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Senate

The Senate met at 9:30 a.m. and was called to order by the Honorable TOM UDALL, a Senator from the State of New Mexico.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Lord of Life, in whose will is our peace and who is worthy of a greater love than we can either give or understand, accept the gratitude of our thankful hearts. Thank You for protecting us from seen and unseen dangers and for being our shield in dangerous times. We praise You for life and health, for sunshine and shadows, for peace in the midst of life's storms. Lord, we are grateful for our lawmakers and rejoice that Your providence will prevail. Keep our Senators firm and steadfast as they put on Your whole armor of faith, hope, and love. Fill this Chamber with Your presence and our hearts with Your magnanimous attitude toward others.

We pray in Your sacred Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable TOM UDALL led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. BYRD).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, May 12, 2010.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable TOM UDALL, a Senator from the State of New Mexico, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. UDALL of New Mexico thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. REID. Mr. President, today, the Senate will resume consideration of the Wall Street reform legislation, with the time until 10 a.m. equally divided and controlled between the two leaders or their designees. At 10 a.m. this morning, the Senate will proceed to a series of three rollcall votes in relation to the following amendments: the Merkley amendment regarding underwriting standards; the Corker amendment regarding underwriting standards; and the Hutchison, as modified, amendment regarding the Board of Governors. Additional votes are expected throughout the day.

MEASURE PLACED ON THE CALENDAR—S. 3347

Mr. REID. Mr. President, I am told that S. 3347 is at the desk and is due for a second reading.

The ACTING PRESIDENT pro tempore. The Senator is correct.

The clerk will read the title of the bill for the second time.

The assistant legislative clerk read as follows:

A bill (S. 3347) to extend the National Flood Insurance Program through December 31, 2010.

Mr. REID. Mr. President, I object to any further proceedings with respect to this bill.

The ACTING PRESIDENT pro tempore. Objection having been heard, the bill will be placed on the calendar.

Mr. REID. Mr. President, would the Chair report the bill, please.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2010

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of S. 3217, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 3217) to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ''too big to fail,'' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

Pending:

Reid (for Dodd/Lincoln) amendment No. 3739, in the nature of a substitute.

Corker amendment No. 3955 (to amendment No. 3739), to provide for a study of the asset-backed securitization process and for residential mortgage underwriting standards.

Merkley amendment No. 3962 (to amendment No. 3739), to prohibit certain payments to loan originators and to require verification by lenders of the ability of consumers to repay loans.

Hutchison modified amendment No. 3759 (to amendment No. 3739), to maintain the role of the Board of Governors as the supervisor of holding companies and State member banks.

The ACTING PRESIDENT pro tempore. Under the previous order, the time until 10 a.m. will be equally divided and controlled between the leaders or their designees.

Mr. REID. Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time be charged equally to both sides.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Republican leader is recognized.

NOMINATION OF ELENA KAGAN

Mr. MCCONNELL. Mr. President, we have only had a few days to consider the President's latest nominee to the Supreme Court, but a few things are already becoming clear about the administration's approach to this vacancy.

As Solicitor General, Ms. Kagan is a member of the President's administration. The President, on Monday, also said: We are friends. The Vice President's chief of staff, who helped oversee her nomination, is evidently hard at work convincing members of the President's party that they will have nothing to worry about in terms of Ms. Kagan's possible appointment.

But in our constitutional order, Justices are not on anybody's team. They have a very different role to play. As a Supreme Court Justice, Ms. Kagan's job description would change dramatically. Far from being a member of the President's team, she would suddenly be serving as a check on it. This is why the Founders were insistent that Justices be independent arbiters, not advocates.

As one of the Founders once put it:

> Under a limited Constitution, the complete independence of the courts of justice is peculiarly essential.

And further:

> There is no liberty, if the power of judging be not separated from the legislative and executive powers.

So it is my hope that the Obama administration does not think the ideal Supreme Court nominee is someone who would rubberstamp its policies. But this nomination does raise the question, and it is a question that needs to be answered. Americans want to know that Ms. Kagan will be independent; that she will not prejudge cases based on her personal opinions; that she will treat everyone equally, as the judicial oath requires. That is the defining characteristic of any good judge, much less a judge on the Nation's highest Court.

The simple fact is, her lack of a record—especially her lack of a judicial record, and the fact that she does not have much of a record as a practicing lawyer either—gives us no way of answering that question at this particular point with any degree of comfort.

She has never had to develop the judicial habit of saying no to an administration, and we cannot simply assume she would. Later this morning, I will have an opportunity to meet with Ms. Kagan and to mention some of the concerns I have raised to her personally. We will welcome her to the Capitol and congratulate her once again on her nomination. This is not an easy process for any nominee, but it is an important one.

MIRANDA WARNINGS

Mr. President, President Hamid Karzai will visit the Capitol today to discuss the current situation in Afghanistan. His visit reminds us that the surge of forces into Afghanistan is not yet complete and that the counterinsurgency strategy developed by General McChrystal is still in its early stages.

President Karzai's visit also reminds us of the importance of completing our work on the war supplemental. We must complete this bill to fund our forces in the field, to help General McChrystal in his efforts to ensure that the Taliban does not return to power, and to ensure that Afghanistan does not again become a sanctuary for terrorists.

Let's remember that the 9/11 attacks were planned in Afghanistan, and that it was because of this attack and al-Qaida's many other attempts to kill innocent Americans that President Obama implemented a strategy for reversing the momentum of the Taliban in Afghanistan last December.

This is why it is so worrisome and, frankly, baffling to hear the Attorney General say the administration's views on issuing Miranda warnings to terrorists are now under reconsideration because of a ''new threat,'' and because we are ''now dealing with international terrorism.''

Perhaps it is the reported involvement of TTP in the Times Square attack that the Attorney General believes is ''new.'' But most people have been aware of the terrorist threat of international terrorists to the homeland since September 11, 2001.

The fact is, the clear purpose of many of the antiterror policies this administration in its first days tried to undo through Executive order was to deal with this threat that the Attorney General is now calling ''new.'' These threats did not begin with the Times Square bomber any more than they ended on 9/11. They have been with us for a long time now, and they are as urgent today as they were 9 years ago.

CONGRESSIONAL BUDGET OFFICE REPORT

Now, Mr. President, I would also like to note some news that might have slipped past some people yesterday in the midst of everything else that is going on. I am referring to the Congressional Budget Office report that the health care bill is now expected to cost $115 billion more than the administration said it would, wiping out every penny of savings they claimed the bill would produce.

This is truly astounding. Here was one of the Democrats' primary arguments in favor of their health care bill: that it would lower the deficit. Yet now we are learning that it will not. But you will not hear a word about it from the people who made that argument day in and day out for more than a year.

The fact is, the list of failed promises is growing every day. They called us alarmists for saying businesses would dump employees from their insurance plan. Yet now it is being reported that some of the Nation's biggest employers are seriously considering cutting employee health care and paying the lower cost penalties instead, just as we predicted. There goes the President's vow that ''if you like the plan you have, you can keep it.''

Another thing we heard was that the health care bill would slow the growth of health care costs for families, businesses, and government. Yet an analysis last month by the Obama administration's own Actuary found that this bill will actually increase costs and that the national spending on health care alone could go up by $1/3 trillion—$1/3 trillion.

The President and the Democrats in Congress said time and again that their health care bill would strengthen Medicare. Yet the administration's own experts now say it would drive nearly one in six hospitals into debt and threaten access to care for seniors on Medicare.

They said the bill wouldn't raise taxes on the middle class. Yet now Congress's own bipartisan scorekeeper on the legislation says middle-class taxpayers will pay billions more in taxes as a result of this bill. Millions more will get hit with a fine for choosing not to buy government-approved insurance.

They said health insurance premiums would fall, but we have learned from the administration just this week that even some of the smaller reforms in this bill will actually drive up premiums.

So when Speaker PELOSI said we would have to pass this health care bill to find out what is in it, she knew what she was talking about, and what they are finding out is that Republicans were right all along. For every promise that crumbles, another one of our warnings is vindicated. Day after day, Republicans said the health care bill would raise taxes, raise premiums, and cut Medicare for seniors. We said it would increase costs because it didn't take an actuary to figure out that you don't save money on health care by spending more on it. Yet, even in the face of the clearest proof that we were right on every single count, the people who forced this bill through Congress against the will of the people continue to call us alarmists and to question our motives. But all of these headlines are already confirming what the American people already believe and what Republicans said all along: More government isn't the solution to out-of-control health care spending any more than spending money we don't have on

projects we don't need is the secret to robust job growth.

The American people are tired of the reckless spending and the failed promises, and they are tired of elected representatives who won't own up to their mistakes.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Illinois is recognized.

TIMES SQUARE BOMBING ATTEMPT

Mr. DURBIN. Mr. President, America was alarmed to learn that Times Square was closed for business because of the potential of a bomb threat. A vehicle was discovered with smoke coming out of it. Some alert people on the sidewalks and vendors called it to the attention of police, and they determined the contents of that vehicle at least included the crude elements that could have resulted in a bomb killing many innocent people. All they had to go on was the vehicle itself and a fleeting glimpse of the person who might have been responsible leaving, changing his shirt as he left that vehicle. It was a frightening situation where many innocent people who were visiting our largest city in America could have been killed just as on 9/11. What happened? Fifty-three hours later, our government arrested the prime suspect, the man who has conceded he was responsible for that vehicle in Times Square—53 hours.

I listened to some of the criticisms from those who come to the floor and say we should do this better, we should be more vigilant, we should change our approach. I would concede that we need to learn from every single incident how to make America safer, how to avoid those vehicles even being in Times Square in the first instance. But let's be honest—to arrest the person responsible for it within 53 hours is an indication of some pretty good work by law enforcement and intelligence officials.

Then comes the argument about Miranda rights. Should we be treating terrorists as enemy combatants or as criminal defendants? Should they be sent to military commissions for trial or to our courts? Well, the fact is, the person involved in the Times Square bombing incident was an American citizen. He cannot be tried in a military commission under existing law. There is a recourse for him, and that is in the courts of America.

If he is to be tried in the courts, the ordinary process of due process suggests he will receive a Miranda warning. In this circumstance, after a number of hours of interrogation, the suspect was given his Miranda warnings. We hear them often on television. It didn't deter him from continuing to offer information literally for days to our law enforcement and security officials.

Many have come to the floor and suggested it is a bad policy for us to consider giving Miranda warnings to those suspected of terrorism. What they failed to note—and I have never heard one of them concede—is this policy is a policy created by George W. Bush and his administration after 9/11. They decided it would be the basic standard when it comes to interrogating suspected terrorists, particularly those who are American citizens, that a Miranda warning would be given.

This past weekend, Attorney General Holder said he believes we should consider some other elements in terms of when the Miranda warnings would be given and when a person would be presented before a court. I think that is a reasonable challenge for us to look to. But remember that the last time the Congress tried to change basic Miranda warnings, a very conservative Supreme Court across the street said no. They said, in fact, that this is part of due process in the United States of America.

So let's approach this carefully. Let's try to take the politics out of it for a moment. Let's concede that the former Republican President made Miranda warnings part of his ordinary process in dealing with terrorists.

Let's also acknowledge that a lot of hard-working men and women, in the 53 hours after the discovery of that vehicle, did everything in their power to find the person responsible and were successful. Let's give them some credit. These are men and women who work night and day, virtually unheralded, who, in this instance, did an extraordinary job and should be acknowledged in a positive way and not in a negative way.

HEALTH CARE REFORM

There has also been conversation on the floor this morning about the health care reform bill. Make no mistake, not a single Republican Senator voted for it. In fact, they virtually boycotted the efforts to build this legislation, to write this legislation. Given ample opportunities to produce their own amendments or a substitute bill, they did not. When they offered a few amendments, they turned out to be amendments primarily designed to protect health insurance companies for a program known as Medicare Advantage. So at the end of the day, only the Democrats voted for health care reform.

Immediately, we heard from the other side of the aisle and from many of their supporters around the United States: Repeal it. Get rid of it.

Well, the American people see it differently. If Republican Senators are going to come to the floor and talk about polls, they should acknowledge that the polls clearly show the American people believe health care reform should be given a chance.

I think the Senator from Kentucky was suggesting to us this morning that we need to pull the plug on health care right now and stop. So does that mean he wants to eliminate the small business tax credit included in health care reform to help businesses with fewer than 25 employees pay for health insurance premiums? Does that mean the Senator from Kentucky wants to eliminate the $250 to be given to those under Medicare who use the Medicare Part D prescription drug program to fill the so-called gap in coverage called the doughnut hole? Does he want to eliminate that? Does the Senator from Kentucky want to eliminate our efforts to move forward so that children up to the age of 26 will be covered by family plans while they are finishing college and looking for a job? Does he want to eliminate and repeal that? Is that what he is looking for? I hope not.

The suggestion that we can't revisit this bill—and we will revisit it in the future—is just plain wrong. I have said on the floor before that there are few perfect laws that have been written and not many by U.S. Senators. In this circumstance, we did our very best, working with the experts.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

Mr. DURBIN. I ask unanimous consent for 5 additional minutes.

The ACTING PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

Mr. DURBIN. Thank you. I will be glad to concede the floor to one of my Republican colleagues if they come during this 5-minute period.

When we wrote the health care reform bill, we relied on the best experts we could find. We were dealing with one-sixth of the American economy, which is the sum total of the cost of health care in our Nation, and we did our very best to move forward. It would have been an easier task had we had the cooperation and joint efforts of the Republican side of the aisle, but they decided to step away and say no.

SECRET HOLDS

The last point I wish to make is that we have reached a historic milestone in the Senate with the Executive Calendar. At this point, we have over 100 nominations to the Obama administration for positions, large and small, that have been held up by the other side of the aisle. I wish to salute Senator CLAIRE MCCASKILL, Senator SHELDON WHITEHOUSE, and a number of my colleagues who have come to the floor and challenged the fact that this calendar is glutted with over 100 nominees who can't be brought to the floor for a vote.

Now let's examine a historical parallel. At the same time in President George W. Bush's administration, there were 20 nominees being held. Now over 100 are being held. Overwhelmingly, these nominees have passed out of committee to the Senate floor with unanimous bipartisan votes or overwhelming bipartisan votes. They are not controversial. These men and women deserve an opportunity to have an up-or-down vote.

What is happening here is that these nominations are being held as bargaining chips for projects and for—I am not sure what. But it is unfair to these men and women who have said they will offer some time in their lives to public service and will go through the

rigors of being examined and questioned and then stand up and try to help make this a better Nation by serving in a government post. There is nothing wrong with that. Whether it is Republican or Democrat—and many of these are Republicans—they should have that opportunity.

I would suggest to the Republican side of the aisle, let's not use these good men and women of both political parties as bargaining chips for something else. Let's eliminate the so-called secret holds where Senators can, in fact, hold up these nominees without ever disclosing publicly that they are responsible. If they have a legitimate grievance against the nominee, make that grievance known publicly, argue it on the floor. But to hold up innocent people, to leave them stranded on the Executive Calendar for weeks and months is unfair to them and certainly unfair to this administration.

I see the Senator from Tennessee in the Chamber, and I yield the floor to my colleague from Tennessee.

The ACTING PRESIDENT pro tempore. The Senator from Tennessee.

AMENDMENT NO. 3955

Mr. CORKER. Mr. President, I thank my friend from Illinois.

I wish to speak for just a moment on the Corker amendment that will be coming up very shortly, and I thank the Presiding Officer for the time.

First of all, I thank Senator GREGG, Senator LEMIEUX, Senator COBURN, and Senator BROWN for being cosponsors. I thank Senator SHELBY for all he has done to help support and make this amendment possible as well as Senator ISAKSON, who brings a wealth of experience to this body as it relates to real estate lending. I thank all of them for their support of this amendment.

It is a basic, commonsense amendment. I think everybody in this body knows that we as a country are going down a pretty slippery slope and that we as politicians act as enablers. We don't tell people what they need to hear. Instead, we try to give them what they want without any degree of discipline.

What this amendment does is restore within the housing market a focus on the core issue that took us into this crisis—something many people in this body do not want to discuss—and that is the fact that there were a lot of loans written to people who had no ability whatsoever to pay them back.

So this amendment does some very simple things. No. 1, it requires a very modest 5-percent downpayment for new home mortgages. If someone borrows more than 80 percent loan to value, it requires a credit enhancement—something that has been part of the American psyche for a long time. Believe it or not, it asks that there be fully documented income, including credit history and employment history. Gosh, what a big issue that would be, just to know someone had the ability to pay back the loan. Then it requires a method for determining the borrower's ability to repay, including consideration of their debt-to-income ratio, which is very important. So this would be done by banking regulators. It does not apply to VA or rural housing administration mortgages. It does give an exemption for organizations such as Habitat and Enterprise and others that allow homeowners to use sweat equity to actually build up some equity in a home.

This is a commonsense amendment. While I respect Senators on the other side of the aisle, Senators MERKLEY and KLOBUCHAR, who have worked on a side-by-side, I want to say to people in this body that while that is a good-intentioned amendment, what it does is build on the construct of the Dodd bill where, in essence, we are giving to this new consumer protection agency the ability to do loan underwriting. I think that is a dangerous path for our country to go down.

I thank my colleagues for letting me give an overview of this amendment, and I urge everybody in this body to support it.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

The Senator from Michigan is recognized.

Mr. LEVIN. Mr. President, I rise as a cosponsor in support of the Merkley-Klobuchar amendment to prohibit kickbacks to lenders who steer homeowners into bad mortgages.

The U.S. Senate Permanent Subcommittee on Investigations recently completed an 18-month investigation and a series of four hearings looking into some of the causes and consequences of the financial crisis. In our first hearing, the subcommittee examined the high-risk lending practices of Washington Mutual Bank, ''WaMu,'' which led to the largest U.S. bank failure of all time. WaMu was brought to the precipice of collapse, in large part, by irresponsible and abusive home lending practices such as steering homeowners into high-risk and high-cost loans, and failing to even verify borrower income when making those loans. The Merkley-Klobuchar amendment prohibits those practices, and would go a long way towards preventing the irresponsible behavior that led to the financial crisis.

In the years prior to its failure, WaMu routinely issued stated income and negatively amortizing loans, which undermined the safety and soundness of the bank and injected hundreds of billions of dollars of high-risk loans into the U.S. financial system. Stated income mortgage loans, sometimes called ''liar loans'' or ''no-doc'' loans, allow borrowers to write their income on a loan application, without offering proof such as a pay stub or W–2 form, and without lender verification. Stated income loans made up 90 percent of WaMu's home equity loans, 73 percent of its option arms, and 50 percent of its subprime loans. During our hearings on regulatory oversight of WaMu's high-risk lending, both regulators—the Office of Thrift Supervision and Federal Deposit Insurance Corporation—supported an end to stated income loans, and inspectors general from those same agencies also advocated that Congress consider doing so.

It's no surprise that WaMu loan originators were steering borrowers into high-risk, high-cost loans, because they were being paid more to do it. Wall Street had an appetite for high-risk loans, and so WaMu built a conveyor belt to churn them out. In order to generate the volume of high-risk loans needed to keep the conveyor belt running, WaMu had to convince people to take out high-risk loans, like Option ARMs, in lieu of low-risk fixed rate loans. WaMu paid loan originators and mortgage brokers much more for issuing these high-risk loans, and so the originators and brokers would do the convincing, and make the sales.

It is time to stop those dangerous lending practices, which had such disastrous consequences for the U.S. financial system, our economy, and American families.

The Merkley-Klobuchar amendment contains one clause that does concern me. The amendment explicitly allows loan personnel to be paid bonuses for loan volume. The recent financial crisis shows how dangerous loan volume incentives are—they encourage loan officers and mortgage brokers to issue as many loans as possible as quickly as possible, with the inevitable consequence being shoddy lending in which loan personnel cut corners and churn out loans to boost their compensation. Our hearing demonstrated how the bonuses paid by WaMu for loan volume and speed resulted in poor quality and even fraudulent loans. It is my hope that the regulators recognize the problem and interpret that provision to permit banks to assign bonuses for only a reasonable number of loans, and that those same bonuses also be made contingent on good quality lending. Regulators should interpret the provision in the context of the overall amendment whose clear aim is to prohibit shoddy lending practices and shut down the type of conveyor belt lending that dumped so many toxic loans into the marketplace.

The Merkley-Klobuchar amendment takes the steps needed to bar stated income loans. It doesn't go as far with respect to negatively amortizing loans, although it takes an important initial step. That step is requiring lenders to qualify borrowers for these loans by evaluating their ability to pay the highest interest rate that would be charged at any time during the first 5 years of the loan. While that is a good first step, I have introduced an amendment with Senator KAUFMAN that would go further and would effectively ban negatively amortizing loans because of their detrimental impact on the safety and soundness of individual financial institutions and the financial system as a whole.

WaMu's experience with neg am loans shows why these loans were so

dangerous to its operations. In 2006, more than 95 percent of WaMu's Option ARM borrowers made minimum payments, and, by the end of 2007, 84 percent of the total value of the Option ARMS in WaMu's portfolio were negatively amortizing. WaMu projected that negative amortization increased monthly mortgage payments for borrowers by 60 percent. Regulators found instances at its subprime originator, Long Beach Mortgage, of payment shock as high as 240 percent, where a loan payment jumped from $1,700 to $5,705 per month, with no data showing the borrower could afford the extra $4,000. Not surprisingly, the payment shock from much higher loan payments led to loan defaults by a large number of borrowers. According to the Treasury and FDIC Inspectors General, WaMu failed largely because of its high-risk loans. The subcommittee investigation found that these high-risk loans also contributed to the 2008 financial crisis, by loading up the financial system with toxic mortgages.

I am cosponsoring the Merkley-Klobuchar amendment because it would take the steps necessary to end stated income loans and lending practices that cause loan officers to steer borrowers to high-cost, high-risk loans.

AMENDMENT NO. 3759

Mr. DODD. Mr. President, I commend my colleagues for their work on this amendment. But, as I have stated, I believe it will fuel, and not limit, the type of charter shopping in search of the most lax regulator that we have seen in this past crisis.

The Hutchinson amendment would preserve the status quo by allowing the Federal Reserve to continue regulating about 845 State banks that are members of the Federal Reserve System out of a total of approximately 6,000 State banks.

This is a tremendous shame. Over the last 2 years, I sat through 80 hearings, listening to witnesses discuss the failings of the Fed—the failure of the agency to write rules protecting consumers, the failure of the agency to regulate derivatives, and its failure to properly supervise holding companies.

In response to these hearings, I initially introduced a bill that would have both streamlined our bank regulatory system and stopped banks from being able to engage in regulatory arbitrage. It would have consolidated the bank supervisory functions of four regulatory agencies—the OCC, the OTS, the FDIC, and the Fed—and would have created a single new agency to supervise banks. In other words, it would have taken the Fed out of the business of bank supervision entirely.

I ended up modifying this proposal in response to concerns raised by my colleagues, but the bill that we passed out of committee still consolidates bank regulatory functions in a clear and logical way. It eliminates the OTS, and gives supervision of all federally chartered depositories to the OCC, and all State-chartered depositories, including both State member and nonmember banks, to the FDIC.

And small holding companies and their banks are supervised by a single regulator. We looked into how these companies are structured and determined that in most cases these holding companies are just shells and their primary assets are just simply banks. In these circumstances, it just makes no sense to have a separate holding company regulator. So, under the bill, small national banks and their holding companies are regulated by the OCC. And small State-chartered banks and their holding companies are regulated by the FDIC.

Meanwhile, the bill requires the Fed to focus on several key areas—its monetary policy role, and its role as lender of last resort. It also expands the Fed's reach into areas that compliment these central bank functions.

The bill gives the Fed supervision of bank holding companies with $50 billion in assets and over, and the supervision of other nonbank financial companies if the failure of these companies would pose a risk to the U.S. financial stability.

The Fed is given the responsibility to establish heightened prudential standards for these companies, including tougher capital and liquidity requires.

And, the bill gives the Fed additional authority to regulate the payments system.

But apparently this isn't enough.

One of the main arguments the Fed makes for retaining this authority is that it needs a window into the workings of small banks in order to formulate monetary policy.

I say to my colleagues—this is a red herring. Take a look at the Fed's Beige Book. The Fed is able to collect information about a variety of sectors in the economy—about manufacturing, real estate, the energy sector, and the agricultural sector without direct regulation in these areas.

And by law, the Fed can already gather any information it wants from any depository institution—whether it regulates that institution or not. Let me read from the relevant parts of the law:

> The Board of Governors of the Federal Reserve System shall be authorized and empowered . . . to require any depository institution specified in this paragraph to make, at such intervals as the Board may prescribe, such reports of its liabilities and assets as the Board may determine to be necessary or desirable to enable the Board to discharge its responsibility to monitor and control monetary and credit aggregates. [12 USC 248(a).]

The Fed also is arguing that it needs to be the regulator of all holding companies so that it can respond effectively in the event of a regional crisis.

I ask my colleagues—do we need a regulator that can respond effectively in the event of a regional crisis or that can effectively prevent the next crisis from occurring?

I would like to point out the possible downside of allowing the Fed to continue supervising State member banks.

Let me play this out. The agency that regulates this country's largest national banks is the Office of the Comptroller of the Currency, which is a bureau of the Treasury Department. The OCC is funded through assessments on the banks that it regulates.

By contrast, the FDIC and the Fed use revenues from their other operations to pay for their supervisory activities and don't charge their banks for examinations. State banks are examined by State authorities every other year, but the States do not charge as much as the OCC. So, it is much cheaper to be a State bank.

I fear that the very largest national banks will have tremendous incentives to become State member banks so that they will have a single Federal regulator—the Federal Reserve. This will concentrate enormous power in the Federal Reserve System—an agency that the financial crisis has shown is already stretched too thin with its many and varied responsibilities.

This could also result in increased regulatory arbitrage. Since the OCC depends on assessments from the banks it regulates to fund its operations, the agency may go to great lengths to keep its banks from converting to State charters. We have seen what happens when depository institutions exploit these weaknesses in our bank regulatory system and when agencies compromise their supervisory integrity to maintain companies within their domain.

If this happens, we could have another race to the bottom—just like the competition and regulatory arbitrage that lead to the financial crisis.

Some will argue that my fears are unfounded, but I remain concerned about the unintended consequences that will flow from the Fed's continued regulation of State member banks.

And therefore I oppose the Hutchison amendment.

The ACTING PRESIDENT pro tempore. The Senator from Oregon is recognized.

Mr. MERKLEY. Mr. President, I ask unanimous consent that there be 2 minutes of debate prior to the first vote, equally divided between the two sides.

The ACTING PRESIDENT pro tempore. Is there objection?

Without objection, it is so ordered.

The Senator from Oregon is recognized.

Mr. MERKLEY. Mr. President, today, we have two amendments that address integrity in retail mortgage origination. I am certainly encouraging you to place your vote squarely for the Merkley-Klobuchar amendment.

This amendment is critical to end no-document liar loans—a big factor in the meltdown that occurred last year.

Second, it establishes underwriting integrity so that underwriters will look at loan to value, credit history, and current obligations—again, integrity of mortgages—which enables loans to be securitized and creates liquidity

so families can get loans at a lower interest rate.

Third, the Merkley-Klobuchar amendment ends steering payments. This is essential. The originators have been in an awkward position where they have been paid bonuses for making deals that weren't in their clients' interests.

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. CORKER. I yield back our time.

Mr. MERKLEY. I yield back our time.

The ACTING PRESIDENT pro tempore. Under the previous order, the question is on agreeing to amendment No. 3962 offered by the Senator from Oregon, Mr. MERKLEY, and the Senator from Minnesota, Ms. KLOBUCHAR.

Mr. MERKLEY. Mr. President, I ask for the yeas and nays.

The ACTING PRESIDENT pro tempore. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) is necessarily absent.

The ACTING PRESIDENT pro tempore. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 63, nays 36, as follows:

[Rollcall Vote No. 141 Leg.]

YEAS—63

Akaka	Franken	Mikulski
Baucus	Gillibrand	Murray
Bayh	Grassley	Nelson (NE)
Begich	Hagan	Nelson (FL)
Bennet	Harkin	Pryor
Bingaman	Inouye	Reed
Boxer	Johnson	Reid
Brown (MA)	Kaufman	Rockefeller
Brown (OH)	Kerry	Sanders
Burris	Klobuchar	Schumer
Cantwell	Kohl	Shaheen
Cardin	Landrieu	Snowe
Carper	Lautenberg	Specter
Casey	Leahy	Stabenow
Collins	Levin	Tester
Conrad	Lieberman	Udall (CO)
Dodd	Lincoln	Udall (NM)
Dorgan	Lugar	Warner
Durbin	McCaskill	Webb
Feingold	Menendez	Whitehouse
Feinstein	Merkley	Wyden

NAYS—36

Alexander	Crapo	LeMieux
Barrasso	DeMint	McCain
Bennett	Ensign	McConnell
Bond	Enzi	Murkowski
Brownback	Graham	Risch
Bunning	Gregg	Roberts
Burr	Hatch	Sessions
Chambliss	Hutchison	Shelby
Coburn	Inhofe	Thune
Cochran	Isakson	Vitter
Corker	Johanns	Voinovich
Cornyn	Kyl	Wicker

NOT VOTING—1

Byrd

The amendment (No. 3962) was agreed to.

AMENDMENT NO. 3955

The ACTING PRESIDENT pro tempore. Under the previous order, there is 2 minutes of debate prior to a vote on amendment No. 3955, offered by the Senator from Tennessee, Mr. CORKER.

The Senator from Tennessee is recognized.

Mr. CORKER. Mr. President, I think everybody in this body knows the core of this last financial crisis was because there were a lot of loans written in this country that people couldn't pay back. The Dodd bill does a lot, but it doesn't deal with that basic core issue of loan underwriting. This is an opportunity for people on both sides of the aisle to support a commonsense amendment that requires a 5-percent downpayment, with fully documented income, including an employment history and a credit history, which I think all of us would like to see, and a method for determining the borrower's ability to repay and that being part of loan underwriting put in place by bank regulators.

This commonsense amendment should be supported by both sides of the aisle. It gives the ability for Habitat, for Enterprise, for those organizations that use sweat equity to be excluded. This is something we all know needs to be common practice. Let's put it in the law and ensure that another financial crisis doesn't come on the backs of homeowners who borrow money, by the way, irresponsibly, and we enable them to do it. Let's vote for something that ensures that common sense is in place in loan underwriting.

This is a good amendment, and I hope my colleagues will support it.

The ACTING PRESIDENT pro tempore. The Senator from Connecticut is recognized.

Mr. DODD. I thank my colleague from Tennessee. He has been a positive, constructive Member of this effort before us, but I oppose his amendment for two reasons.

First of all, it creates a very bright line of mandating 5 percent. Every nonprofit, all FHA mortgages would be subject to that rule, which would exclude an awful lot. The Merkley-Klobuchar amendment we just adopted establishes underwriting standards.

Further, what the Corker amendment does is it strips out the skin in the game. One of the things we learned is that brokers and mortgage dealers had no skin in the game. They were selling off these items and they didn't care what was in it because they were being paid.

Under an amendment we will adopt after the Corker amendment is considered—the Isakson-Landrieu amendment—we will set a standard allowing for the option of that skin in the game, which I think strengthens the bill even further, and I appreciate Senator ISAKSON and Senator LANDRIEU offering that idea to this bill that will come right after this.

For those reasons, I urge my colleagues, respectfully, to reject the Corker amendment.

I yield back.

Mr. CORKER. Mr. President, I ask for the yeas and nays.

The ACTING PRESIDENT pro tempore. Is there a sufficient second?

There is a sufficient second. The question is on agreeing to the Corker amendment.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) is necessarily absent.

The ACTING PRESIDENT pro tempore. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 42, nays 57, as follows:

[Rollcall Vote No. 142 Leg.]

YEAS—42

Alexander	Cornyn	Lugar
Barrasso	Crapo	McCain
Bayh	DeMint	McConnell
Bennett	Ensign	Murkowski
Brown (MA)	Enzi	Risch
Brownback	Graham	Roberts
Bunning	Gregg	Sessions
Burr	Hatch	Shelby
Chambliss	Hutchison	Snowe
Coburn	Inhofe	Thune
Cochran	Isakson	Vitter
Collins	Johanns	Voinovich
Conrad	Kyl	Warner
Corker	LeMieux	Wicker

NAYS—57

Akaka	Gillibrand	Mikulski
Baucus	Grassley	Murray
Begich	Hagan	Nelson (NE)
Bennet	Harkin	Nelson (FL)
Bingaman	Inouye	Pryor
Bond	Johnson	Reed
Boxer	Kaufman	Reid
Brown (OH)	Kerry	Rockefeller
Burris	Klobuchar	Sanders
Cantwell	Kohl	Schumer
Cardin	Landrieu	Shaheen
Carper	Lautenberg	Specter
Casey	Leahy	Stabenow
Dodd	Levin	Tester
Dorgan	Lieberman	Udall (CO)
Durbin	Lincoln	Udall (NM)
Feingold	McCaskill	Webb
Feinstein	Menendez	Whitehouse
Franken	Merkley	Wyden

NOT VOTING—1

Byrd

The amendment (No. 3955) was rejected.

Mr. DODD. Mr. President, I move to reconsider the vote and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 3759, AS MODIFIED

The ACTING PRESIDENT pro tempore. Under the previous order, there is 2 minutes of debate prior to a vote on amendment No. 3759, as modified, offered by the Senator from Texas, Mrs. HUTCHISON, and the Senator from Minnesota, Ms. KLOBUCHAR.

The Senator from Texas is recognized.

The Senate will come to order.

Mrs. HUTCHISON. Mr. President, I ask to be notified after 30 seconds so my colleague, Senator KLOBUCHAR, can speak.

The ACTING PRESIDENT pro tempore. The Chair will do so.

Mrs. HUTCHISON. Mr. President, this is an amendment that reinstates the Federal Reserve as the prudential regulator for small holding companies and State-chartered banks. The State-chartered banks and the community banks have asked to retain the capability to be members of the Fed. They want their input into monetary policy. Over half of the Federal Reserve Bank presidents have also weighed in, saying

this is essential. For instance, in the Dallas Fed it would go from over 500 regulated banks and bank holding companies to 1 or 2. Only the biggest banks would be heard.

The ACTING PRESIDENT pro tempore. The time of the Senator has expired.

The Senator from Minnesota.

Ms. KLOBUCHAR. Mr. President, this amendment assures the Nation's monetary policy has a connection to Main Street and not just Wall Street. As the president of the Grand Rapids State Bank in Grand Rapids, MN said to me recently:

All Senators should be reminded that the Federal Reserve System was created to serve all of America, not just Wall Street.

If you talk to the regional Federal Reserves all over this country, they need this information. This amendment makes a difference. This amendment has support from the Lone Star State of Texas to the North Star State of Minnesota. I ask for your support.

The ACTING PRESIDENT pro tempore. The time of the Senator has expired.

Who yields time? The Senator from Connecticut is recognized.

Mr. DODD. Mr. President, I yield my time. Unless someone wants to speak in opposition, I oppose the amendment but I am not going to speak against it.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the amendment.

Mr. DODD. Mr. President, I ask for the yeas and nays.

The ACTING PRESIDENT pro tempore. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) is necessarily absent.

The PRESIDING OFFICER (Mr. BENNET). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 91, nays 8, as follows:

[Rollcall Vote No. 143 Leg.]

YEAS—91

Alexander	Cornyn	Landrieu
Barrasso	Crapo	Lautenberg
Baucus	DeMint	Leahy
Bayh	Dorgan	LeMieux
Begich	Durbin	Lieberman
Bennet	Ensign	Lincoln
Bennett	Enzi	Lugar
Bingaman	Feingold	McCain
Bond	Feinstein	McCaskill
Boxer	Franken	McConnell
Brown (MA)	Gillibrand	Menendez
Brown (OH)	Graham	Merkley
Brownback	Grassley	Mikulski
Bunning	Gregg	Murkowski
Burr	Hagan	Murray
Burris	Hatch	Nelson (NE)
Cantwell	Hutchison	Nelson (FL)
Cardin	Inhofe	Pryor
Carper	Isakson	Reid
Casey	Johanns	Risch
Chambliss	Johnson	Roberts
Coburn	Kaufman	Rockefeller
Cochran	Kerry	Schumer
Collins	Klobuchar	Sessions
Conrad	Kohl	Shaheen
Corker	Kyl	Shelby
Snowe	Udall (CO)	Webb
Specter	Udall (NM)	Wicker
Stabenow	Vitter	Wyden
Tester	Voinovich	
Thune	Warner	

NAYS—8

Akaka	Inouye	Sanders
Dodd	Levin	Whitehouse
Harkin	Reed	

NOT VOTING—1

Byrd

The amendment (No. 3759, as modified) was agreed to.

