of the reasons that we have had a lot of
10 discussion about pharmacy benefit managers in the past is
11 because pharmacy benefit managers have become the
12 middleman in delivering prescription drug benefits. My
13 colleagues may remember a few years ago there was a
14 question, when pharmacy benefit managers were actually
15 part of the same drug companies that they were working
16 with, to deliver prescription benefit discounts. So we
17 changed that law so that you could no longer be
18 negotiating with your own parent company and keeping part
19 of the discount instead of passing it on to the consumer.

20 Well, as the Federal Government has become an even
21 bigger purchaser through the Part D prescription drug
22 benefit, we have the same questions about transparency in
23 drug pricing. We want to know that, as a purchaser of
24 the Federal Government, we are also going to be getting
25 the best price, that if people are negotiating to deliver

1 a drug benefit, that we know that that benefit, in
2 discount, is not just being pocketed by the PBM in a
3 larger number than should be going to consumers.

4 So this is about transparency through the Secretary
5 of HHS, and to also make sure, because a new phenomenon
6 has now arisen. Pharmacy benefit managers and mail-order
7 pharmacies have gone into business together, so now you
8 have a pharmacy benefit manager owning the mail-order
9 system and being able to deliver better discounts, bigger
10 discounts to them than to the individual pharmacists that
11 are out in the market.

12 Again, what we are after here is transparency of
13 drug pricing, to know what the most competitive offer is
14 being put on the table, to make sure that the consumer in
15 the end, when you are making a large purchase and a
16 discount is being negotiated on behalf of the consumer,
17 that the consumer actually knows the benefit and we as a
18 purchasing entity, the Federal Government, know that we
19 are getting that benefit as well.

20 This kind of transparency, we believe, will help
21 drive down drug prices in a significant fashion. We have
22 made a modification, at the request of Senator Grassley,
23 to make sure that the penalties for disclosure of this
24 information that would be at the Secretary of HHS would
25 have the same penalties that apply in current statute to

1 Medicaid laws on any kind of disclosure, unlawful
2 disclosure, of rebate data.

3 So this is a very important amendment. I encourage
4 my colleagues to support it. The more transparency we
5 can have as new systems are developed in the delivery of
6 partnerships, it will help the consumers really benefit
7 from the large purchasing that they are doing and to reap
8 the benefits themselves instead of having the middleman
9 pocket the money.

10 Senator Hatch. Mr. Chairman?

11 The Chairman. Senator Hatch?

12 Senator Hatch. I would just like to ask a
13 question. Please, yourself or your counsel, explain how
14 this amendment is budget neutral. I would like to know,
15 how does this amendment differ from the one you offered
16 during the Medicare Modernization Act, the Senate floor
17 debate? The amendment, while well-intentioned, was very
18 expensive at the time, if I recall it. There were also
19 concerns regarding proprietary information not being
20 protected. So I just want to know if there is some
21 difference between this and that amendment, because it
22 was considered to be very expensive.

23 Senator Cantwell. The original amendment offered
24 on the floor several years ago was more broadly drafted
25 and the amendment would have the information reported on

1 a larger basis. So there was a concern that that would
2 have an impact in the market, a chilling effect, and so
3 CBO then scored that impact that it would have. We have
4 now drafted it more narrowly so that the information is
5 only through the Secretary of HHS, so that information,
6 as a purchaser we should have access to it, so that is
7 why it is now a neutral score.

8 Senator Hatch. All right. Thank you.

9 The Chairman. Further discussion?

10 [No response].

11 The Chairman. Frankly, I think it is a very good
12 amendment. I strongly approve of it. I mean, this
13 information is needed.

14 Senator Ensign. Mr. Chairman, do we have --

15 The Chairman. It is --

16 Senator Ensign. Oh. Sorry.

17 The Chairman. It is more transparency, more
18 information. Proprietary interests are protected and
19 there are penalties here for failure to disclose the
20 appropriate information. I think it is a good idea.

21 Senator Ensign?

22 Senator Ensign. I just had a question, going back
23 to Senator Hatch. Did CBO officially score this as
24 budget neutral?