CHANGE OF VOTE

Mr. BROWN of Ohio. Mr. President, I ask unanimous consent that I be recorded as yea on vote No. 143. Doing so will not affect the outcome of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The foregoing tally has been changed to reflect the above order.)

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I move to reconsider that vote and lay that motion upon the table.

The motion to lay upon the table was agreed to.

Mr. DODD. Mr. President, what I wish to do at this juncture, if we could, is we have an amendment being offered by our colleague from Louisiana, Senator LANDRIEU, and our colleague from Georgia, Senator ISAKSON.

I believe if they take 10 minutes or so, we could do it on a voice vote. I support and, in fact, I am a cosponsor of their amendment. I think it strengthens our bill tremendously. I want to thank my colleague from Georgia very much, who has forgotten more about real estate than most of us will ever know, having spent a good separate part of his life involved in the business.

We have worked together on a lot of issues over the last couple of years related to real estate. I thank him for his contribution, as well as my dear friend from Louisiana.

I yield the floor to them.

The PRESIDING OFFICER. The Senator from Louisiana.

AMENDMENT NO. 3956 TO AMENDMENT NO. 3739

Ms. LANDRIEU. Mr. President, I thank the chairman for his acknowledgment and his work with us on this amendment. It has broad bipartisan support. I offer it on behalf of myself and the good Senator from Georgia, Mr. ISAKSON, whose expertise in housing matters is well known; also on behalf of Senator WARNER, Senator HAGAN, Senator MENENDEZ, Senator TESTER, Senators LINCOLN, LEVIN, BURR, and HUTCHISON.

We have broad and deep bipartisan support for this amendment, and the reason we do is because it is a good amendment and, more specifically, it addresses the risk retention provisions currently in the bill by helping to eliminate the excessive risk taking we saw in the home mortgage market between 2004 and 2007, without raising interest rates for those home buyers who have maintained good credit, document their income and assets, and finance their home the old-fashioned way. Back to the basics, with savings.

I call up amendment No 3956 at this time, and offer it for the Senate's consideration. I wish to also give 1 minute on our side to the Senator from Virginia, Mr. WARNER, and then turn it over to my colleague from Georgia. But we are proud to offer this amendment for the Senate's consideration.

The PRESIDING OFFICER. Without objection, the pending amendment is set aside.

The clerk will report.

The legislative clerk read as follows:

The Senator from Louisiana [Ms. LANDRIEU], for herself, Mr. ISAKSON, Mrs. HAGAN, Mr. WARNER, Mr. MENENDEZ, Mr. TESTER, Mrs. LINCOLN, Mr. LEVIN, Mr. BURR, and Mrs. HUTCHISON, proposes an amendment numbered 3956 to amendment No. 3739.

Ms. LANDRIEU. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To exempt qualified residential mortgages from credit risk retention requirements)

On page 1047, strike line 4 and all that follows through line 20 and insert the following:

''(i) not less than 5 percent of the credit risk for any asset—

''(I) that is not a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer; or

''(II) that is a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer, if 1 or more of the assets that collateralize the asset-backed security are not qualified residential mortgages; or

''(ii) less than 5 percent of the credit risk for an asset that is not a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer, if the originator of the asset meets the underwriting standards prescribed under paragraph (2)(B);

''(C) specify—

''(i) the permissible forms of risk retention for purposes of this section;

''(ii) the minimum duration of the risk retention required under this section; and

''(iii) that a securitizer is not required to retain any part of the credit risk for an asset that is transferred, sold or conveyed through the issuance of an asset-backed security by the securitizer, if all of the assets that collateralize the asset-backed security are qualified residential mortgages;

On page 1051, between lines 3 and 4, insert the following:

''(4) EXEMPTION FOR QUALIFIED RESIDENTIAL MORTGAGES.—

''(A) IN GENERAL.—The Federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency shall jointly issue regulations to exempt qualified residential mortgages from the risk retention requirements of this subsection.

''(B) QUALIFIED RESIDENTIAL MORTGAGE.—The Federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency shall jointly define the term 'qualified residential mortgage' for

purposes of this subsection, taking into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default, such as—

''(i) documentation and verification of the financial resources relied upon to qualify the mortgagor;

''(ii) standards with respect to—

''(I) the residual income of the mortgagor after all monthly obligations;

''(II) the ratio of the housing payments of the mortgagor to the monthly income of the mortgagor;

''(III) the ratio of total monthly installment payments of the mortgagor to the income of the mortgagor;

''(iii) mitigating the potential for payment shock on adjustable rate mortgages through product features and underwriting standards;

''(iv) mortgage guarantee insurance obtained at the time of origination for loans with combined loan-to-value ratios of greater than 80 percent; and

''(v) prohibiting or restricting the use of balloon payments, negative amortization, prepayment penalties, interest-only payments, and other features that have been demonstrated to exhibit a higher risk of borrower default.

''(5) CONDITION FOR QUALIFIED RESIDENTIAL MORTGAGE EXEMPTION.—The regulations issued under paragraph (4) shall provide that an asset-backed security that is collateralized by tranches of other asset-backed securities shall not be exempt from the risk retention requirements of this subsection.

''(6) CERTIFICATION.—The Commission shall require an issuer to certify, for each issuance of an asset-backed security collateralized exclusively by qualified residential mortgages, that the issuer has evaluated the effectiveness of the internal supervisory controls of the issuer with respect to the process for ensuring that all assets that collateralize the asset-backed security are qualified residential mortgages.

The PRESIDING Officer. The Senator from Virginia.

Mr. WARNER. Mr. President, I want to commend the chairman of the Small Business Committee, and my colleague and friend, Senator LANDRIEU, and Senator ISAKSON for this amendment. I am proud to be part of it.

I think those of us on the committee when we were drafting the legislation wanted to make sure that the mortgage security securitization process, the originators of mortgages, had skin in the game. I think as we went through this process, and working particularly with the expertise of the Senator from Georgia, we realized that while skin in the game is important, it is more the underlying quality of the mortgage.

If we have mortgages that have that 20 percent down, with a high FICO score, the same level of skin in the game is not required. I think this amendment stays true to the intent of the Banking Committee bill.

I am glad the chairman of the Banking Committee is supportive of it. I think this is an amendment that refines and improves the legislation. I am proud to be a cosponsor of it, and grateful for the expertise of the Senator from Georgia and the Senator from Louisiana.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. ISAKSON. Mr. President, first, I appreciate the kind remarks of the Senator from Connecticut, the Senator from Louisiana, and the Senator from Virginia. I ask unanimous consent that Senator GRASSLEY of Iowa be also added as a cosponsor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ISAKSON. The committee did a great job to ensure subprime loans would never be made again by requiring risk retention of 5 percent. The only problem is they have called it on all loans, which meant there would be no mortgage loans. You would not have subprime, you would not have good loans because you cannot make it work with a 5-percent risk retention. As I have cautioned all of my colleagues, in the 1980s when the savings and loan industry failed, they had 100 percent risk retention. Risk retention is not the cure-all to good lending; underwriting is.

The Senator from Louisiana and the other sponsors of this amendment are ensuring that people who have incomes that are verified, they will ensure that they have ratios that meet the tolerance levels for a qualified loan, meaning you are not borrowing more than you can pay back; they will ensure there is equity of 20 percent in every loan made, either through the downpayment being 20 percent or through whatever downpayment is made, having mortgage guarantee insurance on the amount above 80, and up to the downpayment, which is the way things used to work.

In other words, the underlying lender is never at risk for more than 80, more than 80 is made by the borrower, it is mortgage guarantee insurance, which means if there is a default, that insurance is paid immediately, which ensures you that you are making a better quality loan.

What Senator LANDRIEU has basically said is, we are not going where we make zero down, interest-only, all-day, stated-income, reversed amortization loans anymore. But we are going to make the good-old-days loan, where there is a downpayment, where there is skin in the game, where there is an income-to-debt ratio, and where the borrower is qualified to borrow the money they are borrowing.

The only risk retention that will be required is when someone is making a bad loan, which means people will stop making bad loans, which means this bill, with this amendment, will have truly addressed the heart and soul of what led to the failure of the housing market and ultimately the subprime securities in New York.

I appreciate the chairman's acceptance of the amendment. I commend Senator LANDRIEU as the original author of the amendment. I appreciate the time she offered me on the floor today.

The PRESIDING OFFICER. The Senator from Louisiana.

Ms. LANDRIEU. I wish to ask for immediate consideration of the amendment, if it could be voice voted at this time and, if not, scheduled for the earliest possible vote.

Mr. DODD. I appreciate that. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DODD. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 3918 TO AMENDMENT NO. 3739

Mr. DODD. Mr. President, I ask unanimous consent that we temporarily lay aside the Landrieu-Isakson amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Maine.

Ms. SNOWE. I call up amendment No. 3918.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Maine [Ms. SNOWE], for herself and Ms. LANDRIEU, proposes an amendment numbered 3918 to amendment No. 3739.

Ms. SNOWE. I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To improve title X)

On page 1272, line 2, strike ''services who'' and insert ''services, but only to the extent that such person''.

On page 1272, line 22, strike ''(C)'' and insert ''(C)(i)''.

On page 1273, strike line 19 and insert the following:

''(C) LIMITATIONS.—

''(i) IN GENERAL.—Notwithstanding sub-''.

On page 1273, line 20, after ''subparagraph (B)'' insert '', and except as provided in clause (ii)''.

On page 1274, between lines 2 and 3, insert the following:

''(ii) EXCEPTION.—Subparagraph (A) and clause (i) of this subparagraph do not apply to any merchant, retailer, or seller of nonfinancial goods or services, to the extent that such person is subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.''.

On page 1274, strike line 3 and all that follows through ''may'' on line 4 and insert the following:

''(D) RULES.—

''(i) AUTHORITY OF OTHER AGENCIES.—No provision of this title shall''.

On page 1274, between lines 13 and 14, insert the following:

''(ii) SMALL BUSINESSES.—A merchant, retailer, or seller of nonfinancial goods or services that would otherwise be subject to the authority of the Bureau solely by virtue of the application of subparagraph (B)(iii) shall be deemed not to be engaged significantly in offering or providing consumer financial products or services under subparagraph (C)(i), if such person—

''(I) only extends credit for the sale of nonfinancial goods or services, as described in subparagraph (A)(i);

''(II) retains such credit on its own accounts (except to sell or convey such debt

that is delinquent or otherwise in default); and

''(III) meets the relevant industry size threshold to be a small business concern, based on annual receipts, pursuant to section 3 of the Small Business Act (15 U.S.C. 632) and the implementing rules thereunder.

''(iii) INITIAL YEAR.—A merchant, retailer, or seller of nonfinancial goods or services shall be deemed to meet the relevant industry size threshold described in clause (ii)(III) during the first year of operations of that business concern if, during that year, the receipts of that business concern reasonably are expected to meet that size threshold.

''(E) EXCEPTION FROM STATE ENFORCEMENT.—To the extent that the Bureau may not exercise authority under this subsection with respect to a merchant, retailer, or seller of nonfinancial goods or services, no action by a State attorney general or State regulator with respect to a claim made under this title may be brought under subsection 1042(a), with respect to an activity described in any of clauses (i) through (iii) of subparagraph (A) by such merchant, retailer, or seller of nonfinancial goods or services.''.

Ms. SNOWE. I thank the chairman of the committee, Senator DODD, for being responsive and receptive to a number of amendments we have offered with respect to small businesses and for making sure there are not unintended consequences as a result of this legislation that require more regulation on their part.

I also thank the chairman of the Small Business Committee, Senator LANDRIEU, for cosponsoring this amendment and for her efforts as a strong champion on behalf of small businesses. I thank the chairman for working with me to forge a compromise on this particular amendment that gives small businesses certainty that they will be exempted from the Consumer Financial Protection Bureau to the degree that they are not involved in financial products that will be regulated under this legislation.

This amendment will modify a provision in the underlying legislation that could unintentionally ensnare small businesses within the Consumer Financial Protection Bureau if they are judged by the bureau as having engaged ''significantly'' in consumer financial products or services such as selling goods or services on credit or through an installment program.

The term ''significantly'' is unclear. Certainly, it could potentially lead to Main Street enterprises such as jewelers, orthodontists, or furniture store owners being roped into a bureau intended to regulate providers of financial services. The chairman has been clear that through his interpretation, small business owners are specifically excluded, that they were never intended to be placed within the bureau itself. Yet the bill's use of the term ''significantly'' is vague.

Perhaps an article entitled ''To Protect Consumers, Who Will Be Regulated?'' published by the New York Times on April 30 captured this issue the best when it noted:

A review of the consumer protection provisions, which account for 335 pages of the 1,565-page bill, shows that the intent of this legislation is not to cover Main Street businesses. But the ambiguity of some terms—like the word ''significantly''—leaves the regulations open to broad interpretation.

Accordingly, while I strongly believe Congress should pursue the providers of abusive and predatory financial products that harm Americans, we must be careful not to inadvertently target Main Street small businesses. Given the state of the economy and the difficulties placed on small businesses struggling to keep their doors open, entrepreneurs already have enough to be concerned about. We should not be injecting more uncertainty in the very enterprises we are counting on to reverse the 7.8 million job losses we have experienced thus far in this recession and create opportunities for the 15.3 million Americans who remain unemployed. Additional uncertainty will make small firms far less likely to take risks and make new investments.

I believe we add clarity to this provision by virtue of this amendment. We prevent the overregulation of small businesses that may result in regulators interpreting this statute too broadly.

My amendment creates a quick, easy, bright-line test for small businesses. Firms that fall under the Small Business Administration's North American Industry Classification System—the classification system small businesses use to file their taxes and qualify for SBA programs and services—would be exempt so long as the small business extends credit for the sale of nonfinancial goods and does not securitize its debt. For example, this means a doctor's office would be exempt if it has less than $10 million in revenue, a jeweler would be exempt if it has revenues below $7 million, and a grocery or convenience store would be exempt if it has revenues under $27 million. As a result of this modification, business owners would know with certainty that if they were defined as small businesses by SBA standards, they would be exempt from regulations by the bureau. In addition, if a business is in its first year of existence, it would be considered a small business if it is reasonably expected to fall under the SBA's size standard.

This simple measuring stick provides objective criteria for small firms and has also been endorsed by the National Federation of Independent Business, the largest organization and voice for small business. It is also endorsed by the American Dental Association and the American Association of Orthodontists. Finally, the U.S. Chamber of Commerce has indicated that although it continues to have concerns with the Consumer Financial Protection Bureau, it views this amendment as an important step forward.

In the past year, the economic recession and the radical overhaul of the Nation's health care system have sown the seeds of doubt and uncertainty in America's small businesses. In Maine, I have been told time and again by constituents and small business owners that they are concerned about the future and worried about the growth of government. Adding another regulator with ambiguous powers is not the answer small businesses and Mainers are looking for to enable them to make plans about their futures, potentially adding jobs and making future investments.

This is why I have also filed—and intend to call up during this debate—another amendment that I filed with my good friend and colleague, Senator PRYOR. That amendment would ensure that when the newly created Consumer Financial Protection Bureau promulgates rules and regulations, it fully considers the economic impact that those rules and regulations would impose on our Nation's 30 million small firms and their ability to access credit. I look forward to working with Senators DODD and SHELBY to have that amendment considered.

In conclusion, this bipartisan amendment now before the Senate was crafted in consultation with small business stakeholders and is a commonsense solution to this problem. Given that ''stability'' is in the title of this legislation, I urge Members on both sides of the political aisle to aid small business owners and gain a measure of stability in these uncertain times and support the amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Louisiana.

Ms. LANDRIEU. I ask unanimous consent to add Senator BURRIS as a cosponsor of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Ms. LANDRIEU. I thank my colleague, Senator SNOWE, who chaired the Small Business Committee for many years, for her dogged determination to make sure the language in the underlying bill, which is most certainly necessary to curb gross abuses in the financial market, does not unintentionally do harm to small businesses that are the engines of growth to pull us out of this recession. Our amendment helps in a significant way to do that by drawing fine lines and clarifying definitions.

I thank the Federation of Small Businesses, the American Dental Association, and the American Association of Orthodontists, as well as dozens of other organizations that have supported this clarifying language.

I thank the chairman of the committee for giving us an opportunity to offer this important amendment, and I urge my colleagues to accept it. I urge them to look at the cosponsorship opportunity as well.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I thank both of my colleagues, not only for their work on this particular amendment but for the way they have approached the bill. They have been tremendously constructive in offering very solid ideas.

This is one amendment that does a great deal of service to the legislation. As the Senator from Maine pointed out, it was certainly always our intent not to include retailers and merchants under the auspices of the consumer financial product safety commission. The language they have now offered and on which they worked so hard makes that abundantly clear. The word ''significantly'' clearly is an opaque word. No matter how much I tried to make clear what my intentions were with that language, this amendment strengthens it tremendously. As I have said, this was never intended to affect Main Street merchants.

I am delighted that the National Federation of Independent Business, along with the American Dental Association and the American Association of Orthodontists, is now in support, because they were two groups about which it was unclear whether they would be included. As a result of what we have been able to craft, with the leadership of Senators SNOWE and LANDRIEU, we now have their support. I thank them.

Ms. SNOWE. Mr. President, I wish to express my appreciation to the chairman for working so constructively to develop this amendment, to build a consensus, and to give a strong measure of assurance to the small business community about the intent of this legislation so it doesn't create unintended consequences. I appreciate all he has done to make sure this amendment could be considered and hopefully adopted.

Mr. DODD. I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. BURRIS. Mr. President, I am pleased to join the distinguished Senator from Louisiana in supporting this small business legislation. There is a growing chorus in Washington of national leaders and advocacy groups, concerned citizens who have all come together to call for financial reform. Across America, folks are demanding a return to accountability, commonsense regulations, and fair business practices.

Each of us has been touched by this economic recession. Every Member of this body has heard from countless businesses and families back home who have had to tighten their belts and brace for the worst. We have all seen the raw numbers. We have heard the statistics over and over. Too often, we forget what is behind the numbers—real folks experiencing real pain. This economic crisis is far from abstract. It has touched millions of American lives. It has made people wonder when or even if our economic future will be secure again. It has shaken us to the core.

Things are finally starting to look a bit better. Thanks to bold steps taken at the national level, America is back on the road to recovery. Key economic indicators are turning around. But we are not out of the woods yet. The national unemployment rate stands at almost 10 percent. Our economy is growing but more slowly than we had hoped. Some people, especially the elderly and racial and ethnic minorities, remain especially vulnerable. Their pain is real. That is why, as the Senate considers financial reform legislation, we need to make sure they are protected. We need to make sure recovery continues along the right path and, at the same time, to stand up for these folks and prevent this from happening again.

That is why we need to create a Consumer Financial Protection Bureau, a strong advocate standing squarely on the side of the ordinary American, defending them from abuse at the hands of large corporations. This new bureau must be at the center of the financial reform package. It must be empowered to set and enforce strict consumer protection rules.

We should start with the mortgage industry. For years, banks have been allowed to relax their standards. They have made bad loans to people who were never able to make the payments. As a result, foreclosures skyrocketed.

Almost no community in America was immune to the subprime lending crisis, but minority populations were hit the hardest. At the height of the subprime boom, 54 percent of the loans made to African Americans were high-priced loans. The recession has caused these borrowers to come under severe stress, and as a result the Black home ownership rate has decreased.

We need to stop this kind of predatory lending and restore basic principles of fair play to the mortgage industry. That is why our Consumer Financial Protection Bureau would take a hard look at the way the mortgage brokers operate. It would ensure borrowers have access to loans they can afford. It would shut down scam operations, end abusive practices, and keep all brokers honest.

But it doesn't stop there. I believe we should extend many of these same protections to the student loan industry.

Today's young people represent the best America has to offer. They are our future, and we need to invest in their education, so we can make sure they have the tools that will help them succeed in the global marketplace. That is why our Consumer Protection Bureau would have the authority to set basic rules of the road, to make sure students are empowered to make smart choices.

The bureau would provide assistance to borrowers and institutions alike, increasing the flow of information and breathing transparency back into this complicated system. This would provide significant benefits to young people across America. But it would have the strongest impact on minority households, 49 percent of which currently have installment loans, including student loans.

Finally, we must task our new bureau with increasing financial literacy among consumers. Today, far too many Americans get caught up in the fine print, trapped by the deceptive practices of major financial institutions. So if we pass financial reform that includes a Consumer Financial Protection Bureau, these folks will have access to clear information in plain English. If they are still confused, they will be able to call a consumer hotline. This will connect them directly with experts at an office of financial literacy, so they can get their questions answered and make sure they are getting a fair deal.

This will empower consumers to make smart choices and will prevent big financial institutions from taking advantage of ordinary Americans. It would ensure that we stay on the road to recovery and extend a helping hand to regular folks who need it—especially the disadvantaged communities that have felt the worst effects of this crisis.

Most importantly, a Consumer Financial Protection Bureau will help prevent this kind of crisis from ever happening again. We must never forget that cold statistics and Wall Street balance sheets do not tell the complete story of this financial meltdown. It is important to think of the real human beings—individuals and families—who are behind these numbers: the ordinary folks who continue to suffer.

I believe it is time to stand up for these folks. That is why I am glad a Consumer Financial Protection Agency is at the center of our Wall Street reform bill.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CORKER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CORKER. Mr. President, I appreciate the opportunity to come back to the floor and speak on financial regulation. First of all, I wish to congratulate the Presiding Officer from Colorado for being very successful yesterday on passing an amendment that I think is going to be good for our country.

I rise to speak about an amendment I had earlier today. It was a commonsense amendment that I think gets at the heart of this financial crisis. It didn't pass, but the amendment was to put in place underwriting standards to keep the kind of crisis we just saw happen in our country over the last couple of years from happening again.

I think we all realize the base of this crisis, which the Dodd bill does not address, was the fact that we had large numbers of loans written around this country that people couldn't pay back. The underwriting standards were poor. Credit was extended to people who couldn't pay the mortgages back. Those mortgages were passed throughout the world, and then we had $600

trillion worth of notional value derivatives that were based on, again, these underlying bad mortgages. Then we had a systemic crisis not only in this country but around the world.

So what I attempted to do with my amendment was to put some appropriate underwriting standards in place where everybody who purchased a home would need to have a 5-percent downpayment. If they borrowed more than 80 percent loan to value, there would have to be some credit enhancement, up to 100 percent, to ensure it, in fact, was a safe loan. They had to fully document their income. What a breakthrough. They would have to include their credit history and employment history. Then we would have to determine the borrower's ability to repay, including consideration of their debt-to-income ratio.

This was just a basic underwriting guidelines amendment. Again, I think we know at the base of this problem we just went through was the fact that we had a lot of bad loans written.

I had a number of Democratic colleagues come up to me after the vote—or actually during the vote—and they said: I support what you want to do, but the provision striking the 5-percent retention dealing with securitization, which we did have in this amendment, was what kept me from voting for this underwriting amendment.

I put that in there because I think most people looked at the Dodd proposal and the 5-percent retention on securitization and realized that it created a problem, not a solution. So I actually did that to draw people to our amendment. But since I had a number of Democrats, my friends on the other side of the aisle, come up and say they would have supported it without striking the risk retention, I have now refiled that amendment.

I am now saying, OK, let's have some standard underwriting procedures in this country. Now that I have refiled that amendment, if it was the issue of risk retention on the securitization piece that kept you from coming onto this amendment, I have refiled it, and now I am seeking on the other side of the aisle some cosponsors.

We had some great cosponsors last time—Senators GREGG, LEMIEUX, COBURN, and BROWN. Senator SHELBY also supported this amendment. We had JOHNNY ISAKSON, from Atlanta, who probably knows more about real estate lending than anybody here, on behalf of this amendment.

For my friends on the other side who said: I would have done this, but that risk retention piece you had in there regarding securitization kept me from it, now I have a clean amendment that does nothing in that regard. It leaves that in place. Again, it puts into place these underwriting standards. I had a number of Democrats who said: I agree that we ought to at least have 5 percent down. I think maybe we ought to have more.

Well, because I want everyone in this body to have the opportunity to vote for a good, sound amendment, one that takes us away from the way we have been going in this country, which is we want to make sure everybody is entitled—it is no longer the American dream that someone owns a home; it is an American entitlement. Nobody saves. I should not have said that. We have moved away from requiring that people save and show discipline in order to own homes. We have made it now, according to an amendment that passed today, which the Presiding Officer put into place, and I respect what he tried to do, but in essence we said in that amendment that what you can do to have proper underwriting is you can borrow and pay, over time, the downpayment. We are not going to require a downpayment. We will let you put that into the cost of the loan—borrow it and pay it back over time.

Mr. President, I thank the Chair for the opportunity to speak today. Again, I have so many friends on the other side of the aisle who said: CORKER, I would have supported your amendment, but it had that one phrase in it about risk retention. I have taken that out and, hopefully, we will have the opportunity to vote on this again.

I see my friends on the other side of the aisle smiling. I am looking for cosponsors on the other side of the aisle for a simple, commonsense amendment, which says that everybody in America who buys a home will at least put 5 percent down. We will be able to see their income. Let's document their income and see that they can pay the loan back. This will be a brandnew day in America.

My sense is that, as the realtors come to the hill today—my friends—and as the home builders come to the hill today—and they are my friends—obviously, they don't want any underwriting requirements because they want to make sure loans go to everybody in America. I am thankful my friends on the other side of the aisle have come to me today and said: CORKER, ''only if.'' Now I am offering the ''only if.'' I look for cosponsors to help me.

I yield the floor.

The PRESIDING OFFICER (Mr. MERKLEY). The Senator from Illinois is recognized.

Mr. DURBIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BARRASSO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

HEALTH CARE LEGISLATION

Mr. BARRASSO. Mr. President, I come to the floor today—and the Republican leader has already addressed this body—to discuss the issues of health care, about new revelations, new information that has come forth in terms of the specifics of the costs of the health care bill that has been signed into law—the costs that far exceed what was ever anticipated.

I come here as somebody who has practiced medicine in Wyoming for 25 years as an orthopedic surgeon, taking care of families in Wyoming, as medical director of the Wyoming Health Fairs, a program that provided low-cost health screening in Wyoming. This gave people an opportunity to take more responsibility for their own health and keep down costs of their medical care.

I come to the floor with a second opinion, as a physician—a practicing physician, taking care of patients; it is a second opinion about the health care law.

Today, I come to the floor because the goal of the health care bill was truly to improve quality and access and get the cost of care down. Those are the things I think all of the Senate wanted to have achieved.

But having seen this bill that has been passed and signed into law, I believe the bill is going to be bad for patients, bad for our providers, the nurses and doctors who take care of them, and bad for the payers—the American people, who will foot the bill for this health care bill.

I believe this bill will fundamentally, as it has been passed into law, result in higher costs for patients and in less access to care for people all across America. It is going to result in unsustainable spending, at a time when we are running record deficits.

I think about the things the President said when he was not just running for office but as President. He said: The plan I am announcing tonight—it was a joint session—will slow the growth of health care costs for our families, for our businesses, and for our government.

But in fact, the Chief Actuary for Medicare and Medicaid has said that the President was wrong. He said the cost of care will actually go up by $311 billion through 2019. And now we heard the revelation yesterday from the Congressional Budget Office that when you look at some of the things that hadn't been scored, as they say, costed out, it will add another $115 billion on top of that. The President said if you like your health care plan, you will be able to keep it, ''period.'' He said the word ''period.'' He said nobody will take it away, ''period.'' No matter what, ''period.''

The CBO and the Chief Actuary said that 14 million Americans will lose their employer-sponsored health coverage under the new law.

Today, I come to the floor to also mention that recently the Secretary of Health and Human Services, Kathleen Sebilius, had an epiphany about the doctor shortage in America. Last week, she said a nationwide primary care physician shortage had to be addressed before over 30 million Americans get access to subsidized health insurance coverage.

This is her quote:

How are we going to be ready when we already have a shortage in too many parts of the country?

This shortage should not have been a surprise to the Secretary of Health and Human Services. The American Association of Medical Colleges tells us that at the current graduation and training rates, we are facing a shortage of 150,000 doctors in the next 15 years. Over the past year, medical experts warned Congress—this body—and the administration that any health reform bill should tackle the issue of physician shortages. Instead of helping doctors, the new law actually discourages the next generation from becoming doctors. This new bill cuts payments for doctors and cuts patients on Medicare, and it doesn't include enough money to train new doctors.

I believe it was intentional. Maybe the Secretary, maybe the Obama administration, and maybe the Democrats in Congress should have paid attention to the experts before jamming this health care law down the throats of the American people. Maybe they should have heeded the calls I heard from medical professionals all across Wyoming and the country to slow down, let's get it right. But, no, they didn't. And now the American people are stuck with a law that costs too much, doesn't solve America's doctor shortage—doesn't even address it—and doesn't deliver good care for patients.

This should not have been a surprise to the Secretary, because the Wall Street Journal, over a month ago, said that the medical schools can't keep up. As the ranks of the insured expand, the Nation faces a shortage of 150,000 doctors. Right here, it says a shortage of primary care and other physicians could mean more limited access to health care and longer wait times—more limited access and more wait times.

What about the training of doctors? The Secretary just realized this, but it has been in print for months. Doctors' groups and medical schools had hoped the new health care law passed in March would increase the number of funded residency slots—you know, where they train family doctors—but such a provision didn't make it into the final bill. With over a trillion dollar bill, are we going to train doctors? No, they left it out.

Then what about hospitals? Here it is in the Wall Street Journal—the headline ''Hospitals Under the Knife. New York City System Aims to Cut 2,600 More Jobs as State Funding Drops.''

Not enough doctors? All you have to do is go to the New York Times, and this headline: ''More Doctors Giving Up Private Clinics.''

That is the end of it. So why would so many doctors behave this way? Let's look at Congress Daily this past week, May 4: ''Latest CBO Figures Show Higher 'Doc Fix' Price Tag.''

That is to pay doctors for the doctor bill. Of course, it was left out of the health care bill. How can we have a national health care law that fails to address training doctors and paying for them? It is astonishing. It says that scheduled cuts take effect June 1, an option outlined Friday by CBO to freeze Medicare payment rates which, under the new figures, would cost $275.8 billion through 2020. That is an amazing amount, because physician payment rates for Medicare are expected to be cut 21 percent on June 1.

That is what we are looking at now. That is why, today, I come to the floor to give, as a doctor, a second opinion, because it is time to repeal this legislation and replace it with legislation that delivers more personal responsibility and more opportunities for individual patients. We need a patient-centered health care bill, one that provides individual incentives, such as premium breaks for people who behave in a way that encourages healthy behavior and gets down the risk factors that increase the cost of care; that allows people to take their health insurance with them when they switch jobs; that gives people who buy their own health insurance the same tax relief available to people who get their insurance through work; that allows Americans to buy health insurance across State lines; that deals with lawsuit abuse and that allows small businesses to join together to offer health insurance to their employees. These are the things that will work to get down the cost of care and deliver higher quality of care to the American people.

They are not in the health care bill that passed the Senate, that passed the House, and was signed into law. That is why today, once again, in light of this brandnew information on the increased costs and the final realization that the Secretary of Health and Human Services now says: Gee, we don't have enough doctors to cover the situation, it is time to repeal this bill and replace it with what we know will work for the American people.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

AMENDMENT NO. 3736

Mr. WEBB. Mr. President, I rise to speak on an amendment I submitted, amendment No. 3736. This amendment I know has caused some concerns in different places, both in the political process and in the financial sector. I believe it is a very fair, carefully drawn amendment. It is a fulfillment of a promise I made when I voted in favor of the TARP funding on October 1, 2008, when I stated I would do everything I could to make sure, first of all, that we look at appropriate executive compensation issues; second, that we would work to reregulate the financial sector, which we are doing in this bill, thankfully; and third, we would invest the American taxpayers in the upside of the economy when it started to come back because it was the American taxpayers' funding of rebuilding our economy that made this happen, not the funding of the banking system.

This amendment simply says that if you received $5 billion or more from TARP and if you are a couple of other companies, such as Fannie Mae and Freddie Mac, that received significant Federal funding in this bailout, any compensation you received in 2009 that is above your basic compensation and above an initial $400,000 bonus should be shared with the taxpayers who made this possible.

This is not a clawback. It is not retroactive. It is moneys earned in 2009 which were paid out in 2010. It is not ongoing. It is a one-shot proposition. It affects only 13 companies. From the executives of those 13 companies, it is estimated the American taxpayers would be remunerated to the extent of $3.5 billion to $10 billion. I believe this is very fair. But at the same time I understand, based on discussions with leadership, that there may be a constitutional point of order that would preclude consideration of this amendment on this particular piece of legislation.

I wish to take this opportunity to inquire of Chairman DODD, through the Chair, whether that is his understanding as well.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I thank my friend and colleague from Virginia. He is absolutely right. That is exactly the case. Under the Constitution of the United States, all revenue-rising measures must originate in the other body, the House of Representatives.

Despite the merits of his amendment, with which I agree, we have what we call a blue slip. When an amendment originates over here and it impacts the Internal Revenue Code, it is subject to an objection, what we call a blue slip. It does not go to the merits of the amendment. It goes to the constitutionality of such a proposal where revenue is affected. Those matters must begin in the House.

I say to my colleague from Virginia, there will be opportunities, I am sure, with revenue measures coming from the House for our consideration to raise this amendment again. I, for one, am attracted to the amendment and what he is proposing and hope at another point—and I presume that opportunity will arise in the next couple months because I gather revenue measures will be coming over—that we will have another chance to address this issue.

I appreciate his consideration of this matter and look forward to working with him on this question the next opportunity we have to do so. It is my understanding the amendment would suffer from that constitutional question at this point.

Mr. WEBB. Mr. President, I thank the chairman for his clarification. The last thing I wish to do in a bill this complex is to tie up the Senate in procedural votes, rather than votes of substance. Even if this point of order were raised, it is my understanding then

there would be a mandatory vote which would tie us up. I am not going to call up this amendment. I very much appreciate what the chairman said about the possibility that we be allowed to vote on other appropriate legislation being considered in the Senate.

As I previously stated, I believe this is a matter of very eminent fairness, and it would be for the body to vote on it. I would like to have that vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, while we are waiting, there are two pending amendments which we can voice vote, but I gather there may be a second-degree amendment offered to one of these amendments. It will be the first time a second-degree amendment has been offered to one of these amendments.

We are trying to go through the process and give everybody a chance to air their ideas. There have been no tabling motions, no filibusters, at least none declared on the bill at this point. Nonetheless, Senators have the right to offer second-degree amendments, if they wish. We have avoided it up to now, having considered quite a few proposals on the floor of the Senate.

I count about 15, 16, at least on my list of amendments, on the Democratic side Members who would like to be given the opportunity to raise. I cannot speak to the number on the other side, but it is not a large number. Our Republican colleagues, at least based on the list I have seen—it is about six or seven or eight. I may be off a little bit on that count, but it is not a large number.

Here we are again, it is almost 12:30 p.m. and sitting here, potentially going to a quorum call. I am hearing again my colleagues say we have to stay on this bill and don't get off it. I am prepared to stay and work, but we cannot work when Members will not come over and at least allow us to vote up or down on rollcall votes on these amendments.

On Saturday, I submitted to my good friend from Alabama, Senator SHELBY, and his staff a list of technical amendments, as well as bipartisan amendments and others that I thought were noncontroversial that we could make part of a managers' amendment. We can only do a managers' amendment when we get consent. Obviously, any objections to any of the suggestions I sent over on Saturday would exclude them from a managers' amendment.

It is now Wednesday, and I have not heard back whether we can subtract or add to those amendments. It would help tremendously to clean out a lot of issues on which I believe there is consensus.

I made it privately and I make a plea publicly. At some point, the leader is going to say enough is enough on the bill. We are trying to go back and forth in an orderly fashion so Members will have a chance, on either side of this so-called political divide, which I wish did not exist—even in this Chamber—for people to offer amendments. In a dead time such as this, the clock is ticking. We have no votes this Friday. We will not be in on Saturday or Sunday. We would like to move on to other issues.

We have taken a lot of time on this bill. I am a strong advocate of doing that to prove this body can function, we can consider each others' ideas, modify them, vote for them, vote against them but to do what we tell every high school class or elementary school class we talk to as Senators about how the Senate functions. I think we are proving we can do that on this bill, despite the significance of it—the first time in almost 100 years reforming the financial structure of our Nation.

My hope is we will continue and finish it without having to get involved in procedural motions that would deprive people of being heard on their ideas, whether you like it or not, but at least have the opportunity for it to come up.

I am trying to orchestrate the votes that relate to the matters with which we are dealing. It does not work perfectly. It is what every manager tries to do. I know some Members are frustrated because they have not been able to be heard yet on their ideas. I wish to give them an opportunity to do so.

When we get delays such as this, when the time could be filled on considering these matters, it sets us back from the goal of having a bill completed in this Congress where all Members have had a chance to be heard, that we were able to tackle a significant issue and come to a conclusion about it.

There are those who think we cannot do that any longer. I believe we can, and we have been proving it in the last couple weeks. After 2 weeks of a good, spirited, civil, in some cases partisan but civil debate, let us complete the work as we have begun it.

My plea to my colleagues, particularly on the minority side right now, is please respond to these requests so we can have some idea of what can be accepted, what can be modified and not accepted so we can move forward with the legislation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas.

Mrs. LINCOLN. Mr. President, I add my compliments and gratitude to Chairman DODD for his unbelievable patience and hard work and the hard work of his staff in trying to come up with a good consensus, finding common ground where we can move forward and address the economic crisis that has hit this country and deal with the consequences we have seen and certainly the ideas we know exist, to be able to solve the problems and move forward, put our economy back on track, put people back to work, making sure we are rebuilding our country in a way that is going to be sustainable, with a good financial regulatory reform initiative that is going to be meaningful.

I applaud his efforts and patience in what he is doing, working with everyone. I certainly add my efforts in trying to work together with others to make sure we can move this bill expeditiously as possible, obviously with the consideration he has given to everyone's concerns and desires to make it a better bill.

Mr. DODD. Mr. President, if my colleague will yield for a minute, I thank the Senator from Arkansas. She is chairperson of the Agriculture Committee, which is a huge undertaking. Every State is affected by decisions made in that committee. Even small States in New England, contrary to what many people may think, have agricultural interests, maybe not to the extent of Oregon and Arkansas but we have them.

I am very grateful to her and members of her committee for the work they engaged in. We are truly fortunate to have the Senator from Arkansas in the position she is in—making decisions, providing valuable contributions, not just to this effort; we have worked together on a lot of issues over the years. She is a great advocate of her State, but I also say she is a great advocate of our country. That is the quality we hope people bring. We have an obligation to keep an eye out for what happens in our States but also to keep an eye out for what happens to our country. Striking that balance is a challenge we face at one time or another. No one does it better than the Senator from Arkansas, striking a balance.

I have heard that word about Arkansans over and over during her tenure. She is as tenacious a fighter as any State has had in my 30 years here. She is also mindful that Arkansas, similar to Connecticut, is part of a country, and we all have to be mindful of each other's interests. Striking that balance has been invaluable in this debate.

I did not want the moment to pass without thanking her immensely and her staff and others for the contributions they have made.

Mrs. LINCOLN. Mr. President, I thank the Senator from Connecticut. I am grateful to him for his comments and again grateful for his patience and perseverance in getting something done that is meaningful to all Americans. Arkansans are clamoring for it, and I know others across the Nation are.

The will say about the work of the Agriculture Committee, for all Americans who enjoy nutrition, that comes from the hard-working farm families across this country who produce the safest, the most abundant, and affordable food and fiber. We all have a little bit at stake in that Agriculture Committee.

We appreciate so much working with the Senator from Connecticut. Chairman DODD has done a tremendous job.

HONORING OUR ARMED FORCES

LANCE CORPORAL RICHARD R. PENNY

Mr. President, this week, my home State of Arkansas marks a somber

milestone. Since September 11, 2001, 100 service men and women with ties to Arkansas have given their life to help defend our freedoms in this great country. I rise to honor their ultimate sacrifice on behalf of our Nation.

It is also with great sadness that I pay tribute to the family of LCpl Richard R. Penny, 21 years of age, of Fayetteville, AR. Lance Corporal Penny was killed May 6 while supporting combat operations in Helmand Province in Afghanistan, making him our State's 100th service man or woman to have given his life to help defend our freedom.

Along with all Arkansans, I am grateful for Lance Corporal Penny's service and for the service and sacrifice of all our military servicemembers and their families. More than 11,000 Arkansans on Active Duty and more than 10,000 Arkansas Reservists have served in Iraq and Afghanistan since September 11, 2001. These men and women have shown tremendous courage and perseverance through the most difficult of times.

My father and both my grandfathers served as infantrymen. They served our Nation in uniform and taught me from an early age about the sacrifices our troops and their families make to keep our Nation free. As neighbors, as Arkansans and as Americans, it is incumbent upon us to do everything we can to honor their service and to provide for them and their families not only when they are in harm's way but also when they return home.

While it is important to honor those who have served our country in uniform with words, we must also honor them with our actions. I have consistently supported initiatives that expand the benefits our servicemembers and veterans have earned and deserve. During these tough economic times, it is even more important that we don't shortchange these heroes and their families.

That is why I have authored several bills on behalf of Arkansas's military servicemembers, veterans, and their families. In doing so, I have focused on a number of priorities, including requiring more accessible health care for guardsmen and reservists so they can maintain the medical readiness required to fulfill their mission and also ensuring that future GI benefits for members of the National Guard and Reserve keep pace with the national average cost of tuition, and allowing beneficiaries of the post-9/11 GI bill to use their GI benefits more flexibly to develop skills that are critical to our workforce and our economy and their reentrance into the workplace, and also addressing inequities in survivor benefits for military families.

With more than 600,000 courageous men and women who have returned from combat in Iraq and Afghanistan, and with thousands more on the way, mental health care is an issue that also deserves more attention. I have visited injured servicemembers at Walter Reed and in Arkansas and witnessed firsthand that more and more of our troops are affected by service-connected mental health issues, such as traumatic brain injury and post-traumatic stress disorder. To address this issue, I have introduced legislation to ensure that our troops receive proper mental health assessments before and after they enter a conflict zone.

The issue of mental health does not just affect our troops. With more National Guard and Reserve from our rural communities serving abroad, families have expressed concerns to me about the impact increased military deployments have on other children, and particularly their children, and whether schools have sufficient resources to meet these challenges. To meet these concerns, I have also introduced legislation to increase the number of school counselors, school social workers, and school psychiatrists and psychologists in high-needs school districts, many of which are located in our rural areas all across this great Nation.

All of our veterans, from the ''greatest generation'' to Vietnam war veterans to the new generation of servicemembers in the Middle East and across the globe, all of our veterans have sacrificed greatly on behalf of our country. Although the challenges and needs of veterans have changed over time, one thing remains constant: It is the responsibility of our Nation to provide the tools necessary to care for our country's returning servicemembers and honor the commitment our Nation made when we sent them into harm's way in the first place.

Our grateful Nation will not forget them when their military service is complete. It is the least we can do for those to whom we owe so much.

I yield the floor.

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Virginia.

Mr. WARNER. Madam President, I thank my friend, the Senator from Arkansas, for her statement today about the sacrifice of folks not only from Arkansas but across the country—Virginia, Delaware, and from North Carolina.

Madam President, I wasn't planning on speaking, and I will only do so briefly because my friend, the Senator from Delaware, is going to speak much more extensively on this issue. But I think many of us who have had the opportunity to preside have heard—and in particular on Monday afternoons—the Senator from Delaware come down on a regular basis, for months, to speak on what, until last Thursday, was a pretty esoteric issue—an issue that, for somebody who spent 20 years around the finance sector before I got into politics full time, I thought I might have some knowledge of.

But as the Senator started talking about high-frequency trading, collocation, sponsored access, and flash trading, I realized this was a whole realm of new terms that actually even makes derivatives look simple.

The Senator from Delaware sounded an early warning signal that the massive amounts of investments that have been made by certain firms to try to get what appears to be a fractional millisecond advantage in the trading process might come back to haunt us all. Last Thursday afternoon we saw potentially—and we still don't know, and the regulators were up testifying on the Hill yesterday on the House side—what could have been the first warning shot across the bow of what could be the next systemic risk crisis when the stock markets in the United States lost over $1 trillion of value in a dramatic downsweep of about 16 to 20 minutes.

The market recovered, but almost a week later we still don't know the real cause, and I don't think we can blame the regulators. I have had conferences with the head of the SEC, and she acknowledges the difficulty in keeping up with the technology and having the oversight for all of this proliferation of new exchanges—electronic exchanges—many that didn't even exist a few years back.

Most investors probably think they trade on the New York Stock Exchange, the American Stock Exchange, or the NASDAQ. They don't realize the majority of trades are now on electronic exchanges they have probably never even heard of. The Senator from Delaware has consistently raised this issue, and whether we simply need additional speed limits, system brakes, or whether we need to make sure there is not an unfair advantage that is being created, these are all issues we need to come back to.

I want to personally say I am proud of the fact the Senator from Delaware and I contacted the chairman of the Banking Committee and we have spoken out. But he has been the leader on this issue, and I have been proud to follow his lead. I know he is going to speak more about this issue today, and I am sure in the coming weeks. I don't have all the knowledge, I don't know the right answer yet, but I know in my gut that the Senator from Delaware is onto something here; that we all need to make sure we take a better examination of it.

The last thing the market needs right now, particularly for that small-time investor, is some sense that somebody on Wall Street is getting even one further advantage through the use of technology or that there is not appropriate system brakes in the event of a mistake made.

So as I yield the floor, I commend my friend, the Senator from Delaware, and look forward to working with him and the chairman of the Banking Committee, who has said the committee will be taking up this issue. It is something I think we all need to take heed of to make sure in this very important legislation that Chairman DODD is working on we not only make sure we fix the last crisis but we potentially get ahead of the next crisis.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. KAUFMAN. Madam President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KAUFMAN. Madam President, the Senator from Virginia, as usual, is modest. He has explained a lot to me about the intricacies of this area, which is of great concern, and his knowledge on this is great. It is, I am finding, incredibly rewarding working with him on this issue. So I want to speak about that a little today and follow up on the remarks the Senator from Virginia made.

As Senator WARNER said, last Thursday, for one of the few times since 24 stockbrokers first gathered under a Buttonwood tree in 1792, we had a stock market that for 20 minutes stopped performing its essential function—discovering the price of securities based on a balance between buyers and sellers. Our equities markets collapsed in a matter of minutes—liquidity dropped off, a deluge of sell orders overwhelmed the buyers, and the rug was pulled out from underneath millions of investors, plummeting the Dow Jones Industrial Average toward its biggest intraday loss in history—nearly 1,000 points.

Then, just as quickly, and inexplicably, the market reversed course, snapping back like a yo-yo, and recovered much of its lost ground, thank goodness. In the immediate aftermath, the world's focus turned to black-box computer trading, which relies upon electronic trading algorithms to execute thousands of orders in tiny fractions of a second. These high-frequency trading computer programs determine, with minimal, almost no human intervention, the timing, price, and quantity of orders.

It is too soon to know the myriad of factors that played into the week's meltdown, although it appears to be quite likely that we witnessed a real-time example of high-tech trading run wild or, in some cases, unplugged.

The cooperation between the SEC and the CFTC is critical to unraveling what happened in the futures and equities markets, and we should wait for their investigation and for all the facts to be discovered. It is also too soon to coalesce about Band-Aid solutions; that is, without also committing to dive deeper into structural problems and inherent conflicts of interest that are part of all our capital markets. The SEC still has not discovered or explained what triggered or accelerated the incident, but already the leaders of the exchanges have admitted that no one had previously thought to implement system-wide circuit breakers or adequately protect against the possibility of erroneous trades.

Yesterday, after the meeting with the leaders of six exchanges, the SEC released a statement saying:

> As a first step, the parties agreed on a structural framework, to be refined over the next day, for strengthening circuit breakers and handling erroneous trades.

Madam President, that is fine—and I mean that is fine—but it is indeed, as the SEC said, only a first step. While it is true we should wait for information to come in before we reach any conclusions, there are many questions that must be carefully reviewed and answered. The first and most obvious is whether we have gone from too few market centers—it wasn't all that long ago we just had two, the New York Stock Exchange and NASDAQ—to too many, each with different standards and procedures for protecting investors and preserving market integrity.

We now have over 50 market centers, which has brought added competition. Competition is good. Today, algorithmic trading interests are wired against markets—equity, fixed income, futures, and options. The market is the network, and yet our regulators work in silos. Responsibilities are divided between the Securities and Exchange Commission and the CFTC. Within equity markets, we have several self-regulatory organizations setting rules—more silos: New York Stock Exchange, NASDAQ, FINRA, National Stock Exchange, and more. All too often, those rules have been watered down and eliminated in the absence of the SEC establishing these and other regulatory controls across equity markets.

We created a national market system, but we forgot to create a national regulatory and surveillance system to go along with it. We need—we absolutely have to have—a consolidated audit trail across all market centers, as Senator SCHUMER and others have raised. As FINRA Chairman Rick Ketchum admitted last October, regulators are looking at ''an incomplete picture of the market and knowing full well that this fractured approach does not work.''

That is quoting the chairman of FINRA, Rick Ketchum.

The second obvious question is, Why is it taking the SEC so long to reconstruct the unusual market activity of last Thursday? There is an answer to that—because there is no transparency. The Commission does not yet collect by rule the data it needs to officially reconstruct unusual market activity. Even though Congress gave the SEC ''large trader'' reporting authority in the Market Reform Act of 1990—that is 1990, after the SEC had difficulty in reconstructing market incidents in 1987 and 1989—the SEC has never used it.

The SEC proposed a large trader rule in 1991, received comments, reproposed in 1994, and then unfortunately never adopted it—this, even though the Commission acknowledges:

> The current Electronic Blue Sheet system does not efficiently collect large volumes of data in a timely manner that allows the Commission to perform contemporaneous analysis of the market events. Further, the data generated by the EBS system does not include important information on the time of the trade or the identity of the customer.

This is what the Commission acknowledges, that the data generated by the EBS system does not include important information—the time of the trade and the identity of the customer. How are you supposed to find out how something happened if you don't have data on the time of the trade or the identity of the customer?

Flash forward to 2009. To SEC Chairman Mary Schapiro's credit, and to her real credit, she began a process of studying market structure and high-frequency trading last October.

I have to say, however, the pace of the Commission's progress has been slow. Indeed, as many of my colleagues know, I have come to the floor repeatedly to call for a greater sense of urgency at the Commission.

For example, last year on September 23, I spoke on the Senate floor and asked about high frequency trading strategies:

> Do these high-tech practices and their ballooning daily volumes pose a systemic risk?
>
> What do we really know about the cumulative effect of all these changes on the stability of our capital markets?
>
> In order to maximize speed of execution, many sponsored access participants may neglect important pre-trade credit and compliance checks that ensure faulty algorithms cannot send out erroneous trades.

On November 20, 2009, I wrote a letter to SEC Chairman Mary Schapiro asserting:

> [T]ransparency, disclosure and risk compliance requirements on the trading activities of high frequency traders are needed urgently. And while I was encouraged to hear that the Commission may move sooner with its existing authority to require ''tagging'' and reporting by ''large traders'' now using high-frequency algorithms, I am concerned that the Commission does not intend to issue a concept release on high frequency trading until early next year, and that rule proposals should not be expected before the summer of 2010–2011. Given that the Commission under current procedures is now blind to high frequency operations, the need for immediate action should not wait until the Commission has completed its comprehensive review.

In her response on December 3, Chairman Schapiro assured me the Commission was planning to issue a proposed ''large trader'' tagging rule the following month. That was back in December.

But it was not until months later, on April 14, that the Commission finally did so. While I understand these were incredible problems that faced the SEC because there was no real regulatory oversight for many years, and because of the many hurdles regulatory agencies face which slow them down—in particular the need to avoid unintended consequences—this process was clearly way beyond deliberative.

Given the deficiencies in the current data collection system that the SEC itself acknowledges and which Congress gave the SEC the authority to address in 1990, this delay is inexcusable.

The SEC must move aggressively to finalize the large trader rule and insist on fast-track implementation by the industry.

There are many other questions a deeper review should study.

Particularly the problem of high frequency programs which sell stock short without first locating the underlying shares or borrowing them in hope that their price will drop and they can buy those shares back—so-called naked short selling—before the required delivery date—at a lower price for a profit. Last Thursday, it appears that the computers went into overdrive spewing out sell orders, and in the critical 10 minute time period, I will bet my bottom dollar that many of those sell orders were short sales that did not first locate the stock.

Now as I have said repeatedly, there is nothing wrong with short selling, I have done it myself. But I have always had to borrow the stock first.

Last July, along with JOHNNY ISAKSON (R–GA) and six other Senators, we wrote the SEC demanding that short sales not be permitted unless the seller first obtains a ''hard locate'' of specified shares. But that proposal went nowhere, even though the SEC held a Roundtable last September to discuss the problems associated with naked short selling.

The larger point is these high frequency trading firms have assumed the role that specialists used to take. Some of them get the same benefits of specialists. They get to ignore short-selling locate rules. They get to step in front of other orders on the book legally. All because they provide liquidity, for which they are also paid.

Why should they have those advantages? Did some of them abandon their role of liquidity provider when the market needed them most, and instead use their advantages to disadvantage everyone else on the way down? Those questions must be answered.

Last September 14 I went to the Senate floor and spoke about the dangers of unregulated high-frequency trading, asking:

> If we experience another shock to the financial system, will this new, and dominant, type of pseudo market maker act in the interest of the markets when we really need them?
>
> Will they step up and maintain a two-sided market, or will they simply shut off the machines and walk away?
>
> Even worse, will they seek even further profit and exacerbate the downside?

After Thursday's plunge, I am afraid my questions have been answered.

Instead of providing ''fair and orderly markets'' as some market makers are obligated to do, some of these unregulated players may have added to the chaos, while others simply unplugged their computers and suspended operations, reducing liquidity when the market needed it the very most.

Here is another related question: Was there manipulation involved on Thursday? More to the point, does the SEC even have the ability to detect illegal manipulation by high frequency algorithms?

We know the SEC doesn't have the data it needs. The large trader rule hopefully will fix that at some future date. Hopefully sooner before later.

There is also the question of whether the SEC has the internal analytical capability to use that data to police trading activities? I know this is something they want to do and we in Congress should help them get it as soon as possible.

I have been suggesting that once the SEC collects the data, it should mask the proprietary nature of the data and either No. 1 release it to the marketplace, or No. 2 to academics and private analytic firms under ''hold confidential'' agreements. I believe the SEC needs help in conducting analyses about whether high frequency trading practices are harmful to the interests of long-term investors.

Another question I have raised in the past is whether the SEC needs to impose industry-wide pre-trade operational risk controls, in order to prevent the incidents and magnitude of trading errors and the havoc they can cause.

After last Thursday, that one is starting to look easy.

Markets have always had operational risks, but it is clear that the proliferation of competing complex computer models has the potential to magnify and exacerbate these risks in ways that can fundamentally damage market integrity and confidence.

With computerized, high-frequency trading now responsible for an estimated 70 percent of daily trading volume, markets have come to rely upon these black-box systems for ample and consistent order flow.

Yet humans are simply unable to evaluate in real-time whether their trading models are working as intended.

Yet another question is whether our markets are still performing one of their best and most important functions: the constant and reliable channeling of capital through the public sale of company stock known as initial public offerings. According to a series of reports released last year by the accounting firm Grant Thornton, the answer is no, the IPO market in the United States ''has practically disappeared.''

The IPO market is where small and medium-size businesses go to get the capital they need to grow, to pass through the valley of death, to get on with what they have to do.

Without a doubt, there have been many causes of the sad state of America's IPO market. But one source of the problem might be the dominance of high frequency trading strategies designed to trade in the most active, highly liquid names, but with little support for small-cap stocks.

Our markets should work to best serve Americans—by reflecting changes in supply and demand and investors' assessments of stock fundamentals—not by encouraging a battle between algorithms looking to shave microseconds from their transactions in a few highly liquid names. As Dallas Mavericks' owner and longtime and very successful and knowledgeable investor Mark Cuban has recently asked: ''What business is Wall Street in? . . . [I]t is important for this country to push Wall Street back to the business of creating capital for businesses.''

There are other questions, as well, many involving conflicts of interest and the failures of some of the exchanges and market centers to fulfill their gatekeeper function as self-regulatory organizations.

Moving forward, I applaud Senator DODD, the chairman of the Banking Committee, for calling for hearings to be chaired by Senator JACK REED who is very knowledgeable in this area on the market's recent plunge and recovery. It could not be in better hands.

And I am also pleased that a number of market participants and regulators have recognized the need for regulations that will protect the markets from future periods of extreme and inexplicable volatility like last Thursday's.

I am concerned, however, that the SEC must not solely look for quick fixes and surface solutions. The events of May 6 call for a meaningful review of these structural issues, leading to reforms that truly protect investors and, really important, restore the credibility of our markets so they serve well their highest and best function.

That is why Congress, consistent with its oversight responsibilities, must direct regulators to study and report, in a timely manner, on what needs to be done to prevent another meltdown of this magnitude or one even worse. It is entirely appropriate for Congress to elaborate on the needed elements of a meaningful review, many of which I have outlined today.

Senator MARK WARNER and I want to add language to the current Wall Street Reform Act that would do just that. Once that report to Congress is finished, only then can Congress either draft needed legislation or encourage new rules.

We all know that the challenge for regulators is to see beyond the horizon and to act preventively before financial crises hit. That is the key to everything we do around here. We have to look ahead.

This is always difficult, but especially so when markets are opaque and Wall Street interests resist even reasonable suggestions about needed reforms.

During the past 9 months, in response to my calls for transparency and an SEC review of high frequency trading, many voices on Wall Street praised the virtues of electronic trading—and almost none were interested in looking critically or even honestly for weaknesses or potential systemic risks. ''There is nothing wrong here.'' ''You shouldn't even look at this.'' That is all I was looking for and so many on

Wall Street said, ''No, nothing wrong here. We should not spend time on that.''

My staff has read through nearly a hundred comment letters submitted over a period of months from brokerage firms, consultants, exchanges, high frequency firms, and alternative trading systems. The vast, vast majority of those letters stated the markets have performed exceptionally, and just needed to be left alone. They all stated how things were fine and saw nothing amiss. Systemic risk? Not here.

Our exchanges—which by statute are required to ''prevent fraudulent and manipulative acts and practices'' and be the first line of regulatory review of trading practices—are now competing vigorously to attract high volume traders to maintain their profits. Yet in response to the SEC's concept release raising questions about market structure issues, sources of systemic risk and possible manipulation by high frequency traders, the CEO of BATS Exchange sent out a ''call to action'' for all high frequency trading firms, suggesting that they all file comment letters on common themes. ''The best defense is a good offense,'' he wrote.

His letter also said:

> BATS doesn't believe the equities markets are broken. To the contrary, we would argue that the US equity markets were a shining model of reliability and healthy function during what some are calling one of the most challenging and difficult times in recent market history.

He went on to write:

> Those outside the industry, who have differing opinions, are likely to have a difficult time bringing forward compelling arguments based on the lack of hard evidence.

I ask: Is this the attitude we want from those charged with protecting investors? Yes, when the markets are opaque and no one outside the industry has any data, when the exchange leadership itself stays on the offense, it is indeed difficult to offer hard evidence supporting a contrary view.

Then we read from a comment letter to the SEC written by the Securities Traders Association in the week before the meltdown. The week before the meltdown.

> The equity markets are functioning properly, and there are no signs of significant deficiencies or an inability to perform their important functions.

Saying it does not make it so. Now the credibility of both markets is urgently in need of repair. But for that to happen, democracy must work in a way that permits timely reform of our most powerful financial institutions, and Wall Street must and should recognize its own long-term interests. The credibility of our markets is vitally at stake.

As I have said many times on this floor, what is important are two things that make this country great: democracy and our capital markets. If we let something happen to the credibility of our capital markets, we will have done a great disservice to our country now and to our grandchildren.

I will close my remarks today with the same words I used to conclude my floor speech last September 23, as they still ring true to me.

> We cannot simply react to problems after they have occurred. We need the information and resources to identify problems before they arise and stop them in their tracks . . . [We] cannot allow liquidity to trump transparency and fairness, and we cannot permit the need for speed to blind us to the potentially devastating risks inherent in effectively unregulated transactions.

I thought I was right when I gave it on September 23. After what happened last Thursday, I feel it is even more appropriate.

I yield the floor.

The PRESIDING OFFICER. The Senator from Ohio is recognized.

Mr. BROWN of Ohio. Madam President, I appreciate the leadership of my colleague from Delaware who understands this Wall Street reform perhaps better than anybody in the Senate, and has particularly led the charge on working on too big to fail meaning too big. That the size of banks in this country—when the six largest banks' assets 15 years ago were only 17 percent of GDP, and today the assets of the six largest banks total 63 percent of gross domestic product, we know that too big to fail really is too big. I appreciate the work Senator KAUFMAN has done on that.

We know what a financial meltdown looks like. It means pensions shattered, it means homes lost, it means college plans delayed or even abandoned, it means good-paying jobs lost, it means middle-class security undermined. Two years after the financial collapse in March 2010, there were 655,000 unemployed Ohioans. Ohio's unemployment rate today is 11 percent. Three of the largest banks slashed their SBA lending by 86 percent from 2008 to 2009. In Ohio, small business SBA-backed loans went from 4,200 of them in 2007 to 2,100 of them in 2009. Wall Street's casino gambling with the housing markets has caused nearly 90,000 foreclosures in Ohio just in the year 2009. The average median sales price of existing single-family homes across eight of Ohio's metropolitan markets plunged by an average of 16 percent from 2007 to 2009.

So why are my colleagues on the other side of the aisle trying to maintain the regulatory environment that allowed Wall Street to squander middle-class wealth and security? It makes me incredulous to think there are people in this institution, and a number of them, who want to continue the way it is always done, who think Wall Street does not need further regulation.

They were the same people who in the Bush years pushed for deregulation, and then President Bush assisted his Republican friends by putting more pro-bank, pro-Wall Street bank regulators in place to regulate after already weakening the regulations.

Neither Republicans nor Democrats should be starting this debate, should be starting the legislative process, by thinking, well, what is best for Wall Street, and then by working backward to see which consumer protections Wall Street can live with. That is not how you start this debate.

You do not say: Well, we have got to decide, can Wall Street live with these protections? Are these protections okay? Does Wall Street approve of these protections before we do them? That is not the way we should be legislating. We should be starting with what will protect middle-class families from another devastating economic blow, and we should then move forward to put those protections in place. It should be as simple as that.

My Democratic colleagues and I are fighting for the strongest possible measures to hold Wall Street accountable. I hope my Republican colleagues resist the temptation, a temptation they usually succumb to, to water down reform and carve out loopholes for the special interests. That has been the problem all along, the power of the bank lobby here, the power of Wall Street in the House of Representatives and the Senate, the bias so many have that, well, Wall Street did not really do that badly, we should water down this reform, we should carve out loopholes so Wall Street can continue doing business the way they did.

It is time, instead, to act on behalf of the people we serve, not Wall Street firms. Too many of my colleagues across the aisle, simply put, are putting Wall Street before Main Street.

The first step toward the financial recovery is protecting American families who rely on credit cards to meet their financial obligations or mortgages, to finance their dream of home ownership. Let's not forget that the kindling for this fire that became the global financial crisis was a pile of exploding mortgages. If we allow lenders of all types to continue preying upon hard-working Americans, then we are setting ourselves up for another disaster. This time it was securitized mortgages. Next time it can be student loans or it could be credit card debt, or it could be commercial real estate or it could be the junk bond market. Who can say for sure? That is why the independent consumer protection bureau in this legislation is essential.

It will create, for the first time, an entity dedicated to protecting the interests of middle-class Americans against the greed and the recklessness of Wall Street. We need a watchdog to make sure Wall Street gamblers and their lobbyists do not trample the American dream as a means of feeding their own greed.

Beyond establishing this agency, an agency tasked with protecting the interests of middle-class families, we have an opportunity to do much more to protect American families. We should adopt an amendment offered by Senator WHITEHOUSE, cosponsored by my colleague sitting nearby on the floor, Senator CASEY, and a number of us, a bipartisan amendment, that

would empower States to protect their citizens from unfair credit card interest rates.

Thirty-two years ago the Supreme Court decision, the Marquette decision, perhaps the most important Supreme Court decision Americans do not know about, overruled the consumer protections, so-called usury rates, interest rates, among the 50 States.

In other words, if the legislatures of the State of Pennsylvania, the State of North Carolina, the Presiding Officer's State, or my State of Ohio, enacted an 18-percent usury rate or a 16-percent usury rate, that is the top rate at which lenders can charge customers. Those rates were overturned by the Supreme Court decision because the Supreme Court decided it does not matter where the customer is, whether the customer is in Charlotte or Harrisburg or Cleveland or Columbus, it mattered where the bank was.

Basically what that meant was, bank after bank after bank located their operations in a State with very high usury rates or no usury rates at all. Therefore, a customer in Akron or a customer in Toledo or Mansfield or Springfield or Xenia, having a credit card with a bank in South Dakota paid much higher interest rates, even though Ohio set its interest rates much lower.

Usury rates—I quoted today in a presentation earlier—were established by the Bible. In Exodus 12, I believe, the Bible says clearly that usury rates—the usurious interest rates aimed at the poor, and aimed really at everybody, simply should not stand.

Yet, by this Supreme Court decision in 1978, the Court ruled we would basically outsource our interest rate, our consumer protections, to the lowest common denominator State. So if South Dakota has no usury rates or no limit or a very high limit on their interest rates, it means a credit card holder in Lima, OH or Troy, OH or Springboro, OH is paying those high interest rates, even though the Ohio legislature has acted against their doing that.

So the Whitehouse-Casey-Sanders-Brown amendment, a bipartisan amendment, is particularly important simply to give the power back to the States to make a determination of interest rates. For too long, as this Supreme Court decision indicates, and the lack of response from Congress indicates, Washington has been looking out for the megabanks.

Some of my colleagues are still saying these banks' interests are more important than protecting the American public. This bill would not even allow the consumer protection bureau to set rules regarding credit card interest rates. Meanwhile these rates are inexplicably going through the roof, at the same time the banks are again enjoying record low borrowing costs. It makes no sense. We report to the American public, not to high-risk business models.

The next element of financial collapse came when Wall Street bundled toxic mortgages into untested products such as mortgage-backed securities and collateralized debt obligations, and synthetic CDOs and credit default swaps. Many of these new products, products that almost nobody understands, were unregulated derivatives sold in over-the-counter markets with no oversight or transparency.

As a member of both the Banking and the Agriculture Committees, I want to commend the Chairs of each of those committees for the work in creating a derivatives title, a regulation of derivatives, that will provide much needed oversight to the $210 trillion—$210 trillion—that is the 210 thousand billion dollar U.S. derivatives market.

At the same time we balance the need in regulation of derivatives, we balance the needs of manufacturers in Dayton, Youngstown, and Toledo, who used these products appropriately, and that was not where the problem was, to limit their business risk.

This bill provides for financial stability by requiring banks to put capital behind their trades. It uses transparency and accountability to prevent Wall Street banks from taking advantage of their business customers. It reduces speculation that fuels bubbles in markets such as natural gas and mortgages.

I want to single out Chairman LINCOLN's proposal to separate derivatives operations from commercial banks. It is the right thing to do, because the megabanks' speculation is detracting from their primary job, lending. Over the last six quarters, megabanks have decreased their consumer and small business lending. At the three biggest banks, lending under the SBA's 7(a) program, the primary SBA program to help startup and existing small businesses, lending under that program declined 86 percent from 2 years ago to last year, and it does not appear to be getting a lot better this year.

Over the same period, banks' securities holdings increased by 23 percent. What does that mean? That means rather than investing in a local manufacturing company, Elyria Foundry, or Alcoa in Cleveland, or smaller companies, a fastener company in Bedford, or companies, manufacturing companies, instead of investing in those, their security holdings increased. That is where their capital went.

That was not productive for our country. It may have been profitable for the banks, but it does not work to get our economy back in gear. Taxpayer-funded assistance from the FDIC and the Fed should not be going to support a bank's gambling, it should be supporting sound economic growth.

In an ideal world, we would treat derivative products like all other investment products and trade them on exchanges.

This is a strong bill, particularly now that we have adopted Senator CANTWELL's antimanipulation amendment. We are finally going to impose some order and allow sunlight into what has been and is currently a completely dark and opaque market.

The final ingredient to the financial crisis came when massive, interconnected Wall Street banks and investment houses—such as AIG and Citigroup and others—gorged themselves on risky derivatives backed by predatory mortgages. When these bets went bad, the U.S. Government decided these banks were too big to fail, and the U.S. taxpayer was forced to settle their hundreds of billions of dollars in obligations. These too big to fail banks are getting even bigger. Right now the five biggest banks control 97 percent of all U.S. derivatives. For the first time, we are going to have a process to liquidate these large financial institutions if they fail. Such a system was lacking at the time the giant investment banks, such as Lehman Brothers, Bear Sterns, and Merrill Lynch, were in financial peril, due to overleveraging and investment in toxic investments.

I believe the bill should be strengthened to make absolutely certain there are no more meltdowns and no more bailouts. I would like to add stronger safeguards against behemoth banks that control so much of the Nations's wealth they could singlehandedly send our economy spiraling downward. Too big to fail means too big. While this is mostly about the risk these banks took and might take in the future, it is also about size. When 15 years ago the assets of the six largest banks combined were 17 percent of the GDP and today the six banks' total assets make up 63 percent of GDP, too big to fail is also simply too big. It is crucial we adopt an amendment offered by Senators MERKLEY and LEVIN to ban proprietary trading. Too many Wall Street banks got rich at the expense of clients they were supposed to be serving and American families whose homes have been taken from them.

It is equally important that we consider and adopt the amendment offered by Senators CANTWELL and MCCAIN to reimpose the Glass-Steagall wall between commercial and investment banking. We should pass the Dorgan amendment, giving the systemic risk council the authority to spin off parts of large, cross-border financial institutions. After 2 years, after millions of jobs lost, after millions of homes foreclosed upon, we are attempting to put in place rules that might prevent the next crisis. We should not dilute this critical piece of legislation with amendments that coddle Wall Street. Too many of my Republican colleagues are still trying to do that, introducing amendments that choose Wall Street over Main Street.

It is important this legislation move forward. It is important that all of us fight to choose Main Street over Wall Street so this works for Findlay, Warren, Bolero, and Tipp City, OH, communities that have been hit hard by the

greed and recklessness of Wall Street banks.

That is clear.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. CASEY. Madam President, I rise to speak about amendment No. 3878.

We are in the midst of the worst recession, the worst economic climate since the 1930s. That is irrefutable. We have had record job loss, more than 15 million Americans out of work. In Pennsylvania, some 582,000 people are out of work, with the unemployment rate hitting 9 percent. I know a lot of other States have had double-digit unemployment for a long time, but 9 percent is still more than 580,000 people out of work.

There are a number of ways to measure the horrific consequences of this recession—all those individuals out of work, all those families destroyed and communities destroyed, by one estimate $8 trillion of wealth lost by Americans. We can attribute $100,000 per family in negative impact due to what happened on Wall Street.

In the midst of that, a number of people in the Senate have worked very hard to try to put in place new strategies to create jobs, to help us continue to recover. The impact of the recovery bill is still being felt. We are recovering. Economic growth has picked up. Job growth has improved substantially, but we still have a long way to go.

Despite that, we still have people in Washington who don't seem to get it. They seem to want to continue to protect Wall Street. Time after time, when an amendment is proposed to the Restoring American Financial Stability Act, there are still some who want to protect Wall Street. The choice is very clear. There is no middle ground. The American people know it. We can either protect Wall Street and let them do what they have been doing for years, destroying lives because of high-risk practices, allowing these scheme artists—and that is a charitable way of describing people who commit fraud or at least engage in practices that make a very small sliver of the American people on Wall Street very wealthy, creating a handful of billionaires at the expense of tens of millions of Americans who lost their job, their home or, in some cases, both and are in the process of trying to dig out of that and rebuild their lives. You are on one side or the other in this debate. You are either for Wall Street or you are for reforms that will, at long last, begin to hold Wall Street accountable.

It is essential to the economy that we pass this legislation. If we don't, we will be right back where we were, with no commonsense rules in place, Wall Street doing virtually what they want to do to make money, no matter what the consequences downstream with regard to those who lose their jobs, their homes and, by definition, their hopes and dreams. We have to put in place new strategies not only to create jobs but to reduce the deficit. We cannot do that unless we take affirmative steps to hold Wall Street accountable and give some measure of protection to families who have, for too long, been at the other end of the bargain. They lose their house. They lose their job. Wall Street wins. They lose $100,000, on average, per family. Wall Street wins very big.