25 The Chairman. Let me ask. Mr. Schwartz?

1 Mr. Schwartz. Yes, they did.

2 The Chairman. All right.

3 Senator Kyl. Mr. Chairman, could I ask a question,
4 too?

5 The Chairman. Senator Kyl?

6 Senator Kyl. I do not quite understand the concept
7 here. If the information is proprietary, how are we
8 going to use it to make sure that we can squeeze more
9 from the drug companies, number one? And, second, this
10 has been one of the best examples of where -- I mean,
11 these pharmacy benefit managers have reduced the drug
12 prices dramatically from what the predictions were when
13 this legislation was passed.

14 I mean, it is one of the really good examples of how
15 competition with the three or four major PBMs have really
16 squeezed a lot of savings out, as a result of which the
17 seniors' premiums have been reduced. So I am not quite
18 sure, A) what the necessity for this is, and B) what the
19 presumed effect is, and C) how it can have an effect if
20 the information is going to be kept proprietary and we
21 are not going to use it against the companies.

22 Senator Cantwell. So, Mr. Chairman, if I could, in
23 addressing Senator Kyl's issues.

24 The Chairman. Senator Cantwell?

25 Senator Cantwell. There is nothing wrong with

1 pharmacy benefit managers trying to negotiate, on behalf
2 of a purchaser, a discount because they represent a large
3 pool. And, yes, they have been able to get discounts for
4 the population that they are trying to buy a plan for.
5 What we have concerns about is when there is a conflict
6 of interest. As a member of the Judiciary Committee, you
7 may remember some of this debate when it went back to the
8 fact that PBMs were actually owned by drug companies.

9 People said, well, wait a minute. If you are
10 negotiating with the drug company for a discount and then
11 pocketing that discount, is there not a conflict of
12 interest? We have the same concern now as PBMs and mail-
13 order pharmacies are also partnering up, so you are
14 having the majority of drugs -- and you could have a
15 consolidation through some of these entities that are now
16 the largest supplier of drugs in America, having a true
17 conflict in how they are passing on the savings to the
18 consumer.

19 If you basically are the subsidiary, you are
20 negotiating with your parent company, you are negotiating
21 a savings and then pocketing part of that savings back to
22 the same entity. Where is the consumer, the large
23 purchaser, really getting the benefit? So this
24 information is for us, the government--in this case, the
25 Department of Health and Human Services--to say, as a

1 purchaser for Medicare of Part D prescription benefits,
2 we are going to find out what kind of discounts you are
3 actually passing on.

4 If the pharmacy benefit manager negotiates on behalf
5 of the Federal Government or, say, in this case maybe a
6 county government and basically gets a 50 percent
7 discount, but pockets 45 percent of that and only passes
8 5 percent on to the consumer, that is a problem. This
9 gives the government, as a purchaser, the ability to get
10 access to this information. I think it is very important
11 that we do not have the kind of conflicts in the interest
12 here that the Judiciary Committee had stamped out before
13 between drug companies and pharmacy benefit managers.

14 Senator Kyl. Mr. Chairman, if I might ask Senator
15 Cantwell a question here.

16 The Chairman. Senator Kyl?

17 Senator Kyl. Thank you.

18 Would the issue not then be resolved by requiring
19 the disclosure of all relationships? In other words, if
20 there are any legal relationships, whether they are
21 subsidiary, or have contracts with, and in fact rebate
22 money to somebody else? That all could be resolved by
23 simply requiring a disclosure of all relationships rather
24 than seeking the information as to the way that they deal
25 financially with the reductions that they achieve and

1 translate that into premium reductions.

2 It seems to me that the idea to avoid conflicts is
3 solved if you simply indicate who the relationships are,
4 and if there are close relationships, then the government
5 would, as you noted, be able to look behind that to see
6 whether or not the conflict or the relationship has
7 resulted in a true conflict of interest.

8 Senator Cantwell. Well, again, Mr. Chairman, if I
9 could.

10 The Chairman. Senator Cantwell?

11 Senator Cantwell. I think I am more than happy, if
12 the Judiciary Committee -- I think it was U.S. Attorneys
13 across American who first started bringing these cases
14 against PBMs that were owned by drug companies into the
15 public eye, and later than was followed up by the
16 Judiciary Committee.

17 I will be more than happy if the Judiciary Committee
18 looks into the fact that CVS is now becoming one of the
19 largest deliverers of drugs in America, and there could
20 possibly be an antitrust issue here if they end up
21 dominating the market and passing their own savings on to
22 themselves. I think that is truly an issue worth looking
23 at.