One of the things that should be in place is at least the examination of something that was discussed at the G–20 conference in September of last year in Pittsburgh, where the leaders of the 20 largest economies came together and talked about our financial crisis which, of course, is an international crisis. It is not something limited to the United States. Recently, the European Parliament took the first step by passing a resolution supporting a study on a financial transaction tax, a fee. The resolution specifically calls for an in-depth study that would provide technical recommendations on how such a fee should be structured across the Euro zone. The study proposed in my amendment mirrors the European study and positions the United States to have an informed debate about the issue. This study is simple but can have a tremendous impact on the economy because of what we will learn.

The study would examine the implementation of a transaction fee on all security-based transactions, including swaps and security-based swaps, except those that are somehow hedging or mitigating risk. Also included in these transactions would be stock and debt instruments.

Here is what the study would assess. Again, this is not the imposition of a transaction fee. This is a study of the imposition of a transaction fee or the implementation thereof. The study would assess, first, past uses of such fees, what has happened in the recent past and our experience with this, other countries that have tried this, other experts who have weighed in, obviously, on the advantages and disadvantages of this kind of fee, and the potential to raise revenue.

We hear a lot of talk in this Chamber about reducing the deficit. It is going to be pretty difficult to do that in the current environment unless we have new revenue. One of the ways to have new revenue in place is to have a transaction fee. Again, this amendment would simply require the study of a transaction fee.

Next, the study would assess the impact on financial markets, which is something we have to consider and weigh and analyze, and the impact on risky investment behavior. We might know the answer to that, generally, because with a transaction fee in place, it is probably less likely that a financial institution would engage in the kind of risky, reckless, irresponsible and, in some cases, illegal behavior they have engaged in which has cost the average American family $100,000 per family because of what they did on Wall Street over a number of years.

The study called for in the amendment would be open to public comment, would be conducted by the Securities and Exchange Commission and the Commodity Futures Trading Commission, in coordination with the Department of the Treasury. It is important to have those three agencies involved in the review. It is not just going to be farmed out to some think tank, where it can be criticized because it lands on one side of the political divide or another. It is going to be conducted, if we get this in place, by the Securities and Exchange Commission and the Commodity Futures Trading Commission, two agencies with substantial experience and expertise about this kind of a fee, a transaction fee, working in coordination with the Treasury Department. It is important to have those agencies involved instead of having a study done by a group that has, in many cases, limited expertise.

Given the dramatic cost of the recession on our economy, the horrific and destabilizing job loss we have had, not to mention the world economic downturn, we need to be proactive and thoughtful and analytical in assessing a transaction fee and the positive impact it can have on reducing the deficit and creating jobs.

For those who will weigh in against the amendment, I ask: Where is the other revenue they are going to need to reduce the deficit or at least to allocate part of the revenue we generate to reducing the deficit? What are they going to do about job creation? If they are not doing some work on both of those, they are not too concerned about where the economy is going. If we are going to fully recover and grow and sustain growth overtime, we need job creation, and we need to reduce the deficit.

Predictably, I received a letter recently from the Chamber of Commerce that has come out against the study of a transaction fee. In my judgment, it is entirely predictable that the Chamber of Commerce of the United States is opposed. I will leave it to them to make their case. I hope the amendment has bipartisan and broad support, which I believe eventually it will. Unfortunately for the Chamber of Commerce, they are doing what they always do. They are trying to protect Wall Street in a debate on the study of a transaction fee but in the larger debate as well.

It is very simple. There are two places to be—protecting Wall Street or standing for reform. The Chamber of Commerce has just weighed in on the side of Wall Street. They will have to answer to all the small businesses in Pennsylvania, for example, and across the country and even larger businesses but especially small businesses that have been devastated by what has been happening on Wall Street. The idea that the Chamber of Commerce is coming out against the study—the study;

the analysis—of a transaction fee is disturbing. It tells you a lot about where they stand in this debate.

I know where the American people are. They want reform, and they want it now, and they do not want it watered down. They do not want the bill gutted with amendments. They want to have information they should have a right to expect on the effect of a transaction fee—good, bad, or indifferent. They should have that information. What the American people do not want is the Chamber of Commerce or any other organization standing between Wall Street and what has been happening there and reform.

I urge the leadership of the Chamber of Commerce to go back, take another look at this, take another look at what is the harm of having a study conducted by the Securities and Exchange Commission and the Commodity Futures Trading Commission in conjunction with the U.S. Department of the Treasury. I do not care what year it is. I do not care what administration it is, those three parts of our government should have the right and should be instructed by the Congress to study something that has potential—significant potential—to lower the deficit, or help us lower the deficit, and to create jobs.

But to have the usual knee-jerk political reaction the Chamber of Commerce and others will have is not in the best interests of the American people and is not helping in any way the debate we are having on the floor of the Senate.

So for the chamber folks—or for their allies—it is simple, folks. You have two choices. You can stand here and protect, with all your might, the practices on Wall Street—the fraud, the manipulation, the scheme artistry that put us into this ditch we are in right now—or you can be for reform. You have a choice to make. It is very simple. There is no middle ground.

I hope the Members of the Senate would take a closer look at this than apparently the chamber has and stand up for the American people and show at long last we are not going to allow Wall Street to destroy more lives, we are not going to allow Wall Street to allow an adverse impact of $100,000 per family to transpire again, that we are going to at long last provide real reform for the American people and hold Wall Street accountable for the abusive practices they engage in, for the dishonesty and fraud and sometimes criminal conduct they engage in.

It is about time the groups that are opposing reform—of course, the chamber has been opposing lots of reform lately; we will not go into all of it, but I would hope the Chamber of Commerce would make it very clear where they stand in this debate. Because when they come out against proposals such as this, they stand to protect Wall Street at the expense of the American people.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Madam President, I have an amendment which has been filed and is at the desk, and a modification of that amendment, which I wish to explain for a moment.

It is an amendment related to interchange fees. Interchange fees are the fees charged to commercial establishments which accept credit cards. So if I owned a restaurant and accepted Visa or MasterCard, when my customer, who has a bill, presents the credit card to pay for it, then I have to pay a percentage of that bill to the credit card company. That is called the interchange fee.

That is separate and apart from the customer's relationship with the credit card company. This is the relationship of the merchant, the retail establishment, the small business, with the credit card company. Unfortunately, over the years, small businesses across America have had little or no bargaining power with the major credit card companies. They impose interchange fees on these businesses, and if you speak to some of the small businesses in Illinois or across the Nation, you will find that many of them feel they are being treated unfairly.

Let me give you an example. About half of the transactions that take place now using plastic are with credit cards, and there is a fee charged—usually 1 or 2 percent of the actual amount that is charged to the credit card. It is understandable because the credit card company is creating this means of payment. It is also running the risk of default and collection, where someone does not pay off their credit card. So the fee is understandable because there is risk associated with it.

But now gaining in popularity is this so-called debit card, where a person directly draws money from their checking account to pay that same restaurant. Had that person chosen to pay by check—a written check—it would have been banked by the restaurant in their own bank, and drawn from the bank of the customer, with no fee associated with it. If the customer uses a debit card—which accomplishes the same thing without the actual check paper involved—the credit card/debit card companies, Visa, MasterCard, and others—charge similar fees to what they charge for credit card. Yet there is virtually no risk involved in a debit card.

So many of these retail establishments and small businesses across America have come and said: We are not opposed to paying a reasonable, proportional amount for the use of a debit card, for example, at our business, but we cannot even get to first base with Visa and MasterCard. They say: We are going to charge you what we are going to charge you—take it or leave it.

As a consequence, I have submitted this amendment. This amendment is on behalf of small businesses across the United States which have rallied behind this because of their concerns about interchange fees on their cost of doing business. It says we will use the same mechanism we used in credit card reform—a bill that was brought to the floor by Senator DODD of the Senate Banking Committee, which called on the Federal Reserve to establish the appropriate fees and charges to business establishments for the use of credit cards—and that these fees and charges be reasonable and proportional when it comes to debit cards. I do not think that is unreasonable. Senator DODD offered that as part of the original credit card reform when it came to customers using credit cards. I do not think it is unreasonable to apply it to the business establishments.

You would think there would be general support of this across the board, except from the credit card companies and the biggest banks. But it turns out there is opposition to this from the so-called independent community banks and credit unions.

We created an exemption in my amendment saying if you are a so-called independent community bank that has assets of less than $1 billion, you will not be affected by this—believing we took the lion's share, the vast majority of community banks, and exempted them with the $1 billion exemption. Regardless, the independent community banks again teamed up with the American Bankers Association and said: We are going to oppose it anyway, even if the majority of our members are not covered by it. And credit unions, which go lockstep with the so-called independent community banks when it comes to a lot of banking issues, said the same thing. So in an effort to reach a compromise here that will help Members come to the support of this amendment, I am going to modify my amendment to extend and enlarge the exemption to institutions of $10 billion or less.

Let me tell you what that means. With the modification—changing it from $1 billion to $10 billion—it will have a dramatic difference. With a $10 billion exemption, 99 percent of banks would be exempt. All but the very largest banks in America—the ones that have a controlling interest in establishing interchange fees, I might add—99 percent of banks would be exempt. And 99 percent of credit unions would be exempt. All but three credit unions in the United States have less than $10 billion. And 97 percent of thrift institutions would be exempt—19 thrift institutions across America.

When I have talked to my friends on both sides of the aisle, they have said: If you can find a way to resolve the opposition of the community banks and credit unions, then we are open to this. Many of them have said they believe small businesses and retail establishments are being treated unfairly and they wish to support this. But they wanted to make sure they did not harm local and community banks.

Well, I have gone from a $1 billion exemption to a $10 billion exemption. There are very few communities across America that have banks that will not be protected because of this enlargement of this exemption, and I urge my colleagues to consider that, and to also consider the other side of the equation. Think of the hundreds, if not thousands, of small businesses in your State that are being disadvantaged and treated unfairly with these interchange fees.

What we are asking for is to have an arbiter—in this case the Federal Reserve—determine whether the interchange fees, particularly for debit cards, are reasonable and proportional.

We also say you ought to allow a commercial establishment which accepts a credit card to establish a minimum amount which you can charge to a credit card. I went into Washington National Airport, standing at a news stand there, and was behind a woman who was charging 35 cents to a credit card. I said to the person at the cash register: Is that the lowest amount you have ever had charged to a credit card? She said: No. We had 25 cents charged one day.

If you look at the actual calculations of fees paid by that business for the use of that credit card, they lost money on that transaction. They did not make any money on that. By the time they paid the swiping fees and the interchange fees, at the end of the day, they made nothing. They could have lost money.

Is it unreasonable for a business to say: We are not going to accept credit cards for any purchase under $5 or $1? I do not think that is unreasonable since they are going to lose money in the process, and yet the credit card companies prohibit small businesses from even establishing those basic standards. They prohibit small businesses from saying: We will give you a discount on the price if you pay cash. Why? If we are truly going to have a competitive atmosphere and give small businesses in a struggling economy a fighting chance, why would we prohibit these things? Why would we give a monopoly—a virtual monopoly—situation here, where two major credit card companies can impose rules on small businesses which are so costly to them?

That is why I have submitted this amendment. It is not an easy amendment—I understand that—because we have some competition among friends here and Members will have to decide which they think is the just position. I hope they believe this amendment is. I hope they believe that small businesses—which currently have no bargaining power against these monopolies, such as Visa and MasterCard—deserve a voice in the process. I hope they believe that some of the unreasonable standards set by credit card companies and imposed on small businesses have to stop across America.

I cannot tell you how many glowing speeches are given in Congress on behalf of small businesses. We all know how much they mean to us in our communities and in our overall economy. Well, here is our chance. Senators will have a chance to vote on behalf of retail establishments and small businesses all across their States who have come to me, begging me to move forward on this amendment.

I have said—and I believe it is true—this is the first time anyone has offered an interchange fee amendment on the floor of the Senate or in the House of Representatives. The fact is, it has not been offered because it is controversial. Some people do not want to touch it: Stay away from it. Don't bring it up. Well, that is not fair to small businesses. They deserve for us to step forward, and to offer these amendments, and to make a policy choice.

When I tried to offer this amendment on the Credit Card Reform Act, they said: Wrong place. When I try to offer it on this bill related to banks and financial institutions, some have said: It is the wrong place.

I have concluded there is no right place. This is a good place because it relates to consumer protection, it relates to financial institutions, it relates to our economy and making sure it thrives, and thrives in a responsible way. That means making sure interchange fees are reasonable across the board.

This amendment is needed. It is a response to price fixing by Visa and MasterCard. Interchange fees are received by the card-issuing bank in a debit transaction. However, Visa and MasterCard—which control 80 percent of the debit market—set the debit interchange fee rates that apply to all banks within their networks. Every bank gets the same interchange fee rate regardless of how efficient they have been in conducting debit transactions.

Visa and MasterCard do not allow banks to compete with one another or negotiate with merchants over interchange rates, and there is no constraint on Visa's and MasterCard's ability to fix rates at unreasonable levels. VISA and MasterCard consistently raise interchange rates because the more interchange fees the banks receive, the more the banks will issue cards. Visa and MasterCard receive a fee each time a card is swiped, so rising interchange rates enrich them as well.

Visa and MasterCard incidentally have reduced debit card interchange fees in other countries while they have increased them in the United States. Let me repeat that. Visa and MasterCard have reduced debit interchange rates in other countries while they have increased them in the United States. Visa and MasterCard continue to raise U.S. interchange rates, which are already the highest in the world.

The General Accounting Office found that regulators in other countries have worked with VISA and MasterCard to voluntarily reduce their interchange rates. Just last month, VISA lowered many European debit card rates by 60 percent while increasing many U.S. debit card rates by 30 percent.

What can businesses do about it? Nothing—no bargaining power. So these American-based companies are cutting their charges in overseas markets and raising them at a time when we are facing one of the worst recessions in American history. They are making it tougher for that small business to survive. They are making it tougher for them to keep their employees at work. Is that the right thing to do when our economy is facing a recession? I don't think so.

I don't set an interchange fee rate in this law. Some have argued that we would reduce credit availability by regulating credit card interchange rates. However, the amendment's reasonable fee requirement only applies to debit cards; it doesn't apply to credit cards.

The Durbin reasonable debit fee requirement exempts small banks and credit unions with assets under $10 billion, which, as I say, includes 99 percent of all banks, credit unions, and thrift savings and loans across the United States.

This amendment would not enable merchants to discriminate against debit cards issued by small banks and credit unions. VISA and MasterCard contractually require merchants to accept all cards within their networks, and the amendment does not change that requirement. The amendment would not have the Federal Reserve set interchange prices. Under this amendment, the Fed would not set them. Instead, it would oversee the debit interchange fees set by card networks to ensure they are reasonable and proportional to cost.

It is the same standard which the Banking Committee and Senator DODD offered when it came to credit card reform. It is not a radical notion. It is in the law already.

There is an argument some make that consumers benefit greatly from the current interchange fee structure. Let me tell my colleagues the reality. This statement is contradicted by statements from groups that represent consumer interests.

Ed Mierzwinski, who is the consumer program director at U.S. PIRG, testified before the House Judiciary Committee and said as follows:

> The deceptive anticompetitive practices of the two credit card associations VISA and MasterCard have injured consumers and merchants for years. Interchange fees or hidden charges are paid by all Americans, regardless of whether they use credit, debit, checks, or cash. These fees impose the greatest hardship on the most vulnerable customers: The millions of American consumers without credit cards or banking relationships. These consumers subsidize credit card usage by paying inflated prices for many goods and service. These prices are inflated by the billions of dollars of anticompetitive interchange fees used to subsidize reward programs.

The industry of credit cards also argues that merchants benefit from the

present interchange system. A 2009 GAO report found that merchants receive benefits from the existence of credit and debit card systems. It does not say those benefits are the result of the present interchange system. In fact, the same report starts with the title, ''Rising Interchange Fees Have Increased Costs for Merchants,'' citing numerous growing costs that the interchange fee structure imposes on merchants. For example, the report states:

Although accepting credit cards provides benefits, merchants report card costs are increasing faster than their ability to negotiate or lower these costs.

I would say basically if we are going to revitalize small business in America in retail establishments, if we are going to give them a fighting chance, we cannot ignore this any longer.

There are some who say: Withdraw this amendment. Wait for another day. Well, I have waited for a year and I don't want to wait anymore. I think we ought to go on the record. I think we ought to have the courage to stand up and say reasonable and proportional debit card rates that will be regulated by the Federal Reserve is not unreasonable; and secondly, that the anticompetitive practices which are imposed on small businesses and retailers across America have to come to an end.

Most of the people I talk to on the floor of the Senate understand this. I hope this modification I am making to my amendment—creating an exemption for banks with assets valued at lower than $10 billion—will make it clear that we are not trying to create any hardship on community banks and credit unions. Instead, we are going after the largest banks and credit card companies for what I consider to be unreasonable conduct when it comes to the treatment of small businesses and retail businesses as well.

I hope to call up this amendment either late today or tomorrow. I hope my colleagues will join me in standing up for small business. We give a lot of speeches about small businesses and retail businesses. This will give my colleagues a chance to vote for them on this interchange fee regulation reform.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CRAPO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. CRAPO. Mr. President, I call for the regular order with respect to the Landrieu amendment.

The ACTING PRESIDENT pro tempore. The amendment is now pending.

AMENDMENT NO. 3992 TO AMENDMENT NO. 3956

Mr. CRAPO. Mr. President, I call up a second-degree amendment, which is at the desk.

Mr. DODD. First, Mr. President, are we temporarily laying aside the Snowe-Landrieu? What is the pending amendment?

The ACTING PRESIDENT pro tempore. The Landrieu amendment No. 3956 is now pending.

Mr. DODD. OK.

The ACTING PRESIDENT pro tempore. The clerk will report.

The bill clerk read as follows:

The Senator from Idaho [Mr. CRAPO] proposes an amendment numbered 3992 to amendment No. 3956.

Mr. CRAPO. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To improve the credit risk retention provisions)

On page 1 of the amendment, strike line 3 and all that follows through page 3, line 7, and insert the following:

''(i) a portion of the credit risk for any asset that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer; or

''(ii) a reduced portion or no portion of the credit risk for an asset described in clause (i), if the originator of the asset meets the underwriting standards prescribed under paragraph (2)(B) or subsection (e)(4);

''(C) specify—

''(i) the permissible types, forms, and amounts of risk retention that would meet the requirements of subparagraph (B), including—

''(I) retention of—

''(aa) a specified amount or percentage of the total credit risk of the asset;

''(bb) the value of securities sold to investors; or

''(cc) the interest of the seller in revolving assets;

''(II) retention of the first-loss position by a third-party purchaser that specifically negotiates for the purchase of such first-loss position and provides due diligence on all individual assets in the pool before the issuance of the asset-backed securities;

''(III) a determination by a Federal banking agency or the Commission that the underwriting standards and controls of the originator are adequate for risk retention purposes; and

''(IV) provision of adequate representations and warranties and related enforcement mechanisms; and

''(ii) the minimum duration of the risk retention required under this section;

Mr. CRAPO. Mr. President, this is a second-degree amendment to the Landrieu-Isakson amendment. It is not a competing amendment; it is an amendment to add additional provisions. I support the material in the Landrieu-Isakson amendment, which deals with the home mortgage market. This amendment has further provisions in the same section of the bill to deal with risk-retention issues relating to the commercial real estate market and other asset classes.

According to market analysts and financial regulators, the provisions aimed at the securitized credit market in this bill will undoubtedly impact access to credit for millions of American consumers and businesses.

These issues—such as ''risk retention''—are very complicated.

The reforms are aimed at the ''residential and subprime'' market, and I am quite concerned that have not been carefully examined for all markets.

Additionally, they are have not been reviewed in the context of other moving parts outside the bill, such as changing accounting standards, capital requirements, other regulatory mandates, etc.

When combined, these significant changes create a huge amount of ''uncertainty'' in the market, which today serves one of the greatest impediments to new and private lending and investing.

The stakes are high. As Treasury Secretary Geithner has stressed, ''no financial recovery plan will be successful unless it helps restart securitization markets for sound loans made to consumers and businesses—large and small.''

Yet, the ''totality'' of regulatory and account changes impact the future viability of these markets. In fact, both market participants and financial regulators agree that the outcome is unclear in both the short and long term. The ''warning signs'' are there and cannot be ignored after comments by the Fed, the OCC, the FDIC, and the International Monetary Fund, among others.

As such, we must carefully examine any new mandates to determine the most appropriate and direct way to strengthen our lending markets, and to better serve consumers and businesses, while avoiding negative complications.

Such reforms are very important, and it is critical that we get them right.

This ''middle ground'' approach has two basic components:

First, because ''skin-in-the-game'' is important and can come in many forms, the proposed language improves the existing framework—using the current language and construct in the Dodd bill—and requires the regulators to examine and consider equally which method of ''skin-in-the-game'' is most appropriate:

A percent retention; Underwriting standards; strong, standardized and disclosed ''representations and warranties''; Other methods—e.g. a ''third party'' retention for CMBS in the ''Minnick-Bean-Moore-Adler-Campbell-Miller amendment that passed in the House unanimously—or the like.

Second, it clarifies existing language in the bill that requires reforms to be considered by ''asset class.''

Under the Landrieu amendment, the regulators shall create the ''qualified mortgage'' framework important to the residential market.

Under this secondary amendment, the regulators shall consider the appropriate forms of retention by ''asset class'' and type of loan—as well as risk profile associated with it. This would include allowing the regulators to consider using and strengthening a ''third party'' retention framework that is important to CMBS and CRE market participants.

Ultimately, we think such an overall amendment is important because it comprehensively addresses all asset classes, (residential and commercial mortgages, student loans, auto loans, etc.) and helps to have a better format for approaching risk retention.

What the amendment does is take the exclusive focus off of just one form of risk retention and allows the regulator to evaluate the best approach to address risk retention by asset class.

This still includes a percent retention (if necessary), as well as underwriting standards that actually get at the heart of the loans and even strong and uniform ''representations and warranties''—which are important to the investors—such as pension funds, mutual funds and endowments—who fuel lending in the securitized credit markets.

The amendment simply gives important direction to the regulators on structuring reforms by ''asset class.'' This is critical in the context of conflicting rules and proposals aimed at these markets—some of which prejudge or disregard the House and Senate language in this area.

Most important, when taken with the Landrieu amendment, it would address and encourage well underwritten loans—including the ''qualified mortgage'' framework—as well as uniqueness of very different markets—such as commercial real estate, auto loans, student loans, etc.

And, by avoiding a single asset ''carve-out'' for just ''residential,'' it simply allows the regulators to customize ''skin-in-the-game'' for all asset classes—particularly ones that were not a ''root case'' or ''systemic risk''. This protects consumers and businesses that are struggling to get access to credit.

Without ''reinventing the wheel'' on the Dodd bill, this approach provides important reforms, while avoiding negative complications concerning capital, liquidity and credit availability—particularly in the commercial real estate market, which faces challenges and has a very different structure.

Such an approach is crucial for business and consumer credit, and for an overall economic recovery.

And, for that reason, it is supported by lenders of all sizes and in all markets, commercial borrowers who have been active on this issue, and investors who fuel lending and are seeking certainty and confidence.

Lastly, some of the language in this bill, particularly related to the commercial mortgage market, passed the House Financial Services Committee unanimously, as offered by Representatives MINNICK, BEAN, ADLER, MOORE, CAMPBELL, and MILLER.

I urge all my colleagues to accept this amendment as an addition to the Landrieu-Isakson amendment, not a change of it, to help us address more than simply the issues dealing with the residential real estate market but also, and most important, the commercial real estate market and other asset classes.

The ACTING PRESIDENT pro tempore. The Senator from Connecticut is recognized.

Mr. DODD. First, let me acknowledge the contributions of Senator CRAPO to the Banking Committee efforts. While not endorsing the bill as it presently reads, he has been a valuable member of the committee for many years. I deeply appreciate his input. His ideas are always tremendously constructive in any debate we have. I thank him for that.

I have asked my staff to meet with his staff to try to clear up some things. I would like to be in a position of where we can accept the amendment. I am not trying to prejudice one over the other. We would like to keep some risk retention or good underwriting standards so the choice is there. We are not trying to impose both.

I know the staffs are talking. On page 2 of the amendment, beginning around line 18, paragraph (I), beginning ''retention of'' and then it lists three paragraphs and possibly a fourth. We are looking for some clarity on the meaning of ''the value of securities sold to investors or the interest of the seller in revolving assets.'' On those two, we particularly need some clarity on what that means. It seems vague to us as to how that would apply.

Rather than rush this along, we would like to take a few minutes and see if we can come to some resolution of that and possibly accept it. Senator LANDRIEU will have to come over. It is her amendment we are amending. We will see if we can reach accommodation and adopt it, if possible.

Let's take a few minutes and look at how we might work on this together. If we can come to a conclusion, I will be prepared to support the Senator's amendment. I am not trying to distinguish real estate from commercial. I realize there are some differences. They are different transactions, obviously, but the point is the same. We would like to make sure the securitization, on which the Senator is absolutely correct—I think these words become pejorative. When done well, it expands opportunities tremendously in terms of creating additional liquidity, making resources more available for more loans, home sales, and the like, providing there are sound underwriting principles involved so we are not getting ourselves into trouble again. That is why we have had an insistence on strong underwriting standards and risk retention, the old skin in the game. That is what risk retention means. If you have equity in it, you will be careful about what goes out the door and becomes securitized.

I am not interested in having risk retention if, in fact, we have good standards that apply and we don't end up where we were 2 years ago, discovering a lot of these instruments that got securitized ended up being worthless, even worse than worthless, in some cases, because of the problems they caused.

I respect where my colleague is coming from. If we can spend a few minutes and try and resolve this, then maybe we can come to some agreement. That would be my hope.

The ACTING PRESIDENT pro tempore. The Senator from Idaho.

Mr. CRAPO. Mr. President, I appreciate the chairman's remarks and willingness to work on this amendment. We are both trying to get at the same thing. I believe we can work out the questions with regard to the language so we can move forward in a fashion that will help us to address these problems to make sure the ultimate objective, on which we all agree—namely, making sure we have confidence in the quality of the assets that are utilized in securitization—is achieved.

I welcome that opportunity and look forward to working with the chairman.

Mr. DODD. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant Daily Digest clerk proceeded to call the roll.

Mr. DODD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

AMENDMENT NO. 3918

Mr. DODD. Mr. President, I ask unanimous consent to temporarily lay aside the Landrieu-Isakson amendment.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. DODD. Mr. President, I believe we are prepared to have a voice vote on the Snowe-Landrieu amendment, which is the pending amendment, if I am not mistaken.

The ACTING PRESIDENT pro tempore. If there is no further debate, the question is agreeing to amendment No. 3918.

The amendment (No. 3918) was agreed to.

Mr. DODD. Mr. President, I move to reconsider the vote, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. DODD. Mr. President, let me once again thank Senators SNOWE and LANDRIEU for their very valuable contribution to this bill in more clearly refining and making it abundantly clear that merchants and retailers and others are not included as financial services or financial products companies and are not to be covered by the consumer financial product bureau. I am very appreciative to both of them for their contribution.

With that, Mr. President, I see my colleague from North Dakota is here, and I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I know this is beginning to be a lengthy debate

and process on the floor of the Senate to get through amendments. My colleague from Connecticut exhibits great patience to try to work through this. I know there are a lot of interests that have different views about this, and they come to the floor and they want this amendment or that. I understand all that. I know my colleague from Connecticut views this with the same seriousness of purpose as I do and understands that many of us not on the Banking Committee have not had the opportunity to be involved in the debate until now—until it comes to the floor of the Senate—and have not been able to offer amendments.

I think that represents the appetite in the Senate to be engaged and to understand what has caused the most devastating financial event for our country since the Great Depression—something that collapsed some $15 trillion in value for the American people, caused very substantial unemployment, dramatic losses in income, the loss of homes and has led to hopelessness and helplessness for many Americans.

What happened to cause that? Was this some sort of natural disaster? No, it wasn't a fire, a flood, a tornado, or an earthquake. It wasn't a natural disaster. This was made with human hands. This is a manmade disaster and, by the way, it could well have been predicted, in my judgment, and some of us did. Without pointing at myself necessarily, I said 11 years ago that I thought we were setting ourselves up for massive taxpayer bailouts. I will not show the charts again, but it is not surprising. We were going to modernize the financial system a decade ago in order to compete with the Europeans and to bring it into the modern age. Modernizing meant deciding let's deregulate everything. Let's not look at everything that is going on. The result is, a decade later, a very substantial collapse in our economic system.

Mr. President, I have been thinking about the work that has gone on in the last couple of weeks on the floor of the Senate. I came in early this morning to get something from the radio addresses of Franklin Delano Roosevelt in 1933 and 1934. The situation in this country, while different by many decades, is similar with respect to what caused a substantial problem in this country. Then it was the Great Depression.

Let me read, if I might, just a couple of excerpts of what then-President Franklin Delano Roosevelt said about our country and about what was needed to be done because it has, I think, significant application to today. Here is a quote from Franklin Delano Roosevelt on March 12 of 1933:

> We had a bad banking situation. Some of our bankers had shown themselves either incompetent or dishonest in their handling of the people's funds. They had abused the money entrusted to them in speculation and unwise loans. This was of course not true in the vast majority of our banks but it was true in enough of them to shock the people for a time into a sense of insecurity and put them into a frame of mind where they did not differentiate, but seemed to assume that the acts of a comparative few had tainted them all. It was the government's job to straighten out this situation and do it as quickly as possible. And the job is being performed.

This was, again, from President Franklin Roosevelt in 1933. Quoting again, he says:

> After all, there is an element in the readjustment of our financial system more important than currency, more important than gold, and that is the confidence of the people. Confidence and courage are the essentials of success in carrying out our plan. You people must have faith; you must not be stampeded by rumors or guesses. Let us unite in banishing fear. We have provided the machinery to restore our financial system; it is up to you to support and make it work.

He was talking about a time in the shadow of the Great Depression. On September 30, 1 year later, in his address to the Nation, Franklin Delano Roosevelt said:

> The second step we have taken in the restoration of normal business enterprise has been to clean up thoroughly unwholesome conditions in the field of investment. In this we have had the assistance from many bankers and businessmen, most of whom recognize the past evils in the banking system, in the sale of securities, in the deliberate encouragement of stock gambling, in the sale of unsound mortgages and in many other ways in which the public lost billions of dollars. They saw that without changes in the policies and methods of investment there could be no recovery of public confidence in the security of savings.

Interesting. You could read that today, and it describes the task we have before us today. But this wasn't language of today. This was from 1933 and 1934. The thoroughly unwholesome conditions in the field of investment, in the sale of securities, in the deliberate encouragement of stock gambling, the sale of unsound mortgages. That is the year 2005, 2009. Yet Franklin Delano Roosevelt described it in 1934, and he put together a plan. That plan included Glass-Steagall and other things to protect this country; to say never again will we allow that to happen.

Then, a little over a decade ago, in this Chamber and in the White House, they said: We have to modernize our system. We have to get rid of all those protections from the Great Depression. They are old-fashioned. Let's dump them. So the Congress dumped them. I didn't support that. I vigorously opposed that. But they dumped them.

So the country had a very serious problem—the runup of a substantial amount of new exotic securities, things that people didn't understand very well—CDOs, securitization of almost anything somebody could securitize, getting fees from the sale of the transfer of securities, and then the development of something new called the credit default swap.

The credit default swap was a new approach. It was an insurance policy against a bond default. But then there was a synthetic CDO or a synthetic credit default swap, or what some called naked default swaps. That meant that you could buy one of these instruments back and forth without ever having an insurable interest in the instrument itself, just making a wager with someone else about what might or might not happen in the future.

During all of this time we watched a very substantial amount of activity, on Wall Street particularly, take place that I think has been pretty unwholesome for our country. This is an article of September 30, 2008, which talks about the money from Wall Street that is beyond the legal reach. It says there is $1.9 trillion of money that is run out of the New York metropolitan area that sits in the Cayman Islands—a secrecy jurisdiction. Another $1.5 trillion is lodged in four other secrecy jurisdictions.

Let me quote from this article by Robert Morgenthau in the Wall Street Journal on September 30, 2008.

> Following the Great Depression, we bragged about a newly installed safety net that was supposed to save us from such a hard economic fall in the future. However, the Securities and Exchange Commission, the Federal Reserve System, the Comptroller of the Currency and others have ignored trillions of dollars that have migrated to offshore jurisdictions that are secretive in nature and outside the safety net—beyond the reach of U.S. regulators.

Well, it is not surprising that at the same time that money was being hidden in other parts of the world by some of the same Wall Street interests that a massive amount of money was being paid one to another on Wall Street and in the investment banking area.

Just to cite a couple of these examples, I have a description from about a year and a half ago when Lehman Brothers went bankrupt. The Lehman Brothers bankruptcy followed Lehman Brothers Holdings agreeing to pay a total of more than $23 million to three executives leaving the securities firm just days before it collapsed.

The reason I point this out is there was so much money around for everybody—for everything—days before the collapse of Lehman Brothers. There was $23 million paid to three executives leaving the securities firm days before it collapsed. You wonder why. Does that make any sense? Does anybody think that is something that is worthy?

Here is a payment of $19 million to a man named Alan Fishman. He was the CEO of Washington Mutual, which was run right into the ditch and went belly up and had to be acquired by another company. Alan Fishman worked 3 weeks for Washington Mutual, and he got a severance deal of $19.1 million—$19.1 million.

In the heyday of executive compensation a couple of years ago on Wall Street, in 2007, the head of Merrill Lynch made $161 million. That was Stanley O'Neal. John Thain at Merrill Lynch made $83 million; Lloyd Blankfein of Goldman made $54 million; John Mack of Morgan Stanley made $41 million; James Dimon of

JPMorgan Chase made $29 million; and—well, the list goes on. Kenneth Lewis of Bank of America only made $20 million. He must be looking up at Stanley O'Neal's $161 million and asking: Where did I miss the boat?

But this kind of money was hanging around all of these issues and these firms, and it was, Katey, bar the door. We are making massive amounts of money and we are going to pay almost never before heard of sums to individuals for running these big companies—$150 million, $50 million, $83 million. So it is not surprising, then, that the American people have a pretty dim view of what was going on on Wall Street when we announce that what went on on Wall Street led to this dramatic economic devastation to our country.

By the way, the devastation doesn't apply to everybody. I just saw this morning that the unemployment rate among the higher income Americans is 3 percent. So they are not feeling the pinch so much. But in the bottom 20 percent of the American people, the unemployment rate is around 18 percent. So there are a whole lot of folks at the bottom of the economic ladder who are paying the price for this unbelievable behavior.

So the question is, What do we do about all this? What do we do to make sure that when we are done in the Congress on something called financial reform, the American people have some notion that we will have done the right things to prevent from happening again that which happened to us in the last couple of years?

The presentations I have made on the Senate floor have perhaps led people to think that I believe investment banks have no merit or no worth. That is simply not the case. I understand that our country and the ability to produce in our country through a productive sector needs financing and that financing would include a range of financing opportunities. You do need investment banks, you need commercial banks, you need venture capital firms, you need securities. I understand all of that.

But I also understand—it was a comedian, Mark Russell, who once described investment banks by saying: ''Investment banking is to productive enterprise like mud wrestling is to the performing arts.'' If ever that applied, it surely must apply now when we look back to see what has happened in the last decade in investment banking. If we do not fix it in this legislation, put a cork in it, and we leave this Chamber and this Congress and claim to have fixed it and have not done it, then shame on us.

We have a responsibility. Let me tell you what I think the responsibility is. It relates to a range of things that are not yet done. It relates to dealing with the issue of too big to fail. I know we had one vote, and we failed, unfortunately. There are other ways to do this. But if we have institutions that are too big to fail, that are so large that they cause moral hazard to this country should they fail, so large that they cause completely unacceptable risks of bringing the country's economy down should they fail—if we do not do something about that, we cannot claim ever that we have done something about this system. It is not about saying big is bad. It is about saying no-fault capitalism doesn't work if you allow financial institutions to become so large that their failure can bring down this country's economy. That is what the issue is, and that needs to be fixed.

It appears to me we are probably not on the way to fixing that, but hope still arises. For me, it is not a triumph of hope over expectation; it is a triumph of hope, believing it is still possible for us to do the things necessary to fix what we need to do.

I also think the set of issues, in addition to too big to fail, includes an amendment I will be offering banning naked credit default swaps, saying that if there are credit default swaps issued that have no insurable interest in bonds, then it seems to me that is just wagering and that can be done at our gambling centers in our country but ought not be done in the lobbies of banks. That is an amendment which is very important. If we don't fix this, we will leave this town saying we did financial reform but we did nothing about too big to fail and we did nothing about the binge of speculative activity in instruments that have no insurable interest in bonds, credit default swaps that have no insurable interest in bonds.

Mr. Pearlstein, who writes a column for the Washington Post, asked a question which led me to be interested in the question, Why should there be more insurance policies against bonds than there are bonds?

In any event, why should we, in our financial institutions, have people wagering about whether a bond will default when, in fact, they have no interest in the bond? We do not allow people to buy life insurance on someone else's life because they don't have an insurable interest. We don't allow someone to buy fire insurance on someone else's house because there is not an insurable interest. Yet we have trillions of dollars out there, called credit default swaps, making a wager on someone else's bond, whether someone else's bond will fail, despite the fact that they have no insurable interest in the bond. If we do not put a dagger in the heart of that kind of intense speculation that has caused a significant amount of these problems, then we will have, in my judgment, failed to have addressed the real causes and failed to have done what we should do to make sure this cannot happen again.

I believe my colleague from the State of Washington is going to offer a restoration of sorts of the old Glass-Steagall law, which I think makes sense. Others will offer legislation that would say to insured banks: You ought not be trading securities and derivatives on your own proprietary accounts. It makes a lot of sense to me. All of those are important.

I mentioned before that I wrote the cover story for the Washington Monthly magazine 15 years ago titled ''Very Risky Business.'' At that time, there was $16 trillion of notional value of derivatives, and I wrote the article saying it was very risky business because even then banks were beginning to trade derivatives on their own proprietary accounts. That is not what insured banking should be. That is far too risky and puts the taxpayer at risk.

Now we see that unemployment is at 9.9 percent. We are still trying to recover from this devastating recession. We are making some progress.

Wall Street is back on track for record profits. This is 5 months ago, now, from the New York Times. In a report released Tuesday, the comptroller of New York State said Wall Street profits in 2009 are on track to exceed the record set 3 years ago at the height of the credit bubble. He also talked about bonuses at six banks that he thought would exceed the $162 billion paid in 2007. By the way, fueling these record profits by these institutions is from the firm's own securities trading accounts, according to this story, as they borrow at near zero interest rates and put the money to work in the securities markets. It sounds as if nothing has changed. That is what helped cause this mess. Yet here we are, back again, and the question is, Who is healing? The big investment banks are healing.

Let me for a moment remind everyone how important regulation is. This bill has a lot of regulatory allowance—some instruction but a lot of it allowance that says to regulators: Here is your responsibility.

One of the key issues that has exacerbated this substantial economic collapse was something that happened in 2004, on April 28, in the basement of the Securities and Exchange Commission. On the afternoon of April 28, 2004, there were five members of the Securities and Exchange Commission who met in a basement hearing room to consider a request by the five biggest investment banks. They wanted an exemption for their brokerage units from the old regulation that limited the amount of debt they could take on. What they said is: We want to be able to unshackle billions of dollars now that we hold in reserve as cushions against losses on investments. If we could unshackle that money we have to hold in reserve against losses, we could use that to flow up to the parent company and we could enable it to invest in a fast-growing world of mortgage-backed securities and credit derivatives and so on.

The five investment banks that led the charge—one of them was Goldman Sachs, headed then by Henry Paulson, who 2 years later was Secretary of the Treasury and inherited the mess that

was in part created by it. They had 55 minutes of discussion that afternoon, and after 55 minutes of discussion, the Securities and Exchange Commission voted unanimously to allow these biggest banks in America to take on leverage, going from about 12 to 1 or so, to 33 to 1. In other words, for every dollar in equity, it could leverage about $33 in debt. By that notice in a basement hearing, with no press there at all—I think one reporter was there; it was barely reported—they set the stage for loading up dramatic amounts of debt in these institutions.

Now these institutions are, of course, very opposed to the amendment I am going to be offering here at some point, I hope, I expect, or I insist—one of the three—that would ban naked credit default swaps trading. They are very opposed to that. I understand why. They are making a lot of fees and profits as a result of this massive bubble of speculation in these kinds of securities. But I don't think we have any choice but to be taking on the center of the cause of this economic collapse in our country.

The amount of effort that has been made to water down some of the amendments that have been offered is troublesome to me. I think the legislation that came out of the Banking Committee is meritorious. It has value. I appreciate the work the committee did. But, as I said when I started, most Members of the Senate have not had a chance to weigh in on this, and there are some substantial improvements that can be made—I hope should and will be made to the Banking Committee product. But the improvements will not be improvements that strengthen our ability to prevent what happened from ever happening again if the so-called improvements are diminishing the strength of this bill.

We need regulatory oversight. If we have learned one thing in the last decade, it is that you have to have regulators on the beat who take regulation seriously. You also have to decide to put a stop to the things that don't represent the kinds of business practices that give any strength to this country at all and, in fact, represent business practices that undermine this country's economy. That is why I believe it is critically important we continue to address the issues as I have just described—too big to fail and credit default swaps and related issues.

I am going to read, just for a moment, something from the November 5, 1999, New York Times article when Congress passed a new piece of legislation called financial modernization. This was written by Stephen Labaton. This is a quote, after the passage of the bill. I voted against it. I believed strongly then that it was a dangerous mistake for our country. It turns out it was even more dangerous than I thought.

The architects and others said:

> Today, Congress voted to update the rules that have governed the financial services industry since the Great Depression and replaced them with a system for the 21st century. This historic legislation will better enable American companies to compete in the new economy.

Another quote—in fact, that was from the White House, by the way. That was from someone at Treasury.

This is from a Senator:

> The world changes and we have to change with it.
>
> We have a new century coming and we have a new opportunity to dominate this century the way we dominated that century. Glass-Steagall in the midst of the depression came at a time when the thinking was that government was the answer. In this era of prosperity, we decided that freedom is the answer.

Another Senator said:

> If we don't pass this bill, we could find London or Frankfurt or, years down the road, Shanghai becoming the financial capital of the world. There are many reasons for this bill but first and foremost is to ensure that U.S. financial firms remain competitive.

The passage of that bill set this country up for the biggest fall since the Great Depression.

The question on the floor of the Senate is this: Are we going to pass a piece of legislation that has real strength in deciding that which caused this deepest recession since the Great Depression cannot be allowed to happen again? Are we going to pass a piece of legislation that has real regulation and real rules that work? Are we going to pass a piece of legislation that says too big to fail is too big, period? Are we going to pass a piece of legislation that pierces the balloon of speculation in instruments such as naked credit default swaps—something that was not even in our language 20 years ago. Are we going to address the questions of the securitization of everything, in many cases just for the sake of being able to capture fees? Are we going to address the question effectively of rating agencies that gave AAA ratings to bonds that were worthless? Are we going to address all these questions or are we just going to pass a bill to say: We did it, good for us, this is success, only to find out 5 years later or 10 years later that we are right back in the same swamp?

I wish to simply say today that the American taxpayer has now been obligated—in addition to the joblessness and homelessness and other things visited on the American people and the loss of about $14 trillion or $15 trillion in value, the American taxpayer has been obligated to the tune of somewhere around $11 or $12 trillion lent, spent, or borrowed to interests that we do not now know because the Federal Reserve Board says: It is none of your business to whom we gave trillions of dollars.

Given that, given the economic catastrophe that has visited a lot of the American people, I think we owe them a piece of legislation here with amendments that improve it, a piece of legislation that allows all of us at the end of this day to say no, we didn't water it down, we strengthened it. We recognize the value of our financial institutions, but we don't recognize the value of financial institutions that run this country into the ground, pay $83 million in salaries, $20 million in bonuses, buy things they will never get from people who never had them and claim fees on both ends, and claim they have done something good for the country.

This country can do better than that. This is one of those times—I know this is not seen perhaps by some with the same passion as some of the other issues that get peoples' blood boiling, but I tell you, what we do here will long be remembered because it will have consequences, whether this country has a growing, strong economy for many years ahead, and whether we avoid economic collapse or a deep recession.

I watch every morning and read the stories about Greece and other countries that are in great difficulty. Our country is in some significant economic difficulty. We have sent people off to fight wars for 8, 9 years, not paid for one single penny of it. Unbelievable to me. Every single bit was borrowed and put on the debt.

Then we have got people who thumb their suspenders and talk about how awful the debt is. We have a trade deficit that is relentless and means we end up owing other countries, which will be paid with a lower standard of living in our country. In addition to those issues, we have got this issue of the near collapse of our economy by unbelievable speculation coming from the banking industry.

We have got to fix all of these things if we want a country that gives our children the same opportunities we had. We cannot fix it by glossing over things with a coat of light paint. This has to be fixed with real policies that tackle the central issues on what caused this collapse.

I am here and I am ready to offer my amendment. In fact, the sooner the better. I have been anxious to do that. I will stick around. As soon as I am told my amendment will be in order, I am going to offer it. I guess we will be here until we finish this debate and complain until I get to offer the amendment.

With that, I yield the floor. I will be hanging around.

The ACTING PRESIDENT pro tempore. The Senator from Georgia is recognized.

Mr. CHAMBLISS. Mr. President, what is the current business before the Senate?

The ACTING PRESIDENT pro tempore. The Crapo amendment and the Landrieu amendment are the pending questions.

AMENDMENT NO. 3816 TO AMENDMENT NO. 3739

(Purpose: To implement regulatory oversight of the swap markets, to improve regulators' access to information about all swaps, to encourage clearing while preventing concentration of inadequately hedged risks in central clearinghouses and ensuring that corporate end users can continue to hedge their unique business risks, and to improve market transparency)

Mr. CHAMBLISS. Mr. President, I ask unanimous consent that the pending amendments be set aside and I be allowed to call up my amendment No. 3816.

The PRESIDING OFFICER. Is there objection?

Mr. DODD. Reserving the right to object, and I will not object at all, I have chatted with my friend, Senator CHAMBLISS, as well. I know he is inquiring among his members, as is my colleague from Arkansas as well, about a time agreement on the Chambliss amendment.

My hope would be it would not take too long. I know that is the plea of every manager, majority and minority leader. So if they can inquire as soon as possible on a time. There are several other amendments tonight I think we will be able to deal with, some of which will not require any rollcall votes.

But, obviously, Members like to get some sense of when votes will occur. I am not trying to suggest we truncate anything. I know my colleagues agree that we need to find a time agreement. So I make that plea to both the chairman and the ranking member of the subcommittee.

With that, I have no objection.

The ACTING PRESIDENT pro tempore. The Senator from North Dakota.

Mr. DORGAN. Reserving the right to object, and I will not object, I understand the unanimous consent request is to set aside the pending amendment. Is that correct?

The ACTING PRESIDENT pro tempore. That is correct.

Mr. DORGAN. I will not object. Let me respond for a moment, if I might, to the Senator from Connecticut.

I have indicated I wish to offer an amendment at some point. I want to know if I am on the list.

Mr. DODD. I say to my good friend, he is on the list. We are going to try to get to that amendment as soon as we can. I promise the Senator that.

Mr. DORGAN. Mr. President, the word ''promise'' actually made the day for me. So I will not object, and look forward to offering that amendment at the earliest opportunity.

Mr. DODD. I thank my colleague.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Georgia [Mr. CHAMBLISS], for himself, Mr. SHELBY, Mr. MCCONNELL, Mr. GREGG, Mr. CRAPO, Mr. JOHANNS, Mr. COCHRAN, Mr. VITTER, and Mr. THUNE, proposes an amendment numbered 3816 to amendment No. 3739.

Mr. CHAMBLISS. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(The amendment is printed in the RECORD of May 5, 2010, under ''Text of Amendments.'')

Mr. CHAMBLISS. Mr. President, first, let me thank the chairman. And he is exactly right, I would encourage all of those who have indicated to me they wish to speak on my amendment, from both sides of the aisle, to let us know, come down to the floor. We wish to dispose of this amendment as soon as possible. I am prepared to enter into any kind of reasonable time agreement as soon as we get an idea of exactly how many speakers there will be in order to accommodate those folks.

I am going to talk in detail about the amendment, but first I do want to respond to the Senator from North Dakota who makes some good points with which I agree. But when we talk about the elimination or not allowing credit default swaps, let me say what bothers me about that.

In 2000, when we passed the Commodities Futures Modernization Act, nobody envisioned that credit default swaps would mushroom as they did. The fact is that not only did they grow larger in number, they grew in dollar volume, and they grew in a way that certainly did participate in the collapse that occurred in 2008.

But the real problem with it is not that we had those products on the market but that the regulators did not have the power and authority and the tools to deal with those products, rather than thinking about eliminating a specific product, knowing these smart folks who are in this business in the financial industry are out there right now looking at this bill, and trying to figure out other products they can design that will be different from a credit default swap, but yet be as dangerous as what happened in 2008. We need to give the regulators the power and authority to look at these products and put 100 percent transparency in place. That is what I want to see, and that is what my chairman, Senator LINCOLN, wants to see, and I think everybody in here agrees we ought to have full transparency.

Mr. DORGAN. Will the Senator yield for a clarification?

Mr. CHAMBLISS. Surely.

Mr. DORGAN. Mr. President, let me clarify that my position is to ban what are called naked or synthetic credit default swaps, not ban credit default swaps. Those with no insurable interest of any kind are considered naked credit default swaps. It appears to me that 70 to 80 percent of all credit default swaps are in that category; they have no insurable interest. So I did not want the Senator to think I want to ban credit default swaps. That is not the case. Naked credit default swaps, yes.

Mr. CHAMBLISS. I understand that. My point is the same, though, that if we give the regulators the authority to regulate those products, then I think we can deal with it better that way than targeting specific products to be eliminated or banned.

Among the many complex issues this body deals with every day, there are few more complicated than the issue of derivatives. However, we should not let the complexity of the swaps market be an excuse for ignoring good public policy and ensuring that our markets are both safe as well as functional.

In the past couple of years, a lot of people have become acquainted with one particular type of derivative known as, as we have just talked about, a credit default swap or CDS, which permits one party to transfer the credit risk or bonds or syndicated bank loans to another party.

Since AIG was heavily involved in CDS, it seems simple enough to blame swaps generally for what went wrong in the system. However, that would be an inaccurate oversimplification, because the real situation is much more complicated. We need to distinguish between credit default swaps and the actual underlying assets represented by those swaps, in this case mortgage-backed securities or mortgages that were themselves the root of the problem.

There are so many other types of swaps that U.S. businesses rely on every day to mitigate just about any risk they face in the ordinary course of doing business. Before we make a big policy change that makes these over-the-counter products less desirable to market participants or require that these products trade only on an exchange type facility, we need to ask ourselves whether this will even address the underlying problem.

Why take a chance in these uncertain times to make legislative and regulatory changes that could possibly make things worse, potentially dry up more capital or force the cost of business going higher? This does not mean there is not room for improvement. That is why I have joined with several of my colleagues today in developing an amendment to apply strong and reasonable regulation to the derivatives markets.

Let me be clear. We share the desire to apply stronger safeguards in these markets to regulate swap market participants and to ensure that swap transactions are more closely monitored by the regulators. I am absolutely convinced that the market volatility and financial meltdown of the recent past makes the case for more market transparency.

How can we in the Congress be sure of the outcome of sweeping reforms without first properly identifying the exact cause of these problems? How can we identify the cause of the problem without authorizing and requiring more transparency through the collection of necessary data?

For this reason, I have worked with several of my colleagues to develop an amendment that would require all swap transactions be made known to the appropriate regulators so effective regulation can be applied where necessary.

Additionally, there will be public dissemination of prices and volumes of completed swap transactions in order that investors and other market participants might be assisted in marking existing swap positions to market, making informed decisions before executing future transactions, and assessing the quality of transactions they have executed.

Beyond requiring more transparency, I also believe we should provide the CFTC and the SEC with the necessary authorities to more properly regulate those market participants who are potentially contributing to the type of risk that jeopardizes our financial system: swap dealers, Fannie Mae, Freddie Mac, large hedge funds, and AIG-type entities.

Many may not even realize that swaps are statutorily excluded from the current regulatory oversight of both the CFTC and the SEC. That is right; current law does not provide for clear regulation of swap market participants. Our amendment would ensure that these market participants are fully regulated and that their swap positions are cleared through a fully regulated clearinghouse. This is a huge departure from current law.

Speaking of clearing, we need to determine how best to encourage the clearing of certain derivative products without jeopardizing either the use of these risk management tools or the sustainability of our clearinghouses. For that reason, our amendment would enable true end-users, those businesses that use swaps to hedge their risk, not for speculative purpose, but true hedging, to avoid an expensive mandate to clear their swaps.

These businesses had absolutely nothing to do with the financial crisis and should not be punished with increased costs and burdens. We certainly do not want to discourage them from managing their risk, especially not in the current economic environment.

Last Friday, the Department of Labor published their unemployment report for the month of April. Again, unemployment rose from 9.7 percent to 9.9 percent. In my State, it is in excess of 10 percent. Why would we subject U.S. companies to expensive mandates when we should be advancing policies that lessen their financial burdens so they can employ more people?

Why is Congress considering slapping an additional cost on them in the form of a clearing mandate? This does not make sense, when these individual companies are the true end-users of the products they are trading in, and they were absolutely not the cause of the financial meltdown. Those mandates should be targeted and in such a way to lessen the risks of those large financial institution swap dealers who are responsible for the bulk majority of all swap transactions and, therefore, contributing to systemic risk.

But a clearing mandate is not appropriate for businesses using swaps to manage their risks and keep their costs down. This is very simple. If their costs go up, they will either pass it along to consumers or stop managing their risk, and then they certainly cannot afford to hire more workers.

Our amendment has a more targeted clearing mandate designed to reach those who are actually responsible for this crisis we are in, Wall Street and not Main Street businesses.

The Senate will soon have the chance to vote on this substitute amendment on derivatives. I am looking forward to further debate on our amendment because it will highlight a handful of significant differences between the derivatives language in the Dodd-Lincoln amendment versus our amendment. I believe our approach on transparency, on clearing, on end users, on capital requirements, and on trading mandates is much more appropriate, much more reasonable, much more business friendly, and, frankly, much more secure. My amendment will ensure that Main Street businesses will still be able to appropriately use derivatives in hedging their daily business risks, while ensuring that appropriate regulatory standards are put into place for the institutions and transactions that contribute to systemic financial risk.

If Congress is truly interested in addressing the problem as opposed to politicizing a solution, we can no longer ignore the complexities of these markets. We must seek to understand the legitimate purposes these complex instruments serve for large and small businesses in each of our States. Unfortunately, the language currently before the Senate misses the mark when it comes to the appropriate regulation of derivatives. The underlying bill would have many unfortunate consequences—some intended, some unintended—resulting from applying complicated regulations too broadly and will subject our American businesses to more risk, not less.

Three consequences of the underlying bill on derivatives are these: One, the users will pay huge clearing fees and pass on those expenses to consumers; two, no longer will businesses use the derivatives market, and they will pass on the higher, unstable market costs to consumers; and three, these businesses, instead of using U.S. markets, will simply take their business offshore. As they do today, they will trade in the dark, and no U.S. regulator will ever see what they are doing. That is not right. That is not what any of us intend to see happen.

The fact is, if we pass the derivatives provisions in the underlying bill, there is going to be a significant number of end users who take their business offshore. That truly is unacceptable. Our amendment makes good business sense and good common sense.

We have received support for our amendment from a wide array of businesses. These are not banks that stand to make profits. These are individual users. I have a letter from the National Association of Manufacturers which states:

> We have serious concerns that the current end-user exemption in S. 3217 (and in the pending Dodd Substitute) is not strong or clear enough. In addition, other provisions in the derivatives title could effectively eliminate the exemption for many companies and, in some cases, subject them to capital and margin requirements or higher costs. Conversely, the Chambliss/Shelby substitute includes a clear and strong end-user exemption that appropriately exempts businesses that use OTC derivatives to hedge their business risk from the regulatory scheme applicable to swap dealers.

From the Coalition for Derivatives End-Users, we have the following: That my amendment would ''strike the right balance between bringing fundamental and needed reforms to the over-the-counter (OTC) derivatives market while also ensuring significant and burdensome new costs are not necessarily imposed on business end-users.''

Lastly, I have a letter signed by several energy supply groups which states that they ''remain concerned about the potential impact of the proposed financial reform legislation on end-users.'' They go on to say that:

> Due to the broad definition of ''swap dealer,'' end users may be ineligible for the end-user exemption if they engage in hedging business risks in the ordinary course of business.

I ask unanimous consent that these respective letters be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL ASSOCIATION OF MANUFACTURERS,
Washington, DC, May 10, 2010.

DEAR SENATORS: The National Association of Manufacturers (NAM), the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states, urges your support for the Chambliss/Shelby Substitute Amendment (SA 3816) to S. 3217, the Restoring American Financial Stability Act.

While the NAM supports initiatives to prevent excessive speculation and improve transparency and stability in the derivatives market, it is critical that policymakers preserve the ability of responsible companies to access over-the-counter (OTC) derivative products. Manufacturers of all sizes use customized OTC derivatives to manage the cost of borrowing or other risks of operating their businesses, including fluctuating currency exchange, interest rates and commodity prices. In today's challenging economy, these risk management tools help businesses keep operations going, invest in new technologies, build new plants and retain and expand workforces.

NAM members believe strongly that any derivatives reform effort should ensure business end-users' continued access to OTC derivatives, providing them with greater financial certainty and allowing them to allocate resources to core business activities. In addition, we have called for clear exemptions

from central clearing, bilateral margining and exchange-trading requirements for business end-users to avoid drawing large amounts of capital from business operations, including job creation.

We have serious concerns, however, that the current end-user exemption in S. 3217 (and in the pending Dodd Substitute) is not strong or clear enough. In addition, other provisions in the derivatives title could effectively eliminate the exemption for many companies and, in some cases, subject them to capital and margin requirements or higher costs.

Conversely, the Chambliss/Shelby Substitute includes:

Clear exemptions from central clearing, bilateral margining and exchange-trading requirements;

A clear and strong end-user exemption that appropriately exempts businesses that use OTC derivatives to hedge business risk from the regulatory scheme applicable to swap dealers;

Clarification that any increases to capital charges on swap dealers are based on actual risk of loss and designed to promote the safety and soundness of the financial system rather than to penalize the use of OTC derivatives; and

Prospective application recognizing that market participants negotiated current derivatives contracts with an understanding as to their potential obligations based on the laws and market practices in place at that time.

The NAM's Key Vote Advisory Committee has indicated that all votes related to the Chambliss/Shelby Substitute Amendment (SA 3816), including procedural motions, may be considered for designation as Key Manufacturing Votes in the 111th Congress. Thank you for your consideration.

Sincerely,

JAY TIMMONS,
Executive Vice President.

COALITION FOR
DERIVATIVES END-USERS,
May 11, 2010.

TO THE MEMBERS OF THE UNITED STATES SENATE: The Coalition for Derivatives End-Users strongly supports an amendment that has been filed by Sen. Chambliss, SA 3816 to S. 3217, the ''Restoring Financial Stability Act,'' because it would bring important and needed reforms to the derivatives markets. If this amendment is brought to a vote, the Coalition urges you to support it.

The Chambliss amendment would strike the right balance between bringing fundamental and needed reforms to the over-the-counter (''OTC'') derivatives market, while also ensuring significant and burdensome new costs are not unnecessarily imposed on business end-users. Consistent with the Coalition's position, the amendment:

Provides explicit exemptions from central clearing, bilateral margining, and exchange trading requirements for business end-users that do not pose a threat to financial stability and that primarily use OTC derivatives to hedge business risk;

Ensures increases in capital charges continue to be based on risk of loss and aimed at promoting safety and soundness of the financial system, and not used to penalize OTC derivatives;

Provides legislative certainty that any new requirements are applied prospectively, recognizing that market participants negotiated existing trades based on the laws and market practices in effect at the time of these transactions.

Throughout the legislative process, the Coalition has advocated for a strong derivatives bill that brings full transparency to OTC derivatives market, imposes new regulatory standards on swap dealers and market participants whose activities in the OTC market could impact the stability of the financial system, and provides a strong clear exemption from mandatory clearing and bilateral margining for business end-users.

The Coalition remains concerned that Title VII of S. 3217 does not provide a strong clear exemption for end-users. If implemented, we believe many end-users of derivatives would be forced to divert precious working capital away from productive use to margin accounts, move their hedging practices overseas, or forego hedging altogether—leaving them exposed to the volatility and price uncertainty that OTC derivatives have so effectively mitigated. A survey and analysis conducted by the Business Roundtable and Keybridge Research found that a requirement to impose initial margin on OTC derivatives could lead to a loss of 100,000 to 120,000 jobs within the S&P 500 companies alone. The additional impact of variation margin could significantly increase this negative impact on jobs.

The Coalition urges you to support the Chambliss amendment. We stand ready to support any further amendments that will ensure a viable OTC market for companies across the country, and look forward to working with Members of the Senate to that end.

Sincerely,

American Petroleum Institute; Business Roundtable; Financial Executives International; National Association of Corporate Treasurers; National Association of Manufacturers; National Association of Real Estate Investment Trusts; The Real Estate Roundtable; U.S. Chamber of Commerce.

APRIL 29, 2010.

Hon. CHRISTOPHER DODD,
Chairman, Senate Committee on Banking, Housing, and Urban Affairs, Dirksen Senate Office Building, Washington, DC.

Hon. BLANCHE LINCOLN,
Chairman, Senate Committee on Agriculture, Nutrition and Forestry, Russell Senate Office Building, Washington, DC.

DEAR CHAIRMAN DODD AND CHAIRMAN LINCOLN: Commercial end-users support transparency and efforts to control systemic risk in U.S. financial markets. As you know, commercial end-users use over-the-counter derivatives as a risk-management tool to hedge against fluctuations in commodity prices, interest rates, and currency exchange rates. This process creates market stability, and keeps costs down for businesses and for the consumers who use their products.

To that end, we would like to express our appreciation for your inclusion of a commercial end-user exemption in your compromise language. This exemption is critical to ensuring that end-users are not faced with the costly requirements of mandatory clearing and bilateral margining.

However, we remain concerned about the potential impact of proposed financial reform legislation on end-users. Due to the broad definition of ''swap dealer,'' end-users may be ineligible for the end-user exemption if they engage in hedging business risks in the ordinary course of business.

To clarify and strengthen the exemption, we recommend the legislation define ''Swap Dealer'' as ''any person who—(i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly engages in the purchase and sale of swaps in the ordinary course of business; and (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps'' instead of as any person meeting any one of those criteria.

We would also ask that you include the following de minimis exception, which ensures that end-users whose swap transactions are nominal will be exempt from the designation of ''swap dealer.'' ''De Minimis Exception.—The Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers.''

Our concerns can also be addressed by clarifying that commercial end-users are not swap dealers. This can be achieved in the following way: ''In General.—The term 'swap dealer' means any person (other than a commercial end-user) who—''

Again, thank you for the inclusion of an end-user exemption. We would ask that you carefully consider our suggestions. Clarification of the definition of ''swap dealer'' is critical to ensuring that end-users have access to the capital needed to remain competitive in the global marketplace and expand job growth in the U.S.

Sincerely,

American Petroleum Institute; National Association of Manufacturers; Natural Gas Supply Association; US Oil & Gas Association.

Mr. CHAMBLISS. Mr. President, I have had numerous discussions with both the chairman of the Banking Committee as well as the ranking member and the chairman of the Ag Committee about this issue for weeks and months. I know we have the same goal in common: to ensure there is transparency in the marketplace and that we have regulators who will do the job we ask them to do. Frankly, I am not sure that was the case 5 years ago or even 2 years ago. But if we give these regulators the tools and if we give them the opportunity to look at every transaction, irrespective of whether it is going through a clearinghouse or whether it is over the counter, and they have the opportunity to review every large institution or every small institution that engages in these transactions and they also have the opportunity to look at the other side and see which companies are using these products or which entities are using them and they can then deal with those entities that become systemically risky—they didn't have that power and authority before, and we are going to give them that power and authority now—I have all the trust and confidence that they will use it in the right way and that with those tools and with that transparency and with the bringing of these trades out of the shadows and into the sunlight, we will be able to control the financial markets in a way that allows our end users, those who did not cause any of the problem and are not part of the problem, from being thrown into the same basket with those folks who did become systemically risky and caused the financial meltdown that occurred.

My amendment does that. It does it in the right way. I urge my colleagues to support the amendment.

I yield the floor.

The PRESIDING OFFICER (Mr. MERKLEY). The Senator from Arkansas.

Mrs. LINCOLN. Mr. President, I rise with great respect for my colleague from Georgia, my ranking member on the Ag Committee, and all his attempts and ideas on how to make our

economy stronger and better. I do rise to speak in opposition to the Chambliss amendment. Again, with the greatest respect for my colleague, the ranking member, he and I and our respective staffs spent several months developing draft legislation in the Agriculture Committee. I am unbelievably grateful to him and his staff as well as my staff. We have made progress. In the end, we accomplished 80 to 90 percent of what is now the Dodd-Lincoln substitute. But as with all policy decisions, some tough choices needed to be made. Senator CHAMBLISS and I simply could not resolve our final differences. We ran out of time, basically, in the committee.

Let me be clear. As chairman of the committee, I made the decision to move forward with a strong reform bill, a bill that was voted out of my committee on a bipartisan vote. I know to my colleagues the Agriculture Committee derivatives title is the only legislation to gain bipartisan support in this debate. We want to strive to continue in that vein and to work in a bipartisan way to get to a good resolution of something that is going to be beneficial to this Nation, to our economy, and that is going to gain the respect of Americans who have suffered from this financial crisis.

Unfortunately, the amendment being considered today by Senator CHAMBLISS and some of my Republican colleagues does not contain the essential reforms required to ensure the stability of our markets. It creates loopholes and fails to bring the transparency and accountability Americans are demanding of us at this juncture. This amendment would be detrimental to our economy and to our markets.

The derivatives title of the Dodd-Lincoln bill is strong reform. Our bill provides necessary transparency and accountability to our shattered financial markets and regulatory system. Today this derivatives market is completely in the dark with no—I repeat, no—regulation, no oversight, and no public disclosure. The Dodd-Lincoln bill will bring a completely unregulated market into the light of day for the first time ever. But it is important to point out, it is not regulation for regulation's sake. The steps we have taken in this bill have meaningful issues in terms of what they are dealing with. It maintains a narrow end-user exemption, appropriate restraints on the regulators, where necessary, and provisions that recognize we are competing in a global financial marketplace.

Many have commented about what might happen in these markets, in moving markets overseas. I will address that in a moment. But I believe all Americans are certainly demanding good, sound marketplaces. I think people globally are clamoring for those same types of sound marketplaces.

The facts speak for themselves. The Chambliss amendment does not meet the test of what our markets require. It is a stark reminder that if we do not act boldly in the face of the near collapse of our economy, tragic Wall Street abuses and abysmal regulatory failures, we will all suffer the consequences.

I have a number of concerns with the Chambliss amendment. Clearing and exchange trading is at the heart of reform, mitigating risk, reducing leverage, and forcing accountability on the derivatives marketplace. This amendment would remove the underlying bill's mandatory exchange trading requirement and remove the mandatory clearing provisions. This is not acceptable. We understand and know from our experience with the futures market what the clearing does and the stability it brings to the marketplace. It is absolutely essential.

This amendment removes real-time price transparency to the public. The Dodd-Lincoln bill provides real-time price transparency to the public and to the regulators. Without robust transparency, the markets would not function, and the regulators can't do their jobs. That real-time, 100 percent transparency is what moves these activities into those exchanges, into the clearing that is so necessary to ensure we bring that stability to the marketplace.

Information is power. This amendment will keep this power in the hands of those on Wall Street instead of giving it to Main Street. We have watched as these selected few on Wall Street have maintained their grip on these dark markets and on this information. What have they done with it? They have benefited themselves. It has not produced the kind of benefit across this great country that people in communities in places such as Arkansas and other States could see the benefit of that information because we had no access to it. Shedding sunlight on that, that sunlight, which is the disinfectant we need on Wall Street, is going to be critically important to making sure we are a success, and ensuring that transparency is here is part of what we have done in the Dodd-Lincoln bill.

If we do not capture the AIGs of the world, we cannot claim to have real reform. This amendment would miss many of the largest and riskiest players by narrowly defining both swap dealer and major swap participant and exempting too many market participants. More so, this amendment requires less of the largest, riskiest market participants. They will have fewer business conduct standards, fewer recordkeeping requirements, and fewer regulatory core principles to follow. This amendment also weakens the capital standards in the underlying bill. Customized, bilateral, over-the-counter transactions are less safe than those that are cleared and exchange trading. There is no way to get around that. We should expect more capital to back up those riskier transactions, not allowing the obligation to rest on the taxpayers or on the depositors in these banking institutions.

This substitute misses that opportunity in terms of making sure those riskier tools and those riskier transactions are required to have greater capital backing them as well as greater regulation, which is appropriate for their expanded risky nature.

To the comments of those who have said this is going to be pushed into other markets, into other countries, the American people are demanding stability. Consumers are demanding stability in our marketplaces. Why should we think that other countries are any different, particularly as we have seen what has happened in these other countries?

We can seize this as an opportunity to be a leader globally—globally—in this world to create sounder markets, stronger markets, not just for us but for the global economy, which we are such an enormous part of now and will continue to be in the 21st century.

I would prefer to see us seizing that opportunity to be a leader in those global economic markets, and I think we should with a good, strong, stable bill that will be recognized by both markets as well as consumers.

This amendment also delays the implementation of regulatory reform for at least a year. The American people are demanding real reforms, and why we would want to delay implementation is beyond me. The time is now. People are wondering why it has taken us this long already to take these actions, and I think it is clear we must get started.

This amendment removes an important provision that would require swap dealers to put the financial interests of State and local governments, retirement plans, pensions, university endowments, and retirees before their own. The stories of abuse in this area are alarming and need to be addressed.

Jefferson County, AL, is one of the starkest examples we have. Jefferson County was taken advantage of by Wall Street and is now on the edge of bankruptcy, in part because of a $3 billion derivatives deal on bonds that went wrong. Without any responsibility to those entities, we will continue to see these types of circumstances perpetuated, and we have to stop that.

This amendment creates loopholes and broadly defines hedging. We cannot have a situation where the exemptions swallow the rule. Under this amendment, few will end up being regulated, and we will be back to business as usual, and I think we cannot allow that to happen.

The Dodd-Lincoln bill gives regulators explicit authority to prosecute swaps dealers who are aiding and abetting those who commit fraud using swaps. The Chambliss amendment would remove that authority. The Chambliss amendment also fails to require registered entities such as swap repositories or swap execution facilities to have chief compliance officers, allowing these entities to avoid regulatory compliance and further, again, endangering Main Street investors.

This amendment completely removes an important whistleblower program

for commodities markets. The amendment also removes the underlying bill's additional stronger antimanipulation authorities. The amendment also removes important authority for the regulators to close loopholes and strips key anti-evasion language that would allow the regulators to go after anyone who tries to evade the law.

This amendment arbitrarily moves jurisdictional lines and removes more than 30 years of good-faith agreements between regulators, ignoring the expertise of individual agencies and jeopardizing the ability of regulators to act quickly. This is a dangerous path to go down for the ranking member of the Ag Committee, and I hope we will be able to stop this amendment and continue to work in a way that will bring about the kind of solid regulation, transparency, and oversight that needs to be in this bill.

Finally, the Dodd-Lincoln bill includes important conflict of interest provisions that would allow the regulators to ensure that no market participant unduly influences or monopolizes the market. What does the Chambliss amendment do with this provision? It would eliminate it—in effect, handing more power over to Wall Street.

These changes are simply an effort to weaken the bill and riddle it with loopholes. I understand many of my colleagues are being pressured to take this path. But we must forge ahead and enact meaningful—meaningful—reform. The American people deserve no less. They have seen what this financial crisis has done to them—in middle America, where they have seen their savings for their children's college funds, their retirement funds, other things put at risk because of risky businesses and risky deals that have happened in a small group of Wall Street banks that have chosen basically to take those risks, with unfortunately, the liability falling on the depositors as well as the taxpayers.

The same claims and worn-out, catch-all defenses of ''unintended consequences'' or ''driving business overseas'' have been used for decades as reasons to weaken financial reform efforts, and critics are using the very same arguments again today. We are here to tackle complicated problems and find real solutions—meaningful solutions—that will again bring the kind of confidence to the marketplace and consumers we need to be able to strengthen our Nation and our marketplaces and our economy to create the jobs all Americans want to see, and to set the example globally of what good, strong regulations and solid markets can do in terms of growing the global economy.

We certainly should not squander the opportunity for historic reform, nor support any efforts to weaken it. Therefore, I intend to vote ''no'' on this amendment, and I respectfully encourage my colleagues to do the same.