24 But that aside does not mean that the should not be
25 able to get access to accurate information from drug

1 companies that they are doing business with about the
2 types of discounts that are being provided in the
3 marketplace, and how much of the discount that the PBM is
4 going to negotiate on is actually going to go to the
5 consumer. I think that as a purchaser, we ought to know
6 that information.

7 So this is the kind of access and transparency that
8 I think will help keep a healthy, competitive system in
9 America and it will more directly make sure that the
10 consumer is getting the cheapest price for drugs
11 possible. That is what we truly want. We want the
12 consumer to benefit as greatly as possible from the
13 discounts that they are helping to negotiate.

14 The Chairman. Is there any further debate?

15 [No response].

16 The Chairman. Frankly, I might add that I think
17 the Senator's amendment is very important. There have
18 been, in recent years, several lawsuits filed by the
19 Federal Government, by State governments, and by PBM
20 clients alleging PBMs have been operating against their
21 clients' interests, that is, breaching their fiduciary
22 duties to their clients by secretly retaining rebates and
23 discounts that the PBMs were obligated to pass on to
24 their clients. I think that disclosure of the
25 relationships is fine, but that is not going to solve the

1 problem.

2 We all know, in corporate America there are so many
3 interlocking relationships, it makes even the health care
4 reform bill look simple, trying to figure out all this
5 relationships. I think the mere disclosure of
6 relationship is not going to solve the problem we have.
7 We need the data and the proprietary interests are being
8 protected, and I urge us to support the Senator's
9 amendment.

10 All those in favor of her amendment, please signify
11 by saying aye.

12 [A Chorus of Ayes].

13 The Chairman. Those opposed, no.

14 [No response].

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

17 Senator Kyl, do you have an amendment? It is my
18 understanding you do.

19 Senator Kyl. Mr. Chairman, the amendment is Number
20 C10, entitled "Ensuring Consumer Choice of Health
21 Benefits". This relates to the mandated benefit and
22 definition of benefit requirement.

23 Mr. Chairman, it has been argued that Federal
24 regulation of health insurance will not drive up costs.
25 The truth of the matter is, it will. There is plenty of

1 experience and study to demonstrate that is true.

2 I referred earlier to a report by the Council for
3 Affordable Health Insurance, CAHI, which found that
4 mandating universal coverage, imposing the regulations
5 that are outlined in the Chairman's mark--for example,
6 like guaranteed issue and modified community rating--will
7 increase the cost of health insurance between 75 and 95
8 percent.

9 Additionally, it is well-established that mandated
10 benefits increase the cost of health insurance.
11 Individually, each mandate may have a relatively small
12 cost, but the cumulative effect significantly drives up
13 the cost of coverage. We have already begun to see, in
14 our deliberations yesterday, efforts to expand, or define
15 and thereby expand, the kinds of things that would be
16 required to be covered.

17 CAHI estimates that current mandated benefits
18 increase the cost of basic health coverage from a little
19 less than 20 percent to perhaps as much as 50 percent.
20 We are talking about the State mandates, now. They have
21 identified 2,133 benefit and provider mandates across the
22 States, which include mandatory coverage for things like
23 the following: port wine stain elimination--that is
24 actually a birthmark removal; varicose veins; Oriental
25 medicine; protein screening; residential crisis service;

1 athletic trainers; massage therapists. We are all
2 familiar with some of the others.

3 Making matters worse, the modification of the mark
4 gives the Secretary the responsibility to define these
5 benefits on an annual basis. Let me read the language
6 specifically, amending Title 1, subtitle 3: "To require
7 the Secretary, for individually purchased plans, to
8 define and update no less than annually the categories of
9 covered treatments, items and services within benefit
10 classes."

11 This is exactly what Republicans have been warning
12 about when we discussed an individual mandate. It is the
13 foundational building block for the government to define
14 Americans' health coverage. When you say you have to
15 have it, you first have to define it. Now we are going
16 to say it is on an annual basis. We already understand
17 the effect of State mandates on premium expenses, and now
18 we have studies that verify this will substantially
19 increase the cost when combined with the other features
20 of the Chairman's mark.

21 It is a perfect example of how this kind of
22 regulation will increase costs. It will also mean fewer
23 plan options, which ultimately lead to the choice of a
24 government-loaded benefit plan, or essentially no plan at
25 all. This is not what our constituents asked of us back

1 in August when they talked about this. They do not want
2 a Federal health board, a health czar, Secretary defining
3 their health coverage, or Federal mandates that are going
4 to increase their premiums, basically Washington making
5 more and more of the health care decisions for them and
6 their families.