Mr. President, I know I have other colleagues on our side who want to speak on this amendment, and I know there are others on the Republican side. I would encourage all of our colleagues to come to the floor to take the opportunity to speak on this amendment. I know Chairman DODD is anxious to move the bill, as well as others, and we have a great opportunity here to visit about and debate this portion of the bill, and I encourage my colleagues to do that.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. Mr. President, once again, we are debating a comprehensive bill. This one, of course, is only 1,407 pages, as opposed to 2,700 pages that did health care. But this probably does not affect everybody—just almost everybody. This could have been three separate bills, and we could have put a lot more effort into getting it right if it were three bills instead of one. This is one that takes care of the problem with big banks. There is another one that provides consumer protection that people are going to be stunned at, to find out every single transaction, practically, they can make can be controlled by a new board that has no oversight, gets to write their own rules, and has virtually an unlimited budget.

But the piece we are talking about right now has been labeled ''derivatives.'' I keep thinking maybe it has been labeled ''derivatives'' so the American public would not know what we are talking about. It is important they know what we are talking about.

I rise in strong support of Senator CHAMBLISS's effort to improve this ''derivatives'' section in the bill. But I am disappointed Senator CHAMBLISS is even required to offer his amendment. Senators LINCOLN and CHAMBLISS were well on their way to moving toward a bipartisan package of reforms for the derivatives market.

This is the market used to hedge against risk, and if we make a mistake in dealing with it, businesses will suffer, students will suffer, farmers and ranchers will suffer. Many businesses want to lock in a price, so they hedge their risk. They make a long-term commitment to purchase something at a particular price, so they have certainty and avoid the risk that the price will change.

For example, many airlines use this market to lock in long-term fuel prices they can rely on. That is a derivative. That contract can be bought and sold as the market changes—again, to take an acceptable risk. Sometimes I think we call it a derivative, as I mentioned before, so the American people will be confused and will not pay attention.

Senators LINCOLN and CHAMBLISS were on the verge of putting together a key piece of financial reform in a bipartisan fashion. Unfortunately, buoyed by the passage of the extraordinarily partisan health care reform bill, the White House intervened in negotiations. They urged an end to bipartisan negotiations. They pushed the bill further to the left, and we are now faced with a product that will make it harder for American companies to obtain capital or to assure future purchase prices for essential products. This will drive some American jobs overseas, and perhaps entire businesses as well.

It is disappointing that this is becoming commonplace in the Senate. During the health care reform debate, I worked with five other members of the Finance Committee on a comprehensive health care package. We were making progress on a bipartisan bill when the majority, with the guidance of the White House, decided to go it alone, decided that was better politically.

Now we are having a debate about the future of the financial industry. We are working to protect our economy from future collapse and, unfortunately, we are having this discussion in a mostly partisan manner because the White House is interested in scoring some more political points. It is an election year, and these are election-year politics at their worst, and I am disappointed it is becoming the norm.

The White House believes they can win political points on this issue because the word ''derivatives'' is something of a boogieman. People hear that word and they assume it is a group of Wall Street bankers plotting how to increase their end-of-the-year bonuses, as they seek to ruin the rest of the economy. My constituents are told by fear mongers on the left that derivatives are risky transactions, and they are misled into believing there is nothing about derivatives that is useful to ordinary businesses.

The facts do not support those claims. Derivatives are, by their very nature, measures to help limit risk. It is hedging the bet. The vast majority of Fortune 500 companies and many smaller companies are involved in the derivatives market. Employee pension funds are involved in the derivatives market. The agriculture derivatives market is one of the oldest and most established financial markets in the United States because agriculture can be an inherently risky business unless you lock in a favorable price. Producers are at the mercy of the weather, transportation networks, varying input costs, and the global supply of agricultural commodities. These unique market conditions mean that without risk management, markets fluctuate wildly.

I think it could be helpful to those listening to the debate to try to make clear how these transactions actually work. Oftentimes, in business, the greatest potential for profit involves the greatest risk. It only makes sense I would have greater potential to make money if I invest in a startup company than if I invest in a Treasury bond or an old established company. It is also more likely I will lose money with my

investment if I invest in that startup company. I may want to limit the chance I will lose all my money. I may want to figure out a way to lessen my risk. Another company may believe my investment was good, so I will essentially sell them some of my investment in the startup company—along with my chance for maximum profit—in order to have money to invest in a more stable Treasury bond and less profit—hedging my bet. The entity that facilitates that sale is a swaps or derivatives dealer, and they play an important role by helping find willing buyers and sellers to help companies limit exposure—to hedge the risk.

The goal of this legislation should be regulating the market in a way that ensures companies, individuals, and other entities can have access to as much money for investment to create jobs as possible, at the same time that we create a situation where we will never again be forced to bail out the biggest banks, and where we never allow another AIG to occur.

I am not convinced the bill as written addresses the concerns, although I feel confident the bill will lead to less access to money for businesses at a time when our economy is struggling.

In my home State, I am hearing from the energy industry and from agricultural groups that the bill has the potential to treat companies that are trying to limit risk as major banks. Although the bill does provide an end-user exemption, it is unclear if companies can avoid being misclassified as a swap dealer or major swap participant, and if they are misclassified, they lose their end-user exemption.

The Chambliss amendment clarifies the end-user exemption to ensure that bona fide hedging transactions, including those used by a wheat grower in Wyoming or a power company in the Midwest, remain regulated in a reasonable fashion.

One of the difficulties with the way we are doing things here with most of the work being done on the floor is that you cannot pick the glimmer of an idea out of one and the glimmer of an idea out of another and put it together and have a good amendment. Plus, there is all this pressure that the party line should be protected. That is not what this amendment involves. This is trying to make a bona fide change to it. It has to be done in a more global way than we would like, but we are limited on the number of amendments we get to do. There is already talk about how we need to close this debate. I know of dozens of amendments out there that people believe are good changes to this bill to make it a working bill that we probably will not get to debate.

In a meeting yesterday with Federal Reserve Chairman Ben Bernanke, the Chairman emphasized that what has become known as section 106 provisions remain problematic. In the current version of the legislation, the provisions have been moved to section 716 and require that swap business be conducted and affiliated separate from the FDIC-insured banks.

Chairman Bernanke didn't think this section was nearly ready to go, and I suspect the FDIC folks don't either. Although the idea appears to make sense on its outset, the provision will further reduce access to investment money to create jobs as banks are required to hold additional money in their related businesses to limit credit exposure. Instead of using the capital at the bank to limit credit exposure, they are forced to have a second pot of money that they will be unable to lend. The provision will result in less investment money entering the market. It will lead to further consolidation of the market because fewer institutions will be able to meet the credit risk requirements, and it will increase costs to end users.

Putting on my hat as the ranking member of the Health, Education, Labor and Pensions Committee, the Chambliss amendment also helps resolve a concern that pension and retirement plans have with the Lincoln-Dodd substitute. Many people do not realize that pension plans dislike big fluctuations in the market. Private pension plans invest for the long term and would prefer to have steady, long-term growth rather than investing in a volatile market which could cause a company's pension obligation payments to skyrocket when the market falls. Pension plans enter into swap agreements and derivative contracts to hedge price fluctuations and to keep risk at a minimum. For example, pension plans use these contracts to make sure they don't have too high of an interest rate that may be unsustainable or too low of an interest rate that will give too low a rate of return that would not provide enough money to pay pensions as they come due. Even the Pension Benefit Guaranty Corporation, PBGC, uses swaps and derivative contracts to dampen the value swings of the pension trust funds.

Recently, 401(k) plans and individual retirement accounts, IRAs, have been using ''stable value funds'' as an alternative to money market funds to offer a very stable and steady increase of earnings. These stable value funds are stable because of the use of swap contracts, again, because they make sure the underlying investments don't go too high and don't go too low.

Originally, Senator DODD's language in the Banking Committee-reported bill may have caused pension and retirement plans to register as ''major swap providers.'' This, of course, would not work because the regulation and registration requirements may have run afoul of pension requirements for solvency. Senator LINCOLN tried to remedy this, but her solution was to place the swap dealers on the spot by requiring special paperwork for just touching a swap contract for a pension plan.

I believe the Chambliss amendment strikes the right balance. Pension plans are not trying to create a market in swaps, nor are they trying to use swaps to game the markets. Pension plans that use swaps assure pension funds will be there when needed for the people retiring, and the approach taken by the Chambliss amendment allows that to happen.

The Chambliss amendment is a far superior effort to the bill we have on the Senate floor. At one time I was confident that we would be seeing a bipartisan, workable Lincoln-Chambliss provision. It is unfortunate the White House got involved, pushed this bill to the left, and is now pushing us to pass some sort of financial reform legislation—any sort at this stage—at the expense of passing a strong, workable bill. Congress needs to stop with this ''shoot first, ask questions later'' approach, or as we call it in Wyoming, the ''ready, fire, and then aim'' approach that might never hit the target.

I hope my colleagues in the Senate can support the Chambliss amendment or at least get together and cover some of the things we have talked about that are a major problem with the bill. This is one-third of what we are talking about, and it is going to have the potential to ruin a lot of things for individuals, working Americans. We don't want that to happen.

I ask my colleagues to support the Chambliss amendment. I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, let me begin by expressing my gratitude to Senator LINCOLN of Arkansas and Senator CHAMBLISS of Georgia and members of their committee for their tremendous work. In fact, there is some overlap in membership. I think a couple members of the Banking Committee are also members of the Agriculture Committee.

I know how hard they have worked on what is such a critically important piece of this legislation. It is probably an area with which a lot of people are not terribly familiar. A lot of the language we use in describing this area of the bill sounds pretty foreign to a lot of people, but it is terribly important we get this right, for reasons I will try to briefly explain this afternoon.

For many Americans who aren't necessarily experts on our financial system, this is one of the most confusing parts of our work, but it is also incredibly important in terms of our overall reform of the financial system. I am sure this has already been described by the Senator from Arkansas and the Senator from Georgia, so this may be somewhat repetitive.

People ask me: What is a derivative? It is a fancy word, ''derivative.'' Really, what it amounts to, in simple terms that most Americans can understand is, it is a bet. It is a wager, in a sense—an important wager but nonetheless a wager. It is a wager placed on the future value of something, either as a future protection against change in the

value of that instrument or a way to make some money off of it. It is a legitimate operation, provided it is done properly. There is nothing wrong with them. In fact, they play a very important role. If used responsibly as a way to hedge a commercial risk, they are tremendously important.

Many of us have heard about, for instance, the candymakers. We hear this example all the time. Candymakers are able to keep their costs stable as a production company through the use of derivatives. If you are an end user, as they are called, and your costs depend upon future prices of a commodity such as sugar or other additives, that is a way to stabilize those costs and provide some certainty to that particular company; or it can be the future direction of interest rates which can have a huge impact on the cost of a product and the success and well-being of a company as well.

Derivatives can serve as a form of insurance against an unexpected spike in either the price of a product or interest rates. But the problem is this: As companies have come up with new and innovative ways to use derivatives—and they have—much of this activity has taken place in the shadow economy where there is little sunlight at all to expose what these instruments are and how they affect the overall economy of our country. They operate outside the supervision of any regulator, and that is where the problems arise. Not in derivatives themselves, but how they are perceived, how they are seen.

That is how one night in September of 2008, I found myself, along with several other Members of this body, in a room not far from where this Chamber exists listening to the Chairman of the Federal Reserve Bank, Mr. Benjamin Bernanke, and Treasury Secretary Hank Paulson as they explained what had happened to AIG, the largest insurance company in the world, and what would need to happen to fix the problems posed by the activities in which the company was involved.

Just as some international corporations create shell companies in the Cayman Islands to avoid tax responsibilities, AIG created a subsidiary called AIG Financial Products to sell complex and risky products. It was thus able to take advantage of the fact that there was no regulatory requirement that AIG hold enough capital to cover its exposure to these products.

Meanwhile, because AIG was rated AAA by the rating agencies as a company, their counterparties didn't demand much in the way of collateral or margin. Essentially, AIG guaranteed other people's bets; that is, these counterparties—Goldman Sachs, Societe Generale, a French bank—without having the money to pay them if those bets failed. AIG was able to do so without anyone knowing how many of these guarantees they had actually sold. As we now know, they sold trillions of dollars' worth. When it turned out that AIG couldn't pay up, our government—or more sadly, the American taxpayer—was left holding the bag. We were faced as a country with the unprecedented and unpleasant taxpayer bailout to prevent this shocking failure from bringing down our whole economy, or melting down as we were warned.

To make the problem worse, we now know AIG wasn't alone. Unregulated derivatives also helped to mask the credit-worthiness of nonfinancial users such as the Government of Greece. We all know about that and what has happened over the last few days and the problems created in Europe as a result of that problem, to their own ultimate or eventual detriment, as we now know. Hedge funds such as Long-Term Capital Management, energy companies such as Enron, industrial concerns such as Proctor and Gamble, and a wide array of governments at home and abroad have all fallen prey to the problems in the derivatives market.

I think the solution is becoming obvious—at least we hope it is—to put an end to risky, uncovered bets that leave taxpayers and our financial system as vulnerable as it has been. That is why capital and margin requirements, imposed either by regulators or by central clearinghouses, are so critically important in this area of our economy.

Chairman Bernanke of the Federal Reserve described margin requirements as ''an appropriate cost of protecting against counterparty risk.''

The sad truth is this solution has been obvious for some time. You don't need to have just the events of the last couple of years to understand this problem. You can go back 16 years ago. At that time, in 1994, the General Accounting Office produced a report entitled ''Financial Derivatives: Actions Needed to Protect the Financial System.''

At the time of their report, the General Accounting Office determined that the size of the derivatives market was $12.1 trillion—not an insignificant amount in 1994. The report described risks arising from the interconnected relationships between dealers of derivatives and end users, not to mention the rapid growth and increasing complexity of derivative activities because the relationships between the major derivatives dealers and end users, and the exchange-traded markets were so close, the failure of any one part of this system could prove devastating to our entire financial system. This, we knew in 1994, 16 years ago. That was their report.

By 2008, 16 years later, the derivatives market had grown from $12.1 trillion that I mentioned a few minutes ago to an astonishing $600 trillion in 16 years. In a related story, it had gone almost entirely underground.

Each time the Congress had a chance to act, it chose a legislative path that created even more loopholes, more opportunities for these risks to migrate to unregulated pockets of our economy. In 2000, the Congress passed the Commodities Futures Modernization Act which, to a large extent, explicitly exempted over-the-counter derivatives from regulation by the CFTC and the SEC.

So whereas in 1998, 41 percent of derivatives were traded in the shadows, by 2008, 10 years later, that proportion grew to 60 percent—almost a 20-percent increase in 10 years.

Essentially, over time, our financial system came up with more and more ways to take bigger and bigger risks with fewer and fewer safeguards and less and less supervision. That, of course, as we now painfully have learned, was a recipe for disaster, and disaster is what we got. That is why Chairman LINCOLN, Senator JACK REED of Rhode Island, Senator JUDD GREGG, Senator SAXBY CHAMBLISS, and others of our colleagues have worked so hard over these last number of months to bring the derivatives market out of the shadows and into the sunlight where they belong. That is why the derivatives language in this bill is so critically important if we are going to live up to our descriptions of this bill as a major reform of the financial markets in our country.

For the first time in our Nation, over-the-counter derivatives would be regulated by the Securities and Exchange Commission and the Commodities Futures Trading Commission. It includes the Banking Committee's tough requirements for central clearing, exchange trading, capital margin, and reporting that are critical to reducing systemic risk and ensuring that taxpayers would not have to clean up the mess resulting from another AIG implosion.

I know the financial sector lobbyists don't like these rules. In fact, over 1,000 corporate lobbyists have flooded this town—this body, in fact—in an attempt to water down these proposals.

But Joe Dear, the chief investment officer of the California Public Employees Retirement System, explained it well when he said:

> Every firm has reasons why its contracts are ''exceptional'' and should trade privately; in reality, most derivatives contracts are standardized—or standardizable—and could trade rather on exchanges.

Thanks to the work of Senator LINCOLN and the Agriculture Committee, commercial end users have been carefully exempted from these new rules, so companies such as those candymakers I talked about can keep hedging their commercial risks. In fact, the market in which these companies operate will become safer and less expensive because of the new rules for big players: the swap dealers and major participants.

Those big players—the VIPs in the derivatives casino—will have to register with the SEC and CFTC and meet strict requirements for business capital, business conduct, and reporting.

Every single transaction will be reported through a clearinghouse or trade repository or directly to a regulator.

The SEC and CFTC will have enhanced authority to police these markets for fraud, manipulation, and abuse. Those don't sound like radical ideas. Those are commonsense proposals that I think most Americans can understand, even if they don't appreciate the complexities of these instruments.

The combination of these regulatory tools will provide market participants and investors with a lot more confidence during times of crisis, taxpayers with protection against the need to pay for mistakes made by companies, derivatives users with more price transparency and liquidity, and regulators, of course, with more information about the risks in the system.

Instead of an underground gambling club, derivatives will be traded in a well-regulated, transparent market, with rules that must be followed and safety provisions that must be respected.

Everyone is a winner. Derivatives are valuable and important, and we need to have them out there to help our economy grow. Why should some of these ideas be so frightening to people? It seems to me that if we do exactly what we are talking about here, everybody is a winner in the chain, particularly the derivatives users who will have much more clarity, and regulators and taxpayers are protected against abuses that will occur if we don't try to provide what is being proposed with this legislation. I welcome these improvements. Again, this is a debate back and forth.

Despite a lot of hard work between Members of this body to come to some common answers, there are differences that emerge in this debate. The substitute being offered by my friend from Georgia has no requirement for transparent trading and weakens, in my view, those safeguards for major market players.

It loosens capital requirements on the large Wall Street firms. That is a huge mistake, in my view, after what we have gone through that would practically beg for another AIG-type crisis.

The substitute limits the central clearing requirement to only those trades that take place between the very largest firms, providing a blanket carve-out to other financial firms, and letting much of the market continue to operate without the accountability, transparency, and regulation that I think is so critically important.

Unfortunately, there is sort of the status quo. There is some improvement. I acknowledge that. We have an opportunity to make a difference now with the proposals being made by the Agriculture Committee. The status quo is a system in which companies you have never heard of take risks they cannot back up in markets nobody can see.

When they collapse, as they inevitably will—one of the things we have said over and over again in this bill is that we are not going to stop the next economic crisis. We are going to have them. The question is, Do we have the tools in place to minimize collapses when they occur? That is what we are trying to do with this bill. Even with the Agriculture Committee proposals, I cannot imagine—and I am sure I am speaking for her when I say this—there is no suggestion that we are going to stop another company from having great difficulties. We want to minimize that when it happens so it doesn't migrate into the rest of the economy. So we are looking to minimize that kind of chaos that can occur when some company collapses for reasons unrelated to this, as we saw with AIG. When they fell, the price the country paid was vastly in excess of one company having difficulties. Taxpayers were put on the hook to fill the capital holes when they occurred.

This has to stop. This market needs oversight and regulation. It needs to exist, as well, if our economy is going to grow and jobs are to be created. It has been 18 months since AIG proved that once and for all. It is time to bring this trail of destruction to an end and take the steps necessary to allow this market to operate and people to make these kinds of investments and hedge against the kinds of problems that can emerge down the road, so they don't collapse for reasons unrelated to their own difficulties.

That is why hedging is important and why derivatives are important. But also, these safeguards need to be in place if everyone is going to be a winner, as a result of what we are trying to achieve with this legislation. There are debates about various aspects of this bill, and I look forward to that discussion.

I hope we will reject this particular proposal, with all due respect to it, and adopt what has been proposed by the Agriculture Committee and consider that there are additional changes we may work on in order to satisfy some legitimate interests. It seems to me we ought to vote on this proposal and move on to other aspects of the legislation.

With that, I yield the floor. I see my friend from Nebraska as well as my colleague from Rhode Island.

The PRESIDING OFFICER (Mr. FRANKEN). The Senator from Nebraska is recognized.

Mr. JOHANNS. Mr. President, I rise to support the Chambliss-Shelby derivative substitute, and I am very pleased to indicate that I am a cosponsor of that amendment.

There is no doubt, when you are talking about derivatives, you are talking about contractual obligations that are as complicated as any financial industry in our system. So going about trying to figure out how best to regulate them is no easy task. I think that is acknowledged on both sides.

Both the Banking and the Agriculture Committees have wrestled with what is the best approach to regulating this market that, to date, has been somewhat unregulated, to say the least. I regret to say that the current derivatives title that is in the bill being debated—if you study it—is overregulation 101.

I worry about the host of unintended consequences that will beset our economy if it passes in its current form. It is not accidental that there has been article after article pointing out how much heartburn there is on both sides of the aisle relative to the current proposal that is being debated.

The Chambliss-Shelby derivatives substitute is a sensible approach. I have talked to dozens and dozens of those impacted. I have to tell you they are very concerned about the downside impact on our economy.

They say it is unnecessary with the new, robust clearing regime that is in place. Yet the Dodd bill has an exchange requirement.

Why would we not enact meaningful clearing regulations and then add another layer on top, if necessary?

Additionally, I worry about the trickle-down effects for community banks that hedge their interest rate risks with large banks. I come from the State of Nebraska. I don't even think there is a Wall Street in the State of Nebraska. We are basically small community banks. I have had some of our smallest banks warn me about the dangers of the Dodd proposal.

If these larger institutions are banned from engaging in swaps, as the Dodd bill would do, who will work with the community banks to keep interest rates low for our farmers, ranchers, and small businesses?

Furthermore, banning banks from engaging in derivatives isn't going to stop the practice. We don't pass laws for the world. We pass laws for the United States. All we are going to end up doing is sending this $600 trillion market out of this country. In fact, I had a small community banker in my office recently who said to me: MIKE, these products are absolutely essential to what I do.

If they are forced to another part of the world, we will be forced to acquire that product from another part of the world.

Driving this activity back into the dark—which is what we would do if that were to happen—and actually increasing our risk and putting it in an economic climate outside the United States is a meltdown recipe.

The underlying bill treats farm credit system institutions similar to the big Wall Street firms. It doesn't exempt them from coming up with costly capital and margin requirements. Does anybody believe for a second that isn't going to hurt farmers and ranchers and the cost of their loans? I was the former Secretary of Agriculture. Please, believe me, you cannot do this and not expect to have a very negative consequence on farmers and ranchers and small businesses.

Farm credit institutions, our farmers, and farm cooperatives had nothing

to do with this financial meltdown. Yet they are being dragged down with the ship.

Finally, certain trades are simply so unique but so necessary and so specialized that the clearing requirements simply don't work. That doesn't mean they should not be transparent or that they should not be disclosed, but we should recognize the uniqueness of that situation. Why punish these trades that may pose no systemic risk by imposing higher capital requirements? Yet that is what the Dodd bill does.

The bill before us has the potential to have very negative impacts on our economy. It is simply an overreach. I am not the only one here today who has serious concerns.

The White House, the Federal Reserve, former Federal Reserve Chairman Paul Volcker, and the Chair of the FDIC have raised similar concerns relative to this approach.

On April 30, 2010, in a letter from FDIC's Sheila Bair, she says this:

> If all derivatives market-making activities were moved outside of bank holding companies, most of the activity would no doubt continue, but in less regulated and more highly leveraged venues.

A Federal Reserve staff memo says this:

> The prohibition would not promote financial stability or strong prudential regulation of derivatives or derivatives dealers; would have serious consequences for the competitiveness of U.S. financial institutions; and would be highly disruptive and costly, both for banks and customers.

My point exactly. Finally, Chairman Volcker also expressed concerns with the derivatives title of the bill:

> The provision of derivatives by commercial banks to their customers in the usual course of a banking relationship should not be prohibited.

I worry that at some point the Senators are going to come to the floor and pass this mess, and we are going to be stuck with it.

The Shelby-Chambliss amendment is a thoughtful and reasonable approach. It will increase transparency and government oversight of the derivatives market. If we do what is proposed with this Dodd bill, we will push derivatives right back into the shadows. They will be unregulated and they will occur in another part of the world and we will bear the risk and the cost of that.

These individuals simply used derivatives—these people I am talking about are farmers, ranchers, farmers co-ops—to protect themselves from risk. They are not Wall Street speculators.

This proposal from the Shelby-Chambliss approach simply says: Let's use common sense when it comes to the derivatives market. It brings the current unregulated over-the-counter derivatives market into the light where transparency is paramount.

This is an enormous departure from current law. In fact, it is a 180-degree change. It attempts to bring swap trades onto a clearing platform. Yet it also recognizes that companies across our country use these complex products as part of their business activity every day to protect themselves from unreasonable risk.

Look who is supporting this proposal. This approach has gained the support of the National Association of Manufacturers. That can hardly claim to be Wall Street insiders.

The alternative recognizes the negative consequences businesses would face with too rigid a law. Those dangers are obvious—loss of jobs, jobs moving overseas, constriction in liquidity, lack of credit, higher interest rates for farmers in my State, and higher farm input costs.

It also distinguishes that these businesses were not part of the economic meltdown. They are not the AIGs of the world. Instead, they are the companies that use derivatives to manage their finances to keep down their costs, to control interest rate fluctuations, to manage currency volatility and other risk mitigation tools.

The recent prices revealed how inadequate our oversight of derivatives was and how complex this area is. But if we adopt this blanket approach on the rhetoric of punishing Wall Street, what we will do is punish our farmers, our ranchers, our small business people. We will punish the people who are working this area by literally eliminating their jobs.

I thank Senators CHAMBLISS and SHELBY. They understand what is at stake. This is a reasonable approach and an approach I am glad to support.

I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. REED. Mr. President, I rise today to urge my colleagues to reject the proposal by Senator SHELBY and Senator CHAMBLISS. It is well intentioned. It is designed, as other proposals are, to try to provide some appropriate regulation to a very complex and complicated area of financial transactions—derivatives.

Like my colleagues, I have spent some time trying to understand this area. The only major point I can make is that in concept, derivatives are simple. It is a contract that derives its value from reference to another entity such as soybeans or mortgages. That is where the simplicity stops.

These financial instruments are incredibly complicated, and they have been made more so by very sophisticated financial engineers on Wall Street.

What we have recognized in the last several months is we have to take an appropriate step to regulate their sale in the United States and, frankly, influence the worldwide sale and use of derivatives.

The Dodd-Lincoln proposal in this bill is, I think, not only a principled but an effective way to deal with the issue of the sale and use of derivatives. They start off with a premise which is fundamental: We need transparency in the marketplace. There was no transparency in the marketplace when it came to derivatives.

Senator LEVIN held hearings which brought forth individuals from Wall Street, from Goldman Sachs. Frankly, if you listen to the hearings, even they did not understand the products they were selling—complicated, deduced, created by Ph.Ds in mathematics using supercomputers. We need transparency. People have to know what they are selling. Apparently, some people on Wall Street did not even know what they were selling. But certainly consumers have to know what they are buying. Transparency is the key.

The way you arrive at it, in my view, is the way this underlying legislation Chairman DODD has sponsored, along with Chairman LINCOLN, does.

First, it establishes the requirement that all derivatives transactions be reported to a repository so that regulators will have a sense of where the market is moving in terms of specific products.

Second, there is a requirement that you clear these products. Clearing is absolutely critical because an over-the-counter transaction is bilateral in nature. It is someone dealing directly with another party. What you have there is the danger of counterparty risk, the fact that one side of the transaction cannot perform. They go bankrupt, they do not have the resources, they miscalculated tremendously as to the nature of this transaction. And their failure affects other financial institutions.

In those bilateral situations, the danger for counterparty risk is significant. To minimize that, you put it on a clearing platform. You put a party between the two parties of the contract who will assess collateral and margin and do it in a systematic way. These transactions on a clearing platform will be more transparent and there will be reduced risk between counterparties. That is, I think, a sensible and, at this point, nondebatable point because the Chambliss proposal also has a clearing platform aspect to it.

But the next step—and I think it is an essential step—is to move to a trading platform because there you further reduce and manage counterparty risk because it is not just an intermediary clearinghouse that is handling the risk, it is participation in a market. It is individuals who broker deals who come in and buy and leave. It is at the heart of price discovery because the key aspect in all of these discussions is what is this instrument worth? Is it worth $100 or $2? If I am betting it is worth $100 and, of course, it is $2, I will lose. If I am betting it is $5 or $6 and it is $100, I lose on the other side.

Part of this is essential price discovery. This is an esoteric point. It goes right to the nature of our markets—price discovery. That is why we all claim markets are the best form of economic transaction because in a market, you know the price, and if you can meet the price, you can make the transaction.

One of the things that is implied in a marketplace, though, in Econ 101, is perfect information. Buyers and sellers each know what it costs. One of the problems with the derivatives markets is information is asymmetric, it is skewed, it is dramatically skewed to the Wall Street insiders who designed these products. That was one of the lessons of the Goldman Sachs hearings: Who knew what these things were? They did not even know, but they knew a lot more than people they were selling them to.

We have to reduce that asymmetric nature of the market, and the best place to do that is not simply clearing a product, having someone say you have to have this much margin if you want to participate, but actually trade in the product. Again, this is not an academic issue.

Let me paraphrase a story from Michael Lewis's book called ''The Big Short.'' On February 21, 2007, the market began to trade an index of collateralized debt obligations. They called it the TABX—T–A–B–X. For the first time, everyone in the marketplace could actually see on a screen what these CDOs were worth, what someone was going to pay for them. No longer were they waiting on just the dealer, the Wall Street insiders saying: No, no, these are great, buy them; they are terrific, buy them. There was a price. The price confirmed a simple thesis in a way that as Lewis says no amount of conversations with market insiders ever could ever have.

After the first day of trading, those AA-rated tranches closed at 49.25 from a par value of 100. They lost more than half their value in one day of trading. There was now this huge disconnect, and I quote:

> With one hand the Wall Street firms were selling low interest rate-bearing double-A rated CDOs at par, or 100; with the other hand they were trading this index composed of those very same bonds for 49 cents on the dollar. In a flurry of e-mails, their sales people at Morgan Stanley and Deutche Bank tried to explain to clients that they should not deduce anything about the value of their bets against subprime CDOs from the prices on these new, publicly traded subprime CDOs. That it was all very complicated.

Trading illustrates the real value of a product. When the Shelby-Chambliss proposal says, We are not going to trade these, what they are saying is business as usual. Let's let those folks on Wall Street tell us what they are worth. Tell it to the banks, the small community banks, tell it to the farmers, tell it to all those business men and women at the National Association of Manufacturers, this is what it is worth. They will not have to explain the fact that a market might rate it half of what they are claiming the value is.

If we really want to reform what is happening on Wall Street, we are not going to abandon the requirement to trade as many products as we can trade.

I will admit some products are so unique that a trading market might not be established. But the presumption by Wall Street—in fact, I think the head of J.P. Morgan said practically 70 percent of the derivatives could be cleared and probably a significant fraction of that could be traded. If you want transparency, if you want price discovery, if you want efficient markets, reject the Chambliss proposal, support the Dodd proposal.

There is another aspect of the bill, and that is section 716, which does not deal with the mechanics of trading derivatives as much as who can do it. Can it be in a bank? Must it be separated? There are discussions about different approaches. Senator LEVIN and Senator MERKLEY have an approach that bars proprietary trading, that would leave that out of the bank but still leave traditional hedging within the bank. That is part of the debate. That, I think, is a seriously significant open question. In my mind, there is absolutely no question that to accept the Chambliss-Shelby approach that doesn't require trading is the wrong way to proceed.

There is another issue here, too, and that goes to the nature of these over-the-counter contracts. Some of them could be cleared, but some are so unique they cannot. It goes to the exemption for end-users. In the Dodd bill, they have made a successful attempt to separate those over-the-counter transactions which have an economic rationale—it is an airliner hedging their fuel prices—and they have done it in a way which makes sure that this is not a loophole for the sophisticated financial engineer to exploit but a way in which business can continue to conduct their operations.

The exceptions in the Shelby-Chambliss amendment are much too large. In fact, I think this is a drafting error, but as I read the amendment, it could be read as only requiring clearing of swaps between two counterparties under common ownership within the same company, which essentially means there is no requirement whatsoever. I do not think that is what the sponsors proposed but that is what the language says, at least as I read it.

If you want huge loopholes to begin this process, support this amendment. If you want to maintain well-structured exemptions for the economic use of derivatives, that is incorporated within the underlying Dodd-Lincoln bill, and it makes a great deal of sense to me.

There are issues here we have to be conscious of and we can still debate about the allocation of responsibilities between regulatory authorities with respect to these derivatives. That is an issue that I think is still outstanding. But the underlying architecture of derivative regulation has been accomplished by Senator DODD and Senator LINCOLN in their bill.

Again, we have learned a lot. I think we should have learned a bit of collective humility about the ability to deal with these complicated products. So we have to build in multiple lines of defense, if you will. Simply requiring the reporting of transactions to a repository—that is good but not sufficient. Requiring that the majority of these instruments be cleared unless they have an economic value or they are so unique that the clearing would be inappropriate—that is a step forward, too, but insufficient. It is only when you put together the entire spectrum of reporting, clearing, and trading of appropriately traded derivatives do you have the full panoply of protections we need to deal with these complicated products today. Frankly, there is a sense that maybe we haven't seen nothing yet. The sophistication, the ingenuity of the financial engineers may be absent at the moment, but it will return, and we need these multiple lines of defense.

There is another point I wish to make. We have to recognize when we are building this new structure that it, too, has weaknesses. One of the most significant weaknesses is that in a clearing platform, if there is not full transparency and if the clearing platform isn't adept at setting margin requirements and collateral, there is a danger that platform becomes a source of systemic risk. And these platforms are dealing with notional values of trillions of dollars. If they misjudge by a little bit, a clearinghouse could have a significant situation in which it is unable to meet its responsibilities. Once again, I think that is a strong argument for, not a single or a double line of defense, but a triple line of defense with respect to trading also.

Because if there is trading and price discovery, they will have a much better idea of what the product really is worth and they will be able to set margin and collateral much more adequately.

There are many issues that have to be dealt with as we proceed through this markup and on to the conference, I hope. But in my mind, clearly the superior vehicle to pursue those ends is the language incorporated in the Dodd bill, and I would urge all my colleagues to reject the amendment by the gentleman from Georgia.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas.

Mrs. LINCOLN. Mr. President, I rise to compliment my colleague from Rhode Island and thank him for his hard work. He and his staff have done a tremendous job on the Banking Committee on this particular issue. It has been a pleasure to work with him and his staff and certainly to see the good work they have done, and I want him to know I am grateful to him for his hard work in helping us come up with a good package.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SHELBY. Mr. President, a key part of the bill we are considering is title VII, which we all know addresses the regulation of the over-the-

counter—OTC—derivatives markets. While there is still debate among us regarding the root cause of the financial crisis, there is no debate that the lack of transparency in the OTC derivatives market was a contributing factor to the financial debacle.

When Lehman Brothers failed, there were press reports that banks and other large financial institutions had written credit default swaps—we call them CDSs—on Lehman Brothers that could potentially result in $360 billion in cash payouts. As it turned out, though, the number was less than $6 billion. But a lot of needless anxiety preceded the realization that the cash payouts on Lehman Brothers' CDS contracts were manageable. The regulators simply did not have the information they needed to know about the magnitude of the problem they faced.

Limited regulatory information also played a role in the demise of AIG. It is worth remembering that AIG's problems arose both in its regulated insurance subsidiaries, which were exposed to the troubled subprime mortgage market through their securities lending programs, and in its financial products unit, which sold credit default protection for subprime mortgage products and other customized derivatives products.

AIG's financial products unit, on the strength of its credit rating, built up an extremely large, one-sided book of swaps transactions. The contracts were written in such a way that when AIG's credit rating was downgraded, AIG, you will remember, was forced to post collateral on all these transactions.

Regulators at that time did not have the flow of information about OTC derivatives transactions to see this problem building. Without this information, they obviously could not take steps to address the problem.

I believe the AIG bailout and the Lehman Brothers failure provided us with one simple lesson that should serve as the basic test for any OTC derivatives legislation proposal. The lesson is that prudential and market regulators must have the tools to properly oversee OTC swaps markets. The lack of transparency regarding counterparty exposures and the lack of adequate regulatory tools made it difficult for regulators to respond quickly and effectively to this financial crisis 18 months ago.

Unfortunately, the Lincoln-Dodd derivatives bill fails that most basic test. The Lincoln-Dodd bill does not provide regulators with access to the information they need to do their job. It requires all other regulators to go through the Commodity Futures Trading Commission to get information. It gives only begrudging access to the Securities and Exchange Commission—the SEC—to data about the swaps markets and thus limits the SEC's ability to get the information it needs to oversee the securities markets.