7 I also would like to mention one other study, the
8 Milliman study, which analyzed the Finance proposal, the
9 mark, the imposition, first of all, of the minimum
10 benefit plan, and then second, the bronze actuarial value
11 of 65 percent. In their study they concluded "it will
12 materially increase premiums. For example, premiums
13 could increase by as much as 35 percent with those with a
14 high-deductible health plan. Those insured in a typical
15 lean individual insurance plan would have to increase
16 benefits and rates by as much as 18 percent," this
17 according to Milliman.

18 So, Mr. Chairman, regardless of which study you turn
19 to, I think it is pretty clear that the result of the
20 defined, now on an annual basis, mandated coverage is
21 going to increase premiums for our constituents,
22 something we have, I gather, promised we are not going to
23 do but would be the inevitable result of this
24 legislation.

25 If it was necessary before the Chairman's mark or

1 modification, it is even more necessary now. So the
2 bottom line is, it would prohibit the Federal Government
3 from limiting consumer choice by defining the health care
4 benefits offered through the private insurers.

5 The Chairman. Thank you, Senator.

6 This will be the last amendment of the day.
7 Frankly, I would like to limit Senators to five minutes.
8 That was the original understanding on remarks. I will
9 be very brief with mine, saying that I oppose the
10 amendment. If we are going to require insurance, clearly
11 insurance companies have to know what they have to cover.
12 It is pretty simple. In the mark, we have the four
13 benefit categories and we have the definition of levels.
14 We indicate what plans generally must include.

15 This package of inclusions is generally what is
16 practiced and accepted in the commercial market. We were
17 not very proscriptive. We just gave categories. We felt
18 we should not be too proscriptive here. I do believe
19 this is a good basis for moving forward. Namely, we have
20 to have some definition of benefits.

21 I will just name some of the few in the beginning
22 that are not all that long. But plans must provide
23 preventive and primary care, they must provide emergency
24 services, hospitalization, et cetera. It is page 17 of
25 the mark. So, I oppose the amendment. We have to know

1 what the coverage will be and what the benefits will be.
2 We are getting categories here where we are not being too
3 proscriptive.

4 Senator Conrad. Mr. Chairman?

5 The Chairman. Senator Conrad?

6 Senator Conrad. Mr. Chairman. I do not know the
7 source, Senator Kyl, of your assertion that there are
8 going to be these big increases in premiums as a result
9 of this mark. But in the group of six, we asked CBO for
10 their analysis. Their analysis was that this would
11 reduce premiums by 7 to 8 percent in the individual
12 market, by 3 percent in the small group market. They
13 have now sent a letter I have not seen, but my staff
14 informs me, refining that estimate, saying that this
15 would reduce premiums, the Chairman's mark, by 4 to 5
16 percent.

17 Now, that is certainly not everything we would like
18 to accomplish in terms of reduction in premiums. There
19 are other amendments that will be considered here and on
20 the floor to reduce premiums even further. But CBO's
21 analysis, professional analysis, was that the Chairman's
22 mark will reduce premiums, not increase them.

23 The Chairman. Senator Rockefeller?

24 Senator Rockefeller. This is just an observation.

25 This is one of dozens and dozens of amendments that come

1 from across the aisle. It occurs to me that they all
2 seem to be saying that government is trying to decide
3 everything, which is not the case. Government does have
4 a responsibility. I mean, the Congress was not created
5 for no purpose whatsoever, it as created to help do
6 policy, and we do that policy. We could be in a position
7 where we pass some very good policy here. That is not
8 defined yet.

9 But what strikes me as ironic is that the result of
10 all of these amendments that come from the other side,
11 they have decided, I think, that they want to make sure
12 that insurance companies get more money, the point that
13 Senator Cantwell was making. More money. So if you keep
14 government out, that has some resonance with the American
15 people, of course.

16 But what the American people are going to learn from
17 this series of mark-up sessions and our product is that
18 they are being done over, had for lunch, by the insurance
19 companies. Everybody has to make their sort of pick as
20 to how they are going to go philosophically. I think the
21 picks that are made with respect to the two sides of this
22 aisle are fairly clear.

23 The Chairman. Thank you, Senator.

24 On this point, just one final. We have to wrap up
25 pretty quickly here, so I will be very quick. I might

1 say to my good friend from Arizona, as a fellow
2 westerner, we love the west. This is really a Wild West
3 amendment. It is basically saying insurance companies
4 can provide whatever benefits they want. I do not know
5 if that is the result that we want. People need to know
6 there has to be some consistency in what we are doing
7 here, and I think the mark starts that in the right
8 process.

9 Senator Snowe? No, Senator Stabenow.

10 Senator Stabenow. Mr. Chairman, just an example of
11 why this does not work for real people. If we are
12 indicating again that people need to participate in the
13 individual or small marketplace for health insurance,
14 right now 60 percent of the insurance companies in the
15 individual marketplace do not offer maternity care. At
16 least for four of us on this panel, that is a pretty big
17 deal, and I think for all of us, actually.

18 But the idea that we would move forward and not have
19 some basic parameters--again, this is about consumers,
20 this is about describing a basic insurance plan within a
21 system that we are setting up, a universal system. I do
22 not think you can go forward and allow 60 percent of the
23 insurance companies not to provide basic maternity care
24 in the new system we are setting up that hopefully is
25 going to be better than the old one.

1 Thanks, Mr. Chairman.

2 Senator Kyl. Mr. Chairman?

3 The Chairman. Senator Kyl?

4 Senator Kyl. First of all, I do not need maternity
5 care, so requiring that to be in my insurance policy is
6 something that I do not need and will make the policy
7 more expensive.

8 Senator Stabenow. If I could just say to my
9 colleague, I think your mom probably did.

10 [Laughter].

11 The Chairman. All right. Senator Kyl has the
12 floor.

13 Senator Kyl. Yes. Over 60 years ago, my mom did.

14 [Laughter].

15 Senator Kyl. You notice, I was not too specific
16 with regards to that.

17 [Laughter].

18 Senator Kyl. Sure, you have to have a general
19 definition. If you are going to mandate something, you
20 have to generally define what it is. But you do not have
21 to define it in all of the specificity that is
22 contemplated by the mark. What makes it worse, as I
23 said, is the modification to the mark, which puts the
24 Secretary into the position every year. Think about the
25 political pressures that are going to exist on the

1 Secretary every year to add more.

2 Staff informs me, and this is intuitive, that CBO
3 has commented that over time, as the political pressures
4 mount to add more and more, the expense will increase and
5 the premiums will increase. So you have to ask two
6 questions. First of all, with regard to the effect on
7 premiums, it is for whom and when? Premiums will clearly
8 go up for some. One of my colleagues asked what my
9 sources were, and I will state them a third time here.
10 Milliman is one, Council for Affordable Health is
11 another.

12 Here is a letter dated September 22 of this year to
13 the Chairman from the CBO: "At the same time, premiums in
14 the new insurance exchanges would tend to be higher than
15 the average premiums in the current-law individual
16 market, again, with other factors held equal, because the
17 new policies would have to cover preexisting medical
18 conditions and could not deny coverage to people with
19 high expected costs for health care.

20 CBO has not analyzed the magnitude of that effect.
21 Of course, some people with high expected costs for
22 health care do not purchase insurance today because of
23 high premiums they would be charged. Those premium
24 amounts do not enter the average for the current market
25 because they are not purchased." They go on, "People

1 with low expected costs for health care, however, would
2 generally pay higher premiums."

3 Now, my understanding is, this is from Doug
4 Elmendorf, so I am not sure of the source for the
5 statement that premiums would go down. Second, is it not
6 correct, I ask the staff here, that the CBO only scored
7 the mark? The modified mark--at least this provision in
8 the modified mark--has not been scored. Is that correct?

9 Ms. Fontenot. I am sorry. Which provision,
10 Senator?

11 Senator Kyl. The modified Chairman's mark with
12 respect to the mandated benefits.

13 Ms. Fontenot. CBO has --

14 Senator Kyl. The secretarial annual revision of
15 coverage.

16 Ms. Fontenot. CBO did score that provision as
17 budget neutral. The provision requires the Secretary to
18 stay within the bounds of what is covered under a typical
19 employer plan.

20 Senator Kyl. Yes.

21 Ms. Fontenot. They have scored that as budget
22 neutral.

23 Senator Kyl. Right. But budget neutral is not the
24 question.

25 The Chairman. Senator? Senator?

1 Senator Kyl. The question is, with respect to the
2 premiums charged to the beneficiaries, is their
3 conclusion different than in the September 23rd?