Much of this bill reads more like a jurisdictional power grab to some of us than an honest attempt to ensure that all the relevant regulators have the information and the authority they need to do their jobs.

I believe the Lincoln-Dodd bill contains a number of other fatal flaws. For example, key provisions in one title directly contradict key provisions in other titles and also in the current law. One provision in the Lincoln-Dodd bill that has gotten a lot of attention is a prohibition on Federal assistance to any ''swaps entity,'' which includes entities that do not handle any swaps. All clearinghouses, regardless of whether they handle swaps, would be precluded from receiving Federal assistance, which is interpreted to include access to the Federal Reserve's discount window. This provision contradicts language in title VIII, which empowers the Federal Reserve to grant discount window access to clearinghouses.

Also, the bill imposes a fiduciary duty on dealers when their counterparties are pension plans, endowment funds, and municipalities. As understood in current law, pension plans cannot engage in transactions with entities with which they have a fiduciary relationship.

The proposed regulatory framework also poses new risks to the system. For example, the bill anticipates generally imposing a clearing mandate on most market participants as soon as a clearinghouse will accept a swap for clearing. For-profit clearinghouses will have an incentive to clear as many swaps as possible. If they do not properly assess and collect margin for risks associated with these products or do not have sufficient operational capacity, an unanticipated event in the market could topple a clearinghouse and send devastating shock waves throughout the rest of the system. We witnessed that for a few minutes last week.

This bill is also anticompetitive because it further concentrates business within existing dealers. The prohibition on Federal assistance, including FDIC insurance, to swap entities means neighborhood banks will be unable to hedge their own interest rate risks, let alone offer swaps to customers who need to hedge their risks. Bank dealers are given preferential treatment with respect to both capital and margin requirements.

Another disadvantage in the bill for nonbank dealers is that even the commercial aspects of their business will be subject to bank-like capital requirements, which is an unprecedented expansion of bank-like regulation to the nonfinancial corporations. Nonbank dealers may simply exit the derivatives business and leave the swaps business more concentrated among a few large Wall Street dealers, which is not a good result from a competitive or systemic risk standpoint.

I believe the so-called end user exemption contained in this bill is illusory. Main Street corporations that buy swaps in the ordinary course of business to hedge their own business risks will be subject to the same regulatory treatment as Wall Street banks. This means manufacturing firms, power companies, and even beer producers will be required to hold massive amounts of cash and other collateral simply to engage in risk management. I believe this will work as an anti-stimulus plan to pull resources out of the economy, hurt growth, and slow job creation. It will also lead to price increases and price volatility.

For my colleagues interested in increasing their constituents' cooling costs in the summer or heating costs next winter; for those interested in seeing the price of orange juice, cereal, lightbulbs, medicine, office supplies, building materials, cars, and computers rise; for those who would like to make the overall cost of living for all Americans go up and the prospect of getting a job go down, the Dodd-Lincoln bill is for you.

Finally, I believe this bill is unworkable as it is now written. The derivatives title is the one piece of this legislation that will be tested every day. The bill would make massive changes in a huge market in 180 days without the usual notice-and-comment rulemaking period that allows for broad public input during that time. Neither agency has the staff it needs to write or implement the rules at this time. There will be enormous operational challenges for the SEC and the CFTC as they gear up to monitor and receive data on all swap transactions for which there is no data repository. Companies all across the United States will face operational, legal, and financial challenges as they strive to come into compliance with record-keeping, reporting, capital, margin, clearing, and business conduct requirements.

Don't just take my word for it. Check for yourself. Take the words of a recent Bloomberg article, which was aptly titled ''How 'Hard to Fathom' Derivatives Rule Emerged in the U.S. Senate'' or take the words of the National Association of Manufacturers, which warned that the end-user exemption ''is not strong or clear enough. In addition, other provisions in the derivatives title could effectively eliminate the exemption for many companies, and in some cases, subject them to capital and margin requirements or higher costs.''

Take the words of a well-respected lawyer in a memo to his clients which contained the following criticism of the Lincoln-Dodd bill:

> Ordinarily, in writing with regard to a proposed law, the expected role of the law firm lawyer is to provide a description rather than commentary. In the case of the Lincoln-Dodd bill the law firm lawyer attempting a noncommittal description must confront the following problems:
>
> (1) the Lincoln-Dodd bill's substance is inconsistent with its stated purposes; (2) it would give a degree of discretionary power to the U.S. Government that is far out of the ordinary; (3) the Lincoln-Dodd bill is loosely drafted in even its key provisions; (4) it

could make for radical changes in the financial system that seem not to have been considered; (5) the Lincoln-Dodd bill would likely motivate institutions to move jobs to Europe, damaging the U.S. economy and particularly the northeastern financial center economy; (6) it would discourage banks' capital market and real estate lending in the United States by increasing their risks; and (7) the Lincoln-Dodd bill would hurt banks' profitability at a time when they are struggling.

Or take the words of an industry representative who urged us to change a certain provision that would prevent pension plans and government agencies from getting the services they need, and another provision that could force purchasers of swaps into deals with less creditworthy counterparties.

Or take the actions of my colleagues on the other side of the aisle. While several of them have privately admitted that they fear the wrath of the administration for speaking out publicly against the Lincoln-Dodd derivatives bill, their actions speak louder than their silence. They are apparently hard at work, we know that, behind closed doors, trying to make numerous last-minute changes to this flawed bill.

Or take the words of my colleague from Connecticut, Senator DODD, for whom I have a lot of respect, the chairman of the Banking Committee. He was quoted earlier this week saying:

We still have work to do on [derivatives]—there's no question. We have always known that. So a lot of people are spending a lot of time trying to come to some common points on this.

I agree with the committee chairman; the derivative title needs a lot more work. Fortunately, that work has already been done: the substitute derivatives bill that we offer as amendment No. 3816, the Over-the-Counter Swaps Markets Transparency and Accountability Act of 2010. This amendment was crafted and cosponsored by several members of the Agriculture and Banking Committees. The substitute derivatives bill is a bipartisan product. The bill is built from the framework of the Chambliss-Lincoln bipartisan process. It also incorporates key concepts from the Gregg-Reed bipartisan working group that was formed by Chairman DODD himself to hammer out real derivatives reform. The substitute derivatives bill is also a multicommittee product.

My colleague from Georgia and I appreciate the input from the Agriculture and Banking Committees, as well as the important input from the Judiciary Committee, on provisions that strengthen protections for customer funds in the event of a counterparty bankruptcy.

The derivatives substitute amendment addresses five key areas of reform: introducing regulatory transparency and regulatory authority over the OTC swaps markets, mandating clearing for Wall Street dealers, minimizing threats to the financial stability of the United States, preserving Main Street's ability to hedge their business risks, and improving public transparency. I will briefly explain each of the five areas of reform.

First, we address regulatory transparency and regulatory authority. I believe we must repeal the statutory provisions that prohibit regulators from overseeing the OTC swaps markets and give them access to the information they need so they can do their job.

Second, we mandate in our amendment clearing for Wall Street dealers. We must encourage the clearing of derivative transactions among Wall Street dealers and dealer-like firms in well-regulated clearinghouses. This will account for a combined 80 percent to 90 percent of all OTC derivatives transactions.

Third, we minimize threats to the financial stability of the United States. We must prevent the concentration of inadequately hedged risks in individual firms or central clearinghouses.

Fourth, we preserve economically beneficial hedging for Main Street businesses. I believe we must ensure that so-called corporate end users can continue to hedge their unique business risks through customized derivatives. Main Street businesses do not pose any threat to the financial stability of the United States. In fact, prudent use of derivatives for hedging makes their businesses, the financial system, and the economy safer. The prudent use of derivatives enables businesses to protect themselves from changes in interest rates, swings in foreign currency, exchange rates, and the changing prices for raw materials that all of our manufacturers use.

If businesses in America are not able to use derivatives or if the cost of using derivatives increases, they may choose to move operations overseas or curtail business operations, which will mean the loss of jobs when we really need jobs. If they must refrain from hedging their risks, prices will go up for all our consumers—all of us.

Fifth, we improve, in this amendment, public transparency. Without mandating that swap trades must occur on an exchange, we must direct regulators to provide investors and other market participants with information about recently executed transactions for the purpose of helping them to mark existing swap positions to market, make informed decisions before executing future transactions, and assess the quality of transactions they have executed.

The Lincoln-Dodd derivatives title does not achieve these reform objectives but, in fact, threatens to stymie real reform.

The substitute derivatives amendment we offer represents a change in course from the Lincoln-Dodd bill. The substitute amendment is a strong bill that offers real reform. This is why the National Association of Manufacturers has indicated that all votes related to the Chambliss-Shelby substitute amendment, including procedural motions, may be considered for designation as key manufacturing votes in this Congress. I think it is important to American business that we adopt this substitute.

The PRESIDING OFFICER. The Senator from Washington.

Ms. CANTWELL. Mr. President, I rise to speak in opposition to the Chambliss substitute amendment and to ask my colleagues to think about this substitute in a significant way because it dramatically changes the underlying bill. In fact, I almost want to ask my colleagues on the other side of the aisle if they are serious—if they are serious that this is the proposal they are going to put before us in response to the catastrophe that we have seen on Wall Street.

I know we have been on the Senate floor and we have had a lot of history with this, starting in 2001. I think it must have been 2002 or 2003 when we tried to regulate derivatives after the Enron crisis, and one of my colleagues on the other side of the aisle said: We can't regulate derivatives; we don't know enough about them.

What lessons have we learned since this catastrophe? I can tell you this: We were wrong to say we can't understand derivatives because our misunderstanding or not paying attention has led us to the catastrophe we are in today. For the other side of the aisle to say we can't even propose exchange trading, that is like saying the stock market should make changes in options and stock without being on an exchange. That would be like the Presiding Officer and I swapping back and forth Microsoft or Starbucks stock and selling it to other people and having none of the trade basically being reported.

Why would we tolerate that for the stock market? Yet we are saying somehow it is OK for derivatives, this product that has become this unbelievable $600 trillion market, to operate in the dark.

The other side does not even want to have exchange trading? I cannot believe that. I cannot believe somebody would even propose that. I know some people will say they have clearing, but the clearing requirements in this legislation would leave 60 percent of the market uncovered. So we are talking about not having the product on exchange and not having a lot of it cleared. So the two primary principles, learning from the mistakes of the last 10 years, are basically going unnoticed, unaccounted for on the other side of the aisle.

Let's go back to how we got into this situation because we used to have a law that basically said, yes; let's protect consumers. We had transparency in trades—that was reporting to the CFTC; we had on the books capital requirements, we had speculation limits, we had antifraud and antimanipulation laws, we had trader licensing and registration and public exchange trading. So, yes, we actually had it right. We had it right. We had some tools in

place. We had an oversight agency that was supposed to do this job, all of these things that protected the investments of millions of people and made the functionality of people who legitimately had to hedge, such as farmers or airline industries, rules of the road so they weren't taken to the cleaners or the price wasn't artificially driven through the roof.

What happened to these things? What happened to these things is, in 2000, somebody came out on the Senate floor, basically at 7:30 on a Friday night, and stuck into an over 2,000-page bill a little exemption that said: Don't regulate these derivatives. That is what happened.

What happened in the marketplace is that derivatives were a very small business, only a few hundred billion dollars, as you can see, in 1999. It was kind of an uninteresting little market. But we ended up deregulating them, and since then, in this short period of time, it turned into a $700 trillion market.

How do you go, in that period of time, to this $700 billion? You go because we made it a dark market. We basically said: You don't have to have the rules of the road or the regulation or the oversight or the basic things that make this a functioning market.

What happened? We had no transparency, no requirements to keep records. That means you didn't have to be able to prove to the CFTC exactly what you were doing in the market. That way, you could not actually prove fraud because you didn't know what anybody was doing because nobody had to make records. It is like Bernie Madoff on steroids. We had no large trader reporting and no speculation limits.

The reason you have things on an exchange is because when an exchange sees that somebody is making the market or has too large a position—and oftentimes across several exchanges—you have a regulator who can come in and say, you know what. We have speculation limits and you cannot do that much trading because you were driving the market.

So after that we had no speculation limits, we had no capital requirements, and we had this high-risk manipulation and excessive speculation. That is what we did.

A lot of people thought: You know what. I wasn't here, but I know a lot of people said this is going to revolutionize things. Derivatives are going to be the wave of the future. It is going to help us in our financial markets and the amount of liquidity. Everything is going to be great.

Some people said don't worry about this because they are not going to be a very big resource, they are going to be very small and it is only going to be a few people who are going to trade back and forth.

I showed you the chart. It turned into a $700 trillion industry. It was a big opportunity for people to make a lot of money without the oversight.

Where are we today? Have we learned the lessons of this catastrophe? Have we? It is not to say that it isn't hard to be ahead of the smartest guys on Wall Street. I will say it is very hard. That is why you have to have bright lines because otherwise people do come up with new tools. I saw it with Enron in my State. I have seen it now with derivatives. There will be something else. Unless we have rules of the road, then there will be people who will try to continue to have opaque markets and drive trading.

But our underlying proposal, by the chair of the Agriculture Committee and this underlying bill, working with the chair of the Banking Committee, has the rules of the road. The other side of the aisle is proposing a substitute that would take those away. This is clear. If you have unregulated trading, none of this happens. If you had exchange trading, this is what the American public gets protected with: transparent pricing, real-time trade monitoring, transparent valuation, speculation limits and public transparency. That is what this underlying bill does and that is what the amendment is trying to get rid of.

They want this to be blank over here. They want this to be blank. They don't want those things to have to be met.

How could you possibly propose that after what we just went through? You had, prior to 2000, regulation. Things were working hard. You have afterwards a major catastrophe, and these are fundamentals that we have behind all of our markets and exchange trading. So why would you let one thing off the hook?

I will never forget the day when one of the former CFTC staff came and testified before the Energy Committee and said to our committee: Do you know that hamburger in America has more regulation on it than energy futures?

I thought he couldn't be serious, but he was right. Futures of beef have reporting requirements, have to have transparency and real-time monitoring, have speculation limits. But these energy derivatives, because they were exempted by this 2000 act, did not. So somehow we were saying that hamburger in America—making sure it played by the rules—was more important than whether oil or electricity or these other things—as we know, CDOs—played by the same rules.

Make no mistake. This underlying bill gives us this kind of predictability and certainty in the tried and true ways that markets function, with transparency.

We are talking about old-fashioned capitalism. We are not talking about oligarchies where people hide behind things and only a few people know. Who knows when we are going to find out what happened with the ''fat finger'' the other day and what moved the markets? But I know this: If you come back to capital trades with transparency in pricing and real-time monitoring and those speculation limits—their legislation on the other side does nothing to make sure we prohibit the excessive speculation that can move the market in a manipulative way.

So I hope we do not adopt this substitute amendment. Let's show America we are serious about the kind of transparency that has worked in markets in the tried-and-true part of our capitalist system.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. Mr. President, I rise in support of the amendment of Senator CHAMBLISS from Georgia and to express my very serious concerns about the language which has been brought forward by the chairmen of the committees—both the Agriculture Committee and the Banking Committee—relative to derivatives.

Let's begin with what our purposes should be. Let's remember that derivatives, as has been said before on this floor numerous times—the Senator from Alabama said it extraordinarily well—are a critical part of how Main Street maintains its economic vitality. You know credit is what makes America work. One of the great geniuses of our society is that we are able to produce credit in a fairly ready manner which is reasonably priced and which people who wish to take risk can take advantage of in order to create economic activity and jobs. The oil that basically keeps the credit available in the American capital system is derivatives, for all intents and purposes.

As has been pointed out, if you are manufacturing an item somewhere in America and you enter into a contract to sell that item—let's say overseas—there are a lot of risks on how you are going to make money on that item which you have no control over.

Let's say you make it one day and you are going to sell it 6 months later. You enter into a contract when you get the order and you produce it 6 months later. There is a lot of risk there over which you have no control. You know how to manufacture. You know how to create it. If it is credit, you know how to produce it. But you do not have control over the exchange rates you are dealing with. You do not have control over the cost of the raw materials you are using. You do not have control over whether the various parties that enter into this transaction as it moves through the commercial stream survive or go out of business or experience some huge economic upset.

Well, in order to avoid all of that and just be the person who wants to produce the good and sell it, you buy derivatives, which are essentially insurance policies, to make sure you have insurance against the risk which you cannot control. That is derivatives in their simplest form. It also affects all sorts of other instruments, of course, financial instruments, commodity instruments. But basically it is the capacity of someone to make an

agreement with somebody else and know that agreement is not going to be affected by outside events or, if the outside events do occur, there is going to be a vehicle in place to protect you from the risks that outside event may create for you. So derivatives are crucial to our capacity as a society to be economically vibrant.

We also know that during the economic downturn, during the very severe financial crisis we had, the fact that we had so many derivatives in place which were based off of contracts which were not properly supported created a huge cascading event which almost forced our entire financial structure to come to a halt—in fact, it did on one evening—and was about to put our economic house into extreme distress because the derivatives markets had not been properly regulated or managed.

Now, that wasn't the primary cause of the event of the late 2008 period. The primary causes of the events of the late 2008 period were very bad underwriting—in fact, virtually no underwriting standards in some instances—for the loans which were being made, easy money, and regulatory arbitrage. But the accelerant which took those causes and basically turned them into an event of immense proportions which almost shut down America and would have caused massive dislocation in our Nation had it been allowed to go uncontrolled, had the Fed and Treasury not stepped in and taken very definitive action, the accelerant was the derivatives market.

The classic example of that, of course, is the AIG situation, which has been cited here on the floor numerous times as the example of what was wrong with an unregulated market, where essentially you had a company which was issuing insurance based on its good name and virtually nothing else behind the insurance besides its good name. When that insurance started to get called because the contracts started to fail and the counterparties became concerned, there was no capacity to support the insurance.

So our purpose here should be to reorganize our regulatory structure so that type of an event doesn't occur again—I mean, that should be our purpose—while at the same time recognizing that we need a very robust and vibrant derivatives market if we are going to be successful as a nation, if we are going to continue to have economic vitality as a nation. So our goal should be, one, to put in place a structure which as much as possible foresees and limits systemic risk caused by the derivatives market or that could be caused by the derivatives market and, two, maintains an extremely vibrant derivatives market where America remains the best place in the world to create capital and get credit.

Unfortunately, the pending bill undermines the second part of that effort. It could be argued that the first part of the effort—foreseeing and trying to anticipate systemic risk—is addressed in this bill, but it addresses it in such an unwieldy and unmanageable and in some ways counterproductive way, it actually undermines the basic goal, which is to keep the system sound and also keep credit markets vibrant.

Why is that? Well, there are a number of reasons for it, but the two most difficult parts of this proposal relative to getting it right are the fact that it forces the swap desks to be spun off from the financial houses and it essentially forces instant movement from and basically almost total coverage of derivatives from clearinghouses into exchanges. In both those instances, you are basically going to create fairly close to the opposite result you are seeking if you pursue this course.

I would predict that if this bill were to become law in its present form, it would be likely that, one, a large amount of derivative activity would move overseas; two, a large amount of derivative activity which presently occurs and which is necessary for commerce would have to be restructured in a way that would be extraordinarily expensive for the people who are doing that commerce and would therefore significantly curtail commerce; three, the credit markets would inherently contract by a significant amount of money, probably as much as $¾ trillion; and four, the institutions which would be responsible for creating the derivatives market would actually be less stable. The market makers would be less stable than what we presently have today.

You do not have to believe me to understand the seriousness of this and accept this as a statement or an assessment of what the present bill does. I mean, granted, I am just one Member of this body who has an opinion on it. But we do hire people, as a government, to take a look at something like this and say, does this work or does that work, and they are charged with the responsibility of accomplishing the two goals I mentioned: one, avoiding systemic risk, and two, having a vibrant credit market.

One of those agencies is the Federal Reserve. They have taken a look at this language in the Dodd-Lincoln bill and they have concluded: Section 106 would impair financial stability and strong prudential regulation of derivatives, would have serious consequences for the competitiveness of U.S. financial institutions, and would be highly disruptive and costly both for banks and their customers. That is the conclusion of a fair umpire, the Federal Reserve.

Now, there are a lot of people around here who do not like the Federal Reserve. But we pay them. Their job is to look at something like this and say: Does this work or does that work in making our markets more stable, more sound, more risk averse, and more competitive? Their conclusion is this language does just the opposite—would be highly disruptive and costly for both banks and their customers.

But if you do not like the Federal Reserve, listen to the FDIC. The FDIC, under Sheila Bair, during the crisis we have just gone through, has probably been one of the best performing agencies in our Federal Government. They really have stepped in on numerous occasions and stabilized banks, which had far overextended their capacity and had gotten into very serious liquidity positions, and basically settled those banks out in a way that very few customers lost anything.

What does the FDIC say when they look at this, because their responsibility is to maintain safety and soundness of banks. The Chairman of the FDIC, Sheila Bair, said in her letter to—I am not sure to whom it went; I will check that—I think it was to Members of Congress:

> By concentrating the activity in an affiliate of the insured banks, [and that means spinning them off under the proposal under this bill] we could end up with less and lower quality capital, less information and oversight for the FDIC, and potentially less support for the insured bank in a time of crisis. Thus, one unintended outcome of this provision would be weakened, not strengthened protection of the insured bank and the deposit insurance fund, which I know is not the result any of us want.

Then we have Chairman Volcker, who I think everybody agrees is a fair arbiter around here, and he has also said this language in this bill overreaches and does not work.

I ask unanimous consent to have printed in the RECORD the Volcker letter.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

PAUL A. VOLCKER,
New York, NY, May 6, 2010.

DEAR MR. CHAIRMAN: A number of people, including some members of your Committee, have asked me about. the proposed restrictions on bank trading in derivatives set out in Senator Lincoln's proposed amendment to Section 716 of S. 3217. I thought it best to write you directly about my reaction.

I well understand the concerns that have motivated Senator Lincoln in terms of the risks and potential conflicts posed by proprietary trading in derivatives concentrated in a limited number of commercial banking organizations. As you know, the proposed restrictions appear to go well beyond the proscriptions on proprietary trading by banks that are incorporated in Section 619 of the reform legislation that you have proposed. My understanding is that the prohibitions already provided for in Section 619, specifically including the Merkley-Levin amended language clarifying the extent of the prohibition on proprietary trading by commercial banks, satisfy my concerns and those of many others with respect to bank trading in derivatives.

In that connection, I am also aware of, and share, the concerns about the extensive reach of Senator Lincoln's proposed amendment. The provision of derivatives by commercial banks to their customers in the usual course of a banking relationship should not be prohibited.

In sum, my sense is that the understandable concerns about commercial bank trading in derivatives are reasonably dealt with in Section 619 of your reform bill as presently drafted. Both your Bill and the Lincoln

amendment reflect the important concern that, to the extent feasible, derivative transactions be centrally cleared or traded on a regulated exchange. These are needed elements of reform.

I am sending copies of this letter to Secretary Geithner and to Senators Shelby, Merkley, Levin, and Lincoln.

Sincerely,

PAUL.

Mr. GREGG. So we have these independent arbiters, these fair umpires of what we should be doing in order to maintain financial stability and strong credit markets saying: Listen, do not do it this way. Do not do it this way.

There are ways to do this, however, ways to make sure we have a strong derivatives market which is also safer, more sound, and is not subject to systemic risk. Senator CHAMBLISS's amendment accomplishes that in a very effective way.

How do you basically do it? Well, in concept, you do it this way: You make sure that for the most part, all of the derivatives are cleared. They go through a clearing process. What does a clearing process mean? Well, it basically means that you get counterparties having to put up margin. They have to put up actual assets, margins, liquidity, in order to be sure there is something behind their position so that if they have a problem and they have to be called on to pay up their position, they have the capacity to do it and it is there. That is why you have a clearinghouse, because the clearinghouse becomes basically the place where that occurs and it becomes the process by which that occurs. And you make sure the clearinghouse itself, because it stands in and basically is the guarantor, for lack of a better word, of the contract, has the capital and the adequacy to make sure those contracts will not fail.

So as a very practical matter, you can do this by creating a proper structure using clearinghouses. You make sure the clearinghouses have proper oversight from the SEC or the CFTC. And then as these instruments, these various types of derivatives—there are lots of different types of derivatives—become more standardized—and a lot already are standardized—you move them over to an exchange, which is the ultimate process of making sure you do not have an issue of solvency behind the instruments. So as you move them to an exchange, you are able to create an even stronger market. But you do not mandate that everything goes through an exchange right out the door because if you did that, you would end up with a lot of derivatives which are still too customized to be able to move to an exchange and they would simply not be able to be brought forward, and thus you would contract the market again.

You also don't take the swap desks and move them out of the financial house because, in doing that, you would have to create a whole new capital base for the swap desks, which is the concern expressed by the Fed and by the FDIC and by Chairman Volcker, which would inevitably force a massive contraction in credit because that capital would no longer be available to underwrite credit. In addition, you would have much weaker institutions standing behind the swap desks, which is again a point made by the Fed, the FDIC, and Chairman Volcker.

It is not necessary to go down the route outlined in this bill in order to accomplish the goals which we all have. In fact, if you go down the route presented in this bill, you actually undermine the goal which we all have, which is to have a derivatives market which is less prone to systemic risk and which is strong, sound, and vibrant.

Rather, what Senator CHAMBLISS has proposed makes the most sense, which is a comprehensive reform of the derivatives market in a way that insists that for the vast majority of derivatives, they end up going through a clearinghouse process and that if they are standardizable, they end up on an exchange. If they are for purely a commercial purpose, a single-purpose commercial undertaking, then they are able to be exempt from the clearing activity. This would create a much more robust undertaking of a creation of credit. It would maintain the vitality of the derivatives market while at the same time protecting and making sure we had a sound derivatives market. It would avoid what I believe the inevitable outcome of this language will be under the Dodd-Lincoln bill, which is that we would weaken the derivatives market, weaken the systemic protections, and end up forcing overseas a large amount of economic activity which appropriately should be done in the United States and which is very important to our Nation's capacity to be competitive on Main Street. Remember, this is about Main Street.

I certainly hope Members will support the Chambliss amendment. It makes a lot of sense. It is well thought out. It is not exactly what I would do were I writing this myself, but it is a very good piece of legislation. It should be supported. I hope my colleagues will do so.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas.

Mrs. LINCOLN. Mr. President, I appreciate all the debate we have had and the discussion. I thank my colleague from Georgia, my ranking member on the committee. He and his staff are a tremendous group to work with. I appreciate all that. I am confident we have worked hard. In the underlying bill we have come to agreement with Chairman DODD on, we lower the systemic risk by requiring mandatory trading and clearing, which my colleague, Senator CANTWELL, did a tremendous job of explaining, bringing that 100 percent transparency to the market with real-time price reporting, protecting municipalities and pensions and retirees, regulating foreign exchange transactions, and increasing the enforcement authority to punish the bad behavior we have seen. To that point, again, I believe not since the Great Depression have we seen such devastating consequences of a banking and financial system gone wrong. It does call us to action.

We are not here to take easy votes. We are here to tackle complicated problems and find the solutions we know are going to benefit all of America. We certainly should not squander that opportunity for historic reform, nor support any effort to weaken it.

Therefore, I certainly recommend a ''no'' vote on the Chambliss amendment and respectfully encourage my colleagues to do the same. Again, I thank my colleague from Georgia for his hard work. We will continue to work together to find the common ground we know is going to be the best place for us to all be.

I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, let me extend the same courtesy to my chairman. She is my dear friend. We work very closely together on virtually every issue. It is extremely unusual for us to disagree on any major issue. She and her staff have been great to work with, as always. They have been very open. We have had an ongoing dialog. We just simply disagree about the way this issue needs to be dealt with.

Let me say that an indication of how complex this issue is and why this issue is so important and why we don't need to have our constituents expend money when they don't need to expend money that is going to be passed on to consumers of every single product virtually made in America is this: There are a lot of people who have gotten up on the other side and spoken about this amendment. I know they don't intend to get up here and make statements that are not correct. But frankly, that is what we have heard. All I can attribute that to is the fact that this is such a complex issue, that the folks who have been speaking about my amendment simply don't understand it.

Let me give some examples. We talk about large companies falling prey to derivatives. Large companies use derivatives in a very meaningful way that is advantageous to every single American customer. Everybody who buys something—I don't care whether it is an automobile, a widget, a drug—and every major manufacturer uses derivatives. They are very sophisticated individuals who deal in these products. They know what they are doing. They are not falling prey to the use of these products.

There have been a couple folks who have said we don't have transparency, that we ought to let these products come out of the shadows. Let me make clear—and I think the chairman will agree with me—100 percent of the transactions under our amendment would be out in the open. There would

be a clearing of about 85 to 90 percent of all derivatives contracts under our amendment. The others, the end users, the manufacturers, the energy companies that go out and not only borrow money but buy coal or buy natural gas and that want to have stability in their products, those individual end users would be exempt from the clearing requirement. But every single one of them would have to report every single contract to the CFTC or to the SEC, 100 percent transparency on every single derivative.

I don't know why folks can't understand that in our amendment because it is pretty plain. I think Senator GREGG did a good job of explaining exactly how that is done.

Somebody said they don't want to return to old-fashioned capitalism. If I am considered to be one who is promoting old-fashioned capitalism in my amendment, I plead guilty. Old-fashioned capitalism has made this country the strongest economy the world has ever seen. Old-fashioned capitalism has an alternative. It is called socialism. I do not believe in socialism. I believe, if somebody wants to work hard and generate money to make a better quality of life for themself and their family, they ought to have the opportunity to do so. That is what old-fashioned capitalism is all about.

I could go on and on giving examples of things that have been said that are out of context. Let's get down to the bottom line; that is, who supports the underlying bill? Who supports the Dodd-Lincoln bill? The simple answer is Wall Street. Why do I say that? At a hearing in the Government Relations Committee last week, Goldman Sachs was called to the Hill to testify before Senator LEVIN and Senator COBURN's committee. Senator COBURN asked a question directly of the Goldman Sachs agent and said: Do you support the underlying bill that is now being debated on the floor of the Senate? Without hesitation, he said: Yes. Why would they support it? They are going to make a lot of money off this underlying bill. Why do I say they are going to make a lot of money? Who is going to clear these contracts? They are going to be cleared by clearinghouses owned by Wall Street banks.

Under the underlying bill, there is another provision that has not even been talked about today: Transactions are required to be executed on what is called a swaps execution facility. It is a mini exchange. In addition to going to that swaps execution facility, that contract, after that, has to go to a clearinghouse. So what you have is a party who agrees with a manufacturer that they are going to enter into an agreement on a derivative for an interest rate, let's say. That entity that has put that deal together is going to charge a fee. They would do that anyway. That entity is also likely to be charged by the swaps execution facility where the contract is executed. They are going to charge another fee for doing that. Then they are going to have to go to a clearinghouse that is going to charge another fee.

So it is pretty easy to see why Wall Street likes this provision, likes the underlying bill, because they are going to make a lot of money in fees off these contracts.

The only other comment I wish to make, with reference to comments that have been made, is whether these end users leave the U.S. markets and go overseas. There has been contention made that is not going to happen. They are not going to do that. Well, they are. Other markets have already indicated they are not about to follow our lead. The London regulator has openly said they will not follow our lead. We have heard nothing out of the Europeans, nothing out of Singapore. Why haven't we? They are watching to see what we do. They are going to be soliciting U.S. customers to go to their markets because our constituents are not going to have to pay these huge fees in their countries that are required under this bill.

It only makes sense that if they can generate more money for their bottom line and they can sit in their office in New York City, Atlanta or Moultrie, GA, and execute a contract in Singapore, where they don't have to pay that fee, you better believe that is where they are going to go. They have no more risk. It is the same amount of risk. Is the CFTC or the SEC going to know they have done that? Absolutely not. It will not be reported to them.

I could go on and on. At the end of the day, if you want to see 100 percent transparency and you want to see the end users in this business who utilize these swaps and derivatives in a nonsystemically risky way continue to have access, then you need to support my amendment. If you listen to the manufacturers across America that know because they have used these products for decades and have done so in a safe way and a way that provides a cheaper product for their consumer, you need to support my amendment.

I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The Senator from Arkansas.

Mrs. LINCOLN. Mr. President, I ask unanimous consent that the Senate proceed to vote in relation to the Chambliss amendment No. 3816, at 5:30 p.m.——

Mr. SHELBY. It is 5:30 now.

Mrs. LINCOLN. With no amendment in order to the amendment prior to the vote; that upon the disposition of the Chambliss amendment, the next two amendments be the Reed amendment No. 3943 and the Sessions amendment No. 3832.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The question is on agreeing to the Chambliss amendment.

The yeas and nays have been ordered.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) and the Senator from West Virginia (Mr. ROCKEFELLER) are necessarily absent.

I further announce that, if present and voting, the Senator from West Virginia (Mr. ROCKEFELLER) would vote ''nay.''

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 39, nays 59, as follows:

[Rollcall Vote No. 144 Leg.]

YEAS—39

Alexander	Cornyn	LeMieux
Barrasso	Crapo	Lugar
Bennett	DeMint	McCain
Bond	Ensign	McConnell
Brown (MA)	Enzi	Murkowski
Brownback	Graham	Risch
Bunning	Gregg	Roberts
Burr	Hatch	Sessions
Chambliss	Hutchison	Shelby
Coburn	Inhofe	Thune
Cochran	Isakson	Vitter
Collins	Johanns	Voinovich
Corker	Kyl	Wicker

NAYS—59

Akaka	Gillibrand	Murray
Baucus	Grassley	Nelson (NE)
Bayh	Hagan	Nelson (FL)
Begich	Harkin	Pryor
Bennet	Inouye	Reed
Bingaman	Johnson	Reid
Boxer	Kaufman	Sanders
Brown (OH)	Kerry	Schumer
Burris	Klobuchar	Shaheen
Cantwell	Kohl	Snowe
Cardin	Landrieu	Specter
Carper	Lautenberg	Stabenow
Casey	Leahy	Tester
Conrad	Levin	Udall (CO)
Dodd	Lieberman	Udall (NM)
Dorgan	Lincoln	Warner
Durbin	McCaskill	Webb
Feingold	Menendez	Whitehouse
Feinstein	Merkley	Wyden
Franken	Mikulski	

NOT VOTING—2

Byrd	Rockefeller

The amendment (No. 3816) was rejected.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, if I could have the attention of our colleagues to give them some sense of things.

Senator REED and Senator BROWN of Massachusetts have an amendment which will take just a very few minutes to discuss, and then they would like to have a vote on that, which we have agreed to. At the conclusion, that would be the last vote of the evening.

Then the next amendment would be the Sessions amendment. Senator SESSIONS has agreed to debate his amendment tonight. We will vote on that in the morning. Senator SPECTER would be the following amendment and we will debate his amendment this evening and vote on that tomorrow as well. Senator COLLINS, I know, has an amendment and she can debate, if she would, this evening and we will try and

line that up in the morning so we have a series of votes when we come in.

So the last vote today would be on the Reed-Brown amendment, if Members would stay around for just a few minutes to hear that, and then we could be free of any more votes. At least that is the plan.

The PRESIDING OFFICER. The Senator from Rhode Island.

AMENDMENT NO. 3943 TO AMENDMENT NO. 3739

Mr. REED. Mr. President, I call up amendment No. 3943.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Rhode Island [Mr. REED], for himself and Mr. BROWN of Massachusetts, proposes an amendment numbered 3943 to amendment No. 3739.

Mr. REED. I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To establish a specific consumer protection liaison for service members and their families, and for other purposes)

On page 1219, after line 25, insert the following:

''(e) OFFICE OF SERVICE MEMBER AFFAIRS.—

''(1) IN GENERAL.—The Director shall establish an Office of Service Member Affairs, which shall be responsible for developing and implementing initiatives for service members and their families intended to—

''(A) educate and empower service members and their families to make better informed decisions regarding consumer financial products and services;

''(B) coordinate with the unit of the Bureau established under subsection (b)(3), in order to monitor complaints by service members and their families and responses to those complaints by the Bureau or other appropriate Federal or State agency; and

''(C) coordinate efforts among Federal and State agencies, as appropriate, regarding consumer protection measures relating to consumer financial products and services offered to, or used by, service members and their families.

''(2) COORDINATION.—

''(A) REGIONAL SERVICES.—The Director is authorized to assign employees of the Bureau as may be deemed necessary to conduct the business of the Office of Service Member Affairs, including by establishing and maintaining the functions of the Office in regional offices of the Bureau located near military bases, military treatment facilities, or other similar military facilities.