4 Ms. Fontenot. The premiums tied to the
5 beneficiaries are really dependent on the actuarial value
6 of the plan, not the benefits covered. So to the extent
7 that we have not changed the actuarial value, the premium
8 will remain within the range that it was.

9 Senator Kyl. So then presumably the conclusion of
10 CBO, with respect to the modified mark, would be the same
11 as the September 22nd letter relating to the mark, which
12 says that the premiums in the new insurance exchanges
13 would tend to be higher than the average premiums.

14 Ms. Fontenot. The CBO letter specifies that the
15 mark would lower the administrative costs 7 to 8 percent,
16 which is what Senator Conrad was referring to.

17 Senator Kyl. All right. There is a difference
18 between administrative costs and premiums. I have been
19 talking about premiums all along here. So we can then
20 agree that with respect to premiums, this mandate and the
21 other provisions of the mark would tend to be higher.
22 Premiums in the new insurance exchanges would tend to be
23 higher than the average premiums in the current-law
24 individual market.

25 Ms. Fontenot. I believe it says premiums would be

1 higher for some and lower for others, but that more of
2 the premium dollars will be spent on medical costs and
3 fewer on administrative costs.

4 The Chairman. Senator, I just wonder, as a
5 courtesy to members, many members really are rushed to
6 leave. Could we vote on this now?

7 Senator Kyl. Yes, Mr. Chairman.

8 The Chairman. Thank you very much.

9 Senator Kyl. But let me just make this point.

10 The Chairman. If we could, as a courtesy to
11 members, I would really like to have the Clerk call the
12 roll.

13 Senator Kyl. All right. But Mr. Chairman, you
14 asked me to bring up my amendment.

15 The Chairman. Correct.

16 Senator Kyl. I did.

17 The Chairman. Yes.

18 Senator Kyl. And we are in a very important
19 discussion about whether premiums will increase under
20 this bill, and the CBO has said they will. There has
21 been an assertion, I thought, that premiums would not go
22 up. Now that is clarified. We are talking about
23 administrative expenses. Our constituents deserve to
24 know that, according to CBO, premiums will go up as
25 compared to current-law individual market, and my

1 amendment seeks to try to ameliorate that bad effect on
2 our constituents.

3 Senator Rockefeller. We are ready to vote. The
4 Clerk will call the roll.

5 The Clerk. Mr. Rockefeller?

6 Senator Rockefeller. No.

7 The Clerk. Mr. Conrad?

8 Senator Conrad. No.

9 The Clerk. Mr. Bingaman?

10 Senator Bingaman. No.

11 The Clerk. Mr. Kerry?

12 Senator Rockefeller. No by proxy.

13 The Clerk. Mrs. Lincoln?

14 Senator Rockefeller. No by proxy.

15 The Clerk. Mr. Wyden?

16 Senator Wyden. No.

17 The Clerk. Mr. Schumer?

18 Senator Rockefeller. No by proxy.

19 The Clerk. Ms. Stabenow?

20 Senator Stabenow. No.

21 The Clerk. Ms. Cantwell?

22 Senator Cantwell. No.

23 The Clerk. Mr. Nelson?

24 Senator Rockefeller. No by proxy.

25 The Clerk. Mr. Menendez?

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

1 Senator, do you want to vote in person?

2 The Clerk. Mr. Schumer?

3 Senator Schumer. No.

4 Senator Rockefeller. The Clerk will tally.

5 The Clerk. Mr. Chairman, the final tally is 9 ayes
6 and 14 ayes.

7 Senator Rockefeller. So the amendment fails.

8 Before I put the committee in recess, I want to
9 genuinely, I think, speak for all the Senators to thank
10 the staff, behind us and before us, for the overwhelming
11 amount of nonstop work which they have done. We get to
12 go home at night; they do not. This point needs to be
13 made to the American public and it needs to be made by
14 all of us to them, because it is very, very sincere.

15 That said, the committee stands in recess until 9:30
16 a.m. Tuesday morning.

17 [Whereupon, at 11:53 a.m., the meeting was
18 recessed.]

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I N D E X

PAGE

STATEMENT OF:

THE HONORABLE MAX BAUCUS
A United States Senator
from the State of Montana

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