''(B) AGREEMENTS.—The Director is authorized to enter into memoranda of understanding and similar agreements with the Department of Defense, including any branch or agency as authorized by the department, in order to carry out the business of the Office of Service Member Affairs.

''(3) DEFINITION.—As used in this subsection, the term 'service member' means any member of the United States Armed Forces and any member of the National Guard or Reserves.''.

Mr. REED. Mr. President, I propose to make very brief remarks about this amendment. My colleague from Massachusetts, Senator SCOTT BROWN, will make remarks. We would like to expedite a vote, but I would ask that the yeas and nays on a recorded vote be taken when I conclude and when Senator BROWN concludes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays are ordered.

Mr. REED. Mr. President, this amendment is very straightforward. It would provide within the new office of consumer financial protection a military liaison, an individual who is charged with protecting the interests of soldiers, sailors, airmen, and marines as consumers.

Let me tell my colleagues—and I will elaborate later, but let me be very brief and to the point. We have soldiers, sailors, airmen, marines, and their families who are consistently exploited by unscrupulous car dealers, payday lenders—a whole panoply of people who flock around military bases to exploit these individuals. They are in a very difficult situation. They have stress because they are on constant deployments. In many cases, military families today have one spouse deployed and one military spouse back taking care of children. I don't have to go much further. The Presiding Officer understands this from his dealings with the USO and families across the country.

Let me give my colleagues two examples. I could give you 200 examples. If this was not true, it would be almost humorous, but it is sadly true. This is one I like. This is the ''free transportation to the beach'' ploy. True story: A car dealer from Virginia Beach went to Camp Lejeune and offered free round trips to the beach. These are young marines. If you have been to Camp Lejeune, you know it is not the Paris of North Carolina. It is a place where you need a little diversion. They wanted to go to Virginia Beach. They were given this round trip. They got to Virginia Beach. There was no round trip unless they bought a car from this car dealer. Well, he was caught, lost his license, but reappeared later without a license, making the same ploy.

I wish to make a point. I am not condemning car dealers. In my home State, they are great. They do wonderful work for the community. But exploitation by car dealers of military personnel is a significant problem. Seventy-two percent of military financial counselors recently surveyed had counseled Servicemembers on auto lending abuses in the past six months.

One other example. Fort Riley, KS. Army Specialist Jennifer Howard bought a car while she was stationed there. It turns out the dealership which arranged her financing charged her for features on the car she never got, such as a moon roof and alloy wheels. In her words:

The dealership knows that we're busy, we're tired. We don't take the time, because we don't have a lot of time. It's like get in, get out, do what we got to do. If we get taken advantage of later, we'll deal with it then.

That is no way to treat soldiers. It is no way to treat consumers. This liaison would be very important, but I should say it has to have the authority within the bill to actually act against the disruptive behavior of auto dealers, payday lenders, and a whole host of individuals.

The rent-to-own people, they are trying to scam our troops. They are trying to scam consumers.

Frankly, they don't care if you are wearing a uniform or not, they are out to scam who they can. We need to set up a strong consumer financial protection agency, and we particularly have to have somebody in there watching over the troops.

I yield to my colleague.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. BROWN of Massachusetts. Mr. President, I thank Senator REED from Rhode Island for his idea and his thoughtfulness in trying to protect our troops.

I want to discuss this amendment, as well. Senator REED has a distinguished career in both the Army and as a Senator. He has always done his duty looking after the men and women not only of his State but also those in uniform. I thank him for the opportunity to work on this particular amendment with him.

As a 30-year member of the Army National Guard, I share Senator REED's interest and commitment to our Nation's soldiers and their loved ones. As we all know, they make extreme sacrifices to keep us safe and keep our Nation safe.

This amendment would dedicate resources within the new Consumer Financial Protection Bureau to serve as a watchdog for military personnel and their families.

As you know, our military culture of honor, courage, and commitment demands prompt repayment of debts. As a result, payday lenders often congregate outside military facilities. Unfortunately, the financial terms offered by these lenders are not always clear, not always offered up in free form, and typically lead to very expensive and bad loans. Other financial predators have sold military personnel bogus life insurance policies.

These practices take advantage of our soldiers. Our young enlisted soldiers are particularly vulnerable. They don't have the necessary tools, resources, guidance, and financial assistance to make their decisions. They often spend time deployed far from their support networks at home, have steady paychecks, and promised pension benefits. As a result, those financial predators see them as a way to make money.

As they risk their lives defending our Nation in places such as Iraq and Afghanistan, at home they also wear a big target on their back. If a soldier gets into financial trouble with an unscrupulous lender, how is that soldier going to dispute those charges while

they are deployed or getting ready to be deployed? Debts can pile up quickly. This dedicated office would be able to help sort out the truth and get them back to financial stability.

This issue, as you know—and I am about to conclude—has received a lot of attention. Today, there was an article in the Washington Post talking about how extra consumer protections are needed for our fighting men and women, citing the specific example of car dealerships employing high-pressure tactics to trap military families into expensive loans.

I urge colleagues to support this amendment, to put a cop on the beat to make sure our men and women in uniform have a chance to fight back against financial predators.

I yield the floor.

Mr. DODD. I strongly support the amendment offered by our two colleagues from New England, Senator JACK REED of Rhode Island and Senator BROWN of Massachusetts. Both of these colleagues speak with some authority on this amendment. JACK REED is a graduate of West Point and served in uniform for our country for a number of years with great distinction. Senator BROWN has spent some 30 years in the National Guard in Massachusetts and also speaks with more than just passing authority about the importance of the amendment they offer.

It is a very important amendment because it sets the table for a debate tomorrow regarding a certain area of finance companies. The amendment establishes an Office of Military Liaison within the consumer bureau we have created in the overall legislation.

In today's New York Times, there was a description of the case of Matthew Garcia, a 25-year-old Army specialist who was recently subjected to a trick called yo-yo financing by an unscrupulous car dealer, just as he was preparing to deploy to Afghanistan. According to the story, Specialist Garcia, stationed at Fort Hood, TX, bought an automobile at a used car lot and signed up for a loan at a 19.9-percent interest rate. That is not even the abuse, believe it or not, as high as that rate is. The problem came when Specialist Garcia drove the car home. The dealer called Specialist Garcia several days later to say that the financing contract had actually fallen through and demanded an additional $2,500 in cash. To make sure he paid up, the dealer blocked the soldier's car in so that no one could leave. That is the way some—few but some—auto dealers are treating our men and women in uniform. That is why we need the Office of Military Liaison within the Consumer Financial Protection Bureau.

Unfortunately, the story of Specialist Garcia is not unique. It is all too common, whether it is in the area of auto financing, payday lending, mortgage lending, check cashing, these unregulated areas of finance so many of our fellow citizens are subjected to on an hourly basis, let alone a daily one.

Creating an office within the Consumer Financial Protection Bureau to focus on the problems of our young men and women in the military and their families is an important contribution to this legislation. I thank both of our colleagues for offering this proposal.

The office we are creating with this amendment will help resolve many of the complaints brought to the office by our service men and women. It will help advise the director of the bureau's rule writing to take into account the special needs of military families. By doing this, it will help our military readiness as well.

I have letters from the Secretary of Defense and the Secretary of the Army, sent to me and to other Members, laying out the value of having some protection within the automobile financing area.

It is important we have this language in the bill. Let me emphasize as well that unfortunately we are not talking about many auto dealers that engage in financing that cause these problems, but, like most laws on the books, if they were only written because there were a majority of people committing the offenses, it would be hard to make the case against them. But we don't write laws for the many; we write laws for the few, those who will abuse their offices, abuse their operations in such a way as to cause harm to people who otherwise have no protection.

I have talked a lot about the Consumer Financial Protection Bureau over the last number of days. The importance of this is that for the first time in the history of our country, individuals who are taken advantage of in the financial services sector will have someplace to seek redress for the grievances to which they have been subjected. I don't think this is a radical idea, particularly in light of what so many of our fellow citizens have been through over the last several years where homes have been lost, jobs lost, the tremendous abuse that has occurred in too many of the areas of what I call the shadow economy, the unregulated areas of our economy.

The most important purchase the average American makes is buying a home, and we all know what can happen, as we have seen with brokers and mortgage lenders who were unregulated taking advantage of people by getting them into situations they knew they couldn't afford. People say it ought to be buyer beware. I don't argue with that. Obviously, we all bear responsibility to be better informed about financial arrangements. But to suggest this is a level playing field when it comes to home mortgages or car financing is to belie the facts. The analogy may not be perfect, but it has some value.

We don't expect patients necessarily to be as well informed when they are making decisions about their health care. There is something called medical malpractice. Obviously, we have an obligation to ask questions before we submit ourselves to surgery or other things. But we know in the end that if a doctor has abused the Hippocratic Oath and put a patient at risk, there is an ability to seek redress of those harms. It is called medical malpractice. It allows a person who has been injured or harmed because of the misfeasance or malfeasance of someone in the medical profession to get recovery. We understand it is not exactly a level playing field when the average person is trying to make intelligent decisions about their medical care.

The same could be said for mortgage lending. You can't expect the average person to understand all of the details, necessarily, involved. I suggest there is a higher degree of responsibility in the area of mortgage financing by a borrower than there would be necessarily in the case of medical malpractice, but nonetheless there are some legitimate comparisons.

Some have suggested mortgage malpractice may be an appropriate description for what happens when you are across that table from a lender. You have picked out the home you have fallen in love with. Your family is excited about this new place. In many instances, it is the first home you are buying. The idea that you will have your own home to raise your family in is a very emotional time. That lender across the table who is being unscrupulous in his or her behavior can extract commitments, and so forth, from that borrower that could put them at a distinct advantage. We believe in those instances there should be good underwriting standards by law. And if there is some harm done through the misfeasance or malfeasance of someone in the mortgage lending business, you can get some redress when that occurs.

Car financing is not the same as a home mortgage, but if you are an 18- or 19-year-old young person in uniform and you find that automobile you love and you are so attracted to it—I am not suggesting borrowers don't have a responsibility to be well informed—most Americans know what happens. All of a sudden, you end up like Specialist Garcia. You think you have bought the automobile. And at 19, almost 20 percent financing, that in itself ought to be illegal. But the fact that you then find you have a $2,500 extra charge and the wheels have been blocked so you can't drive away—that is the kind of individual who ought not to be allowed to continue to operate under those circumstances.

We believe when it comes to financing such as this we should not say to one sector: You are exempt; we will carve you out; you don't have to worry about any of the laws.

We make that local banker, who also might like to extend that loan, subject to the law's protections. The credit union is subject to the same laws. Why should someone engaged in the financing of a product—an automobile—be exempt? The local bank isn't. They

have to meet their requirements under the law to make sure they are not abusing—not that many do but some do—the rights of an individual and protect them from a disadvantage in that second largest purchase a person may make aside from their home.

I know tomorrow there will be a debate. Senator BROWNBACK will offer an amendment to exempt auto dealers and financing. Auto dealers are not covered. If you are a dealer, you are not affected by this any more than you are if you are a butcher or a dentist or any other retailer merchant. If you are in the financing business, you are the one who is engaging in that contract despite the fact the papers may have been written up by some other lender that is doing business with the auto dealer. Shouldn't we provide to that individual the same kind of protection they would expect if they went to the local bank, the community bank to get a car loan or to the credit union to get a car loan? We require them to meet basic rules, not exaggerated rules but basic protections so you are not taken advantage of.

I have a wonderful relationship with the auto dealers in my State. I fought hard for them last year. The program we had on the clunkers that allowed for people to turn in older automobiles, I fought hard for that. I have a great relationship. In fact, they offered me a nice award last year for my efforts on behalf of auto dealers in my State. I am very proud of it. The overwhelming majority of my dealers, as I know is the case in all of our States, do a good job and are fair. They wouldn't be in business very long if they did not. But all of us also know there are people who take advantage. Certainly to be exempt from any kind of rulemaking when it comes to protecting people ought not to be the decision we are making.

Here we have the Reed-Brown amendment that says we will establish within the office of consumer financial protection an office to protect the men and women in uniform from the abuses of people who would take advantage of them. Then less than 24 hours later we write an exemption and take away one of the major problems these young men and women have. What an irony. What is this institution saying? On the one hand, we say our young men and women in uniform ought to be protected from people who take advantage of them. Then less than 24 hours later we say: But, by the way, in a major area of abuse that occurs, you are exempt. Don't worry about it. The law doesn't apply to you. I am sorry, Mr. Community Banker. I am sorry, Mr. Local Credit Union. You will have to live by the rules. So there is a great disadvantage at the local level. The community bankers and credit unions are rightfully annoyed that they may be subjected to one set of rules and the person down the street who finances an automobile for an unsuspecting purchaser is exempt. That doesn't make any sense to me.

I hope that tomorrow my colleagues will react as I am to this. Again, I am not in any way indicting automobile dealers—quite the contrary. They have been through an awful lot. They have seen the struggle with major problems of the industry in this country. We made major efforts here to get them back on their feet. I am proud to have been involved in that, to see to it we restore and maintain a strong manufacturing sector in our country of automobile dealerships and manufacturers. But to turn around at the local level and say: I will give you a pass on those who would abuse the law and take advantage of people—in fact, it is an invitation to do it. It seems to me, by carving this out, we are not just sending a message to those who are presently engaging in this but to those who may decide this isn't a bad area of business in which to get involved.

The local bank has to meet those obligations and the local credit union or some other financing operation covered under our legislation. Now we will no longer have shadow operators. We cover payday lenders. We cover the check-cashing operations involved in financial services or products. But in the second largest purchase the average American ever makes, you are going to be exempt from any of the laws involving consumer protection when it comes to financing.

I know there is a lot of pressure, a lot of lobbying going on all over the place to carve out this exception. But I urge my colleagues to please be careful about this, to walk in tomorrow and to basically gut the Reed-Brown amendment by saying in this one major area of abuse—read the letter from Secretary Gates. Read the letter from the Secretary of the Army. Listen to our colleagues who are listening to the people on their military bases in the respective States, what goes on every single day by those who take advantage of people who are in uniform.

I urge my colleagues, tomorrow, when we have an opportunity to debate the Brownback amendment, not be lured away from their support of putting an office within the Consumer Financial Protection Bureau and basically gut the very bureau before the ink is dry on the amendment by allowing for a massive exception which would allow for consumers, particularly men and women in uniform, to be taken advantage of.

The PRESIDING OFFICER. Is there further debate on the amendment?

The yeas and nays have been ordered.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) is necessarily absent.

The PRESIDING OFFICER (Mr. BEGICH). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 98, nays 1, as follows:

[Rollcall Vote No. 145 Leg.]

YEAS—98

Akaka	Enzi	Menendez
Alexander	Feingold	Merkley
Barrasso	Feinstein	Mikulski
Baucus	Franken	Murkowski
Bayh	Gillibrand	Murray
Begich	Graham	Nelson (NE)
Bennet	Grassley	Nelson (FL)
Bennett	Gregg	Pryor
Bingaman	Hagan	Reed
Bond	Harkin	Reid
Boxer	Hatch	Risch
Brown (MA)	Hutchison	Roberts
Brown (OH)	Inhofe	Rockefeller
Brownback	Inouye	Sanders
Bunning	Isakson	Schumer
Burr	Johanns	Sessions
Burris	Johnson	Shaheen
Cantwell	Kaufman	Shelby
Cardin	Kerry	Snowe
Carper	Klobuchar	Specter
Casey	Kohl	Stabenow
Chambliss	Kyl	Tester
Cochran	Landrieu	Thune
Collins	Lautenberg	Udall (CO)
Conrad	Leahy	Udall (NM)
Corker	LeMieux	Vitter
Cornyn	Levin	Voinovich
Crapo	Lieberman	Warner
DeMint	Lincoln	Webb
Dodd	Lugar	Whitehouse
Dorgan	McCain	Wicker
Durbin	McCaskill	Wyden
Ensign	McConnell	

NAYS—1

Coburn

NOT VOTING—1

Byrd

The amendment (No. 3943) was agreed to.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I yield to the minority leader.

The PRESIDING OFFICER. The Republican leader.

Mr. MCCONNELL. Mr. President, I thank my friend from Connecticut. He was aware that I was going to ask consent for 30 minutes for a colloquy between Senators BARRASSO, ROBERTS, and myself, as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

BERWICK NOMINATION

Mr. MCCONNELL. Mr. President, let me just make a few observations, and then I will turn first to Senator ROBERTS.

The subject we would like to discuss is the Berwick nomination to be administrator of CMS. To be perfectly frank with you, I think many of us are alarmed by this nominee's focus on the British system, where government makes decisions for people on their care. In fact, I am reminded of a decision by the Department of Health and Human Services that I personally had a good deal of concern about last summer to limit the dissemination of information by companies who were in the Medicare Advantage business so that they could not communicate with their customers—clients—their opinions about legislation that would affect their product.

It was a stunning government gag order in effect saying to a corporation: You are not free to discuss a public issue before the Senate and the House; we are going to tell you what you can say. It was one of the most blatant examples of the government basically

squashing free speech as a condition for doing business with the government.

Now we have this nominee who is applauding—applauding—a system where care is delayed, denied, or rationed. So I am particularly concerned this attack on free speech is just a first step toward much greater government intervention.

I will be talking with Dr. Berwick about his plans, but now I would like to turn to Senator ROBERTS, whom I know has already spoken to Dr. Berwick, maybe as recently as today, to get his thoughts on this nominee for this very important position.

Mr. ROBERTS. If the distinguished Republican leader will yield, I will be happy to respond.

First, I thank the distinguished leader and the doc from Wyoming, who is always bringing forward new and important information about the health care bill and some of the problems that we are experiencing with it, for allowing me to join in this colloquy.

We are talking about President Obama's nominee to be administrator of the Centers for Medicare and Medicaid Service—CMS is the acronym. Rest assured, every health care provider in America knows about CMS, and the nominee is Dr. Donald Berwick. I just met with Dr. Berwick and had an opportunity to hear some of his thoughts on the direction he thinks American health care, and particularly Medicare and Medicaid, should take.

He is a very affable, friendly doctor from Connecticut. He has a wide background in terms of health care. I have also been reading up on Dr. Berwick, who has a prolific record of statements and speeches and books that further lay out his ideas for the future of health care. I recommend everyone within the health care industry and every health care consumer get hold of these speeches and these statements and, if possible books and read them.

Here is what I have learned. Dr. Berwick, I would tell the distinguished Republican leader, is a huge fan, a major champion, and a contributor to the British national health care system called NHS. As a matter of fact, I have a quote of Dr. Berwick regarding the NHS.

> I am romantic about the National Health Service; I love it. The NHS is not just a national treasure; it is a global treasure.

Well, I understand that people become very passionate about their jobs, but romantic seems to me a little unique, but we will let that go.

Now, why is this important? Because the NHS rations health care. The NHS denies and delays patient access to therapies in regard to breast cancer, Alzheimer's, multiple sclerosis, kidney cancer, macular degeneration—this happens to be my favorite example: patients required to go blind in one eye first before they get treatment for the other eye—and brain tumors. A patient group coalition called the group that rations health care in Great Britain unfair and unacceptable.

The quote by Dr. Berwick is:

> The decision is not whether or not we will ration health care—the decision is whether we will ration with our eyes open.

Consequently, I think the good Senator from Wyoming has something to say about that in regard to rationing health care and the British system.

Mr. BARRASSO. Mr. President, I agree absolutely with my colleague because that is exactly what is happening in the British health care system. It is delayed care, and delayed care, to me, equals denied care.

This has been such a major topic for discussion among the people in Britain that it was brought up in the recent debate for the prime ministership in the election, in the first televised debate ever. One of the questions that was asked of then-Prime Minister Gordon Brown was what about the National Health Service; people have to wait too long. Here is the quote. We have a transcript because I read about this in the local papers and got the transcript. He talked about people with cancer.

Now, this is very important to me, Mr. President, because my wife Bobbi is a breast cancer survivor. She was diagnosed in her forties as a result of a screening mammogram. So we spend a lot of time thinking about, talking about cancer, as do many families in this country.

Well, this is what he said about people who have cancer. This is Gordon Brown answering the question, what about the National Health Service and the long delayed time before treatment.

He said, ''They will also be able to know that their operation will be in 18 weeks.'' Mr. President, 18 weeks, if you are a cancer patient in need of an operation—18 weeks for your cancer operation. That is what the Prime Minister of England is promising the people as an aspirational goal. It makes you wonder how long is the delay right now.

So it is no surprise that the British medical journal, the Lancet Oncology, in their August 2008 summary of statistics, says in every category Americans survive cancer at higher rates than patients in other developed countries. American cancer patients have a higher survival rate for every major form of cancer than patients in Canada and Britain. American women have a 35-percent better chance of surviving colon cancer than British women. American men have an 80-percent better survival rate for prostate cancer. I have a list, cancer by cancer—breast cancer, colon cancer, prostate cancer—and the survival rates are much better in the United States than they are in Britain. It is not that our doctors are any better, it is that the treatment is more timely.

Imagine, Mr. President, being diagnosed with cancer and being told that your operation will be coming in September. Here we are in May, so 18 weeks from now—September—is when you will have your operation. All of that time the cancer can be growing. The cancer can be spreading.

As a patient in the United States, you may say: Do I really want Dr. Berwick? Do I want somebody who favors the National Health Service of Britain, someone who says they have incredible respect for the way it works and thinks it is the right way to go? Would an American citizen want that person to be in charge of Medicare and Medicaid for this country?

So I just have to respond to my colleague that, as a physician who has practiced for 25 years, and as a husband of a wife who is a breast cancer survivor—who has had detection through a screening mammogram and then very rapid surgery, where there actually was the spread of the cancer from the breast to one of her lymph nodes—I think she is alive today because of the screening mammogram and the timeliness—the timeliness—of her surgery and treatment in the United States.

I see the minority leader, and I see he is incredulous that we would be considering that sort of a system and that sort of a director for Medicare and Medicaid in this country.

Mr. MCCONNELL. Yes. And I would say to my friends that Wyoming and Kansas and Kentucky have a lot of rural areas. One of the things that Dr. Berwick has made very clear—and there was an article he wrote called ''Buckling Down to Change,'' in which he says there ought to be a concentration of change, in which he says there ought to be a concentration of services in metropolitan areas. He says most metropolitan areas in the United States should reduce the number of centers engaged in cardiac surgery, high-risk obstetrics, and neonatal intensive care services.

What he is really saying is narrow the specialties down to metropolitan areas only. I just think of how that would work in a State such as mine. We have a city—Pikeville, KY, in the mountains—about 2½ hours from the closest major city—Lexington. I wonder how it would work in my State to have to drive 2½ hours to put a baby in a hospital's neonatal intensive care unit. I mean, clearly, what he is talking about is major rationing of services.

That would be bad enough for the urban areas that are lucky enough to still have the service at all, but for States such as Wyoming and Kentucky and Kansas, where we have a lot of people in rural areas who are pretty far removed from major urban centers, we are talking about a catastrophe, as I see it.

Senator BARRASSO has practiced medicine for 25 years. I wonder what his take is on that kind of approach.

Mr. BARRASSO. My take is that it wouldn't work for Wyoming. But this entire health care bill—law, travesty—isn't going to work for Wyoming. We look at the numbers, and the Congressional Budget Office says 15 percent of hospitals in a few years are going to

find they are losing money and they can't stay open. People are going to have to travel long distances, very long distances, to get quality care. Sometimes with weather and with winter, it is very difficult. So I have lots of concerns for all of the rural communities in this country because we have somebody from Boston, or the big city, who doesn't think the way we do in Wyoming or Kentucky or in Kansas.

The other travesty of this is that the President of the United States has been in office now for well over a year—almost a year and a half—and it is only just now he has nominated someone to be in charge of Medicare and Medicaid. I have continued to ask on this floor why that is. Why has the President intentionally refused to send a name to the Senate to be in charge of Medicare and Medicaid at a time when this country was debating health care legislation; at a time when the President was proposing cutting $550 billion from our seniors on Medicare; at a time when the President was pushing—cramming—into Medicaid another 18 million people?

Mr. MCCONNELL. If my friend will yield, some have believed the reason he didn't want to send Dr. Berwick up during the health care debate is because it would confirm the obvious, which was the direction in which we were headed and which Senate Republicans said repeatedly during the debate on health care was the direction we were headed—and nobody has been more accurate on this issue than has Senator ROBERTS on the Finance Committee—which was massive rationing.

But it is hard to believe they had not decided to send the expert on rationing as soon as the debate was over.

Mr. ROBERTS. If the leader will yield, it is one thing to use the British health care system and be romantic about it, to quote Dr. Berwick, as an example for rationing, for practicing health care cost containment. It is another thing to do it by age, which is happening. But it is rationing by region, which the leader has pointed out and Dr. BARRASSO has pointed out, that should strike fear in the hearts of any person living in any rural area in the country. His tenet for modernizing the American health system is reducing what he calls ''the oversupply of inventory.'' That is how he defines it. Dr. Berwick's oversupply of inventory is, in truth, the rural patients' lifeline.

I know Dr. BARRASSO understands that.

As the leader has said, in Kentucky—well, in Kansas, demanding a patient in Kansas drive 200 or 300 miles to Wichita or Kansas City or Denver so their infant can get proper care is ridiculous. I can foresee a time when the rural health care system will consist of a bandaid and a bed pan.

Dr. Berwick is the perfect nominee for a President whose aim has always been to save money by rationing health care.

I would like to add, at this particular time, in addition to the rationing the good doctor talked about, the national health system in Great Britain utilizes an end-of-life pathway to death; an end-of-life pathway to death—that is a shocking description—that many British doctors say leads to premature death in patients who could have otherwise recovered.

To say that is noteworthy is unjust. It is egregious. Dr. Berwick's ideas on end-of-life care seem to mirror this death pathway. The quote is: ''Most people who have serious pain do not need advanced methods; they just need the morphine and the counseling that have been around for centuries.''

This is a rather stunning statement, it seems to me. But it is very similar to President Obama's remarks about the elderly approaching the end of their life. The President has said that as you get older, ''maybe you're better off not having the surgery, but taking the shots and the pain killer.''

The only thing missing in that is the walker.

Consequently, he has also remarked that ''the chronically ill and those towards the end of their life are accounting for 80 percent of the total health care bill out here.'' We know that. ''[T]here is going to have to be a very difficult democratic conversation that takes place.'' That is the end of the quote by the President.

It sounds like this ''difficult democratic conversation'' has already happened in the United Kingdom and that their pathway-to-death solution mirrors Dr. Berwick's and President Obama's ideas exactly.

But age rationing, as has been indicated, is not the only way to do it, as the leader has pointed out. We have regional discrimination as well.

Mr. BARRASSO. It is interesting, looking at this whole thing, because what we see happening in Britain right now—they call it NICE, but there is nothing nice about it—National Institute for Health and Clinical Excellence—what Dr. Berwick has had to say about it is very much the opposite of what doctors who practice there have said. What he has said about this system is that:

> Those organizations are functioning very well and are well respected by clinicians, and they are making their populations healthier and better off.

But a London colon cancer specialist says:

> A lot of my colleagues also face pressure from managers—

Managers in the British health system—

> not to tell patients about new drugs. There is nothing in writing, [he says] but telling patients opens a Pandora's box for health services trying to contain costs.

So it gets down to not quality of care, not availability of care but the cost of care.

Dr. Berwick says NICE is extremely effective and a conscientious, valuable and—importantly—knowledge-building system.

This is what—someone—says:

> Doctors are keeping cancer patients in the dark . . .

These are specialists, polled by Myeloma, United Kingdom:

> Doctors are keeping cancer patients in the dark about expensive new drugs that could extend their lives. . . .

So let's keep people in the dark rather than tell them what is there that can help extend or save their life. That, to me, is not a system that the American people want.

Mr. MCCONNELL. Could I ask my friend from Wyoming, who practiced medicine for 25 years, the Congressional Budget Office just said yesterday that this bill is going to cost $115 billion more than was portrayed on the Senate floor. Would it not be reasonable to assume, based on this nominee's views on the issue of rationing, that it could be that the way they intend to save that $115 billion, if they do, is with massive and extensive rationing, by nominating an individual who has expressed himself so clearly and unambiguously on the virtues of rationing? The exploding costs that everyone, the administration's own actuaries, the Congressional Budget Office, everybody who knows anything about the subject is weighing in, in the aftermath of the health care debate, and confirming the concerns that Senate Republicans raised during the debate, every single one of them has been confirmed by independent groups that this is the way they intend to cut costs.

Mr. ROBERTS. I say to the leader, this isn't anything new. Dr. BARRASSO has been predicting this for some time. Those of us on the Finance Committee and the Health committee, we got a double dose. During the health care debate, we tried to warn of the ''four rationers'' that were embedded in the bill. That is what we called them. I made several statements on them. We have: the Patient-Centered Outcomes Research Institute, the Independent Payment Advisory Board, the CMS Innovation Center, and the U.S. Preventive Services Task Force.

Dr. Berwick was actually the vice chair of the U.S. Preventive Services Task Force until 1996. You may remember this, as Dr. BARRASSO pointed out, this was the body that recently ignited a firestorm by recommending that women wait until age 50 before they receive a mammogram. That certainly angered many doctors in America, and whoever said that beat a hasty retreat.

We also warned that ObamaCare, I say to the leader and my friend from Wyoming, will result in higher costs, not lower, a prediction not only by the CBO but by the bravest man in America, CMS expert, Richard Foster, who—it is amazing to me that he is still on the job, thank goodness. He recently backed all that up, in terms of higher premiums, higher cost, rationing, access to doctors by the elderly, and has renewed his warning time and time again.

Now our predictions are coming true and President Obama's CMS nominee,

Dr. Berwick, will be the man who cuts health care costs by putting the rationing plans into practice. We will call it cost containment, but it will be rationing.

I hope my colleagues will join me in carefully reviewing the statements and the speeches and the books and everything else that good Dr. Berwick has stated in the last 30 years on rationing. I think if we do that, most of us will agree he is the wrong man, wrong time, wrong job.

I thank the leader and the good doctor for allowing me to join in this colloquy.

The PRESIDING OFFICER. The Senator from Maine.

AMENDMENT NO. 3879 TO AMENDMENT NO. 3739

Ms. COLLINS. Mr. President, I ask unanimous consent that the pending amendment be set aside and call up amendment No. 3879, which is pending at the desk.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report.

The legislative clerk read as follows:

The Senator from Maine [Ms. COLLINS] proposes an amendment numbered 3879 to amendment No. 3739.

Ms. COLLINS. I ask unanimous consent the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To mandate minimum leverage and risk-based capital requirements for insured depository institutions, depository institution holding companies, and nonbank financial companies that the Council identifies for Board of Governors supervision and as subject to prudential standards)

At the appropriate place in title I, insert the following:

SEC. ___. LEVERAGE AND RISK-BASED CAPITAL REQUIREMENTS.

(a) DEFINITIONS.—

(1) GENERALLY APPLICABLE LEVERAGE CAPITAL REQUIREMENTS.—The term ''generally applicable leverage capital requirements'' means—

(A) the minimum ratios of tier 1 capital to average total assets, as established by the appropriate Federal banking agencies to apply to insured depository institutions under the prompt corrective action regulations implementing section 38 of the Federal Deposit Insurance Act, regardless of total consolidated asset size or foreign financial exposure; and

(B) includes the regulatory capital components in the numerator of that capital requirement, average total assets in the denominator of that capital requirement, and the required ratio of the numerator to the denominator.

(2) GENERALLY APPLICABLE RISK-BASED CAPITAL REQUIREMENTS.—The term ''generally applicable risk-based capital requirements'' means—

(A) the risk-based capital requirements as established by the appropriate Federal banking agencies to apply to insured depository institutions under the agency's Prompt Corrective Action regulations that implement section 38 of the Federal Deposit Insurance Act, regardless of total consolidated asset size or foreign financial exposure; and

(B) includes the regulatory capital components in the numerator of those capital requirements, the risk-weighted assets in the denominator of those capital requirements, and the required ratio of the numerator to the denominator.

(b) MINIMUM CAPITAL REQUIREMENTS.—

(1) MINIMUM LEVERAGE CAPITAL REQUIREMENTS.—The appropriate Federal banking agencies shall establish minimum leverage capital requirements on a consolidated basis for insured depository institutions, depository institution holding companies, and nonbank financial companies identified under section 113. The minimum leverage capital requirements established under this paragraph shall not be less than the generally applicable leverage capital requirements, which shall serve as a floor for any capital requirements the agency may require, nor quantitatively lower than the generally applicable leverage capital requirements that were in effect for insured depository institutions as of the date of enactment of this Act.

(2) MINIMUM RISK-BASED CAPITAL REQUIREMENTS.—The appropriate Federal banking agencies shall establish minimum risk-based capital requirements on a consolidated basis for insured depository institutions, depository institution holding companies, and nonbank financial companies identified under section 113. The minimum risk-based capital requirements established under this paragraph shall not be less than the generally applicable risk-based capital requirements, which shall serve as a floor for any capital requirements the agency may require, nor quantitatively lower than the generally applicable risk-based capital requirements that were in effect for insured depository institutions as of the date of enactment of this Act.

(3) CAPITAL REQUIREMENTS TO ADDRESS ACTIVITIES THAT POSE RISKS TO THE FINANCIAL SYSTEM.—

(A) IN GENERAL.—Subject to the recommendations of the Council, in accordance with section 120, the Federal banking agencies shall develop capital requirements applicable to all institutions covered by this section that address the risks that the activities of such institutions pose, not only to the institution engaging in the activity, but to other public and private stakeholders in the event of adverse performance, disruption, or failure of the institution or the activity.

(B) CONTENT.—Such rules shall address, at a minimum, the risks arising from—

(i) significant volumes of activity in derivatives, securitized products purchased and sold, financial guarantees purchased and sold, securities borrowing and lending, and repurchase agreements and reverse repurchase agreements;

(ii) concentrations in assets for which the values presented in financial reports are based on models rather than historical cost or prices deriving from deep and liquid 2-way markets; and

(iii) concentrations in market share for any activity that would substantially disrupt financial markets if the institution is forced to unexpectedly cease the activity.

Ms. COLLINS. Mr. President, I am calling up tonight the amendment I debated on the Senate floor on Monday, with Senator DODD and other Members who were present. This amendment would direct regulators to impose strong risk- and size-based capital standards on financial institutions as they grow in size or engage in risky practices. I am pleased to offer this amendment on behalf of myself, Senator SHAHEEN, and Senator BROWNBACK.

Our amendment is aimed at addressing the too-big-to-fail problem at the root of the current economic crisis by requiring financial firms to have adequate amounts of cash and other liquid assets to survive financial challenges without turning to the taxpayers for a bailout.

I note this amendment would ensure that the Nation's largest banks and bank holding companies are required to meet, at a minimum, the same capital standards that are imposed on smaller community banks.

That is right. It may be odd to realize, but the fact is, under current law, regulators can allow larger financial institutions to follow capital standards that are actually less stringent than those that are applied to smaller depository institutions. That makes no sense whatsoever, and that is why this amendment has the strong support of the Chairman of the Federal Deposit Insurance Corporation, the FDIC Chairman, Sheila Bair.

She has written me a letter endorsing this amendment. She points out it is a critical element to ensure that U.S. financial institutions hold sufficient capital to absorb losses during future periods of financial stress. ''It is imperative,'' she writes, ''that they have sufficient capital to stand on their own in times of adversity.''

This amendment would apply to some of our largest banks as well as bank holding companies, and it would also apply to nonbank financial institutions that are identified for supervision by the Federal Reserve by the new Financial Stability Oversight Council, established by the bill.

This council is the council of regulators that will be created so we have an entity that would look across the economy to identify financial institutions and practices, risky practices that could pose a systemic risk to our economy.

Since I did debate the amendment at length on Monday, I am not going to go on at length tonight, especially since there are others of my colleagues who are waiting to speak. I would note that I have had a very good discussion with the managers of the bill, and I look forward to working further with them in the hopes that we can schedule this amendment for a vote tomorrow. I note this is a bipartisan amendment and that we have consulted at length with the chairman of the Banking Committee.

With that, I ask unanimous consent that the letter from the Chairman of the FDIC be printed in the RECORD, which letter further describes the amendment and the need for it, and I yield the floor.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

FEDERAL DEPOSIT
INSURANCE CORPORATION,
Washington, DC, May 7, 2010.

Hon. SUSAN M. COLLINS,
Ranking Minority Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR SENATOR COLLINS: I am writing to express my strong support for your amendment number 3879 to ensure strong capital requirements for our nation's financial institutions. This amendment is a critical element to ensure that U.S. financial institutions hold sufficient capital to absorb losses during future periods of financial stress. With new resolution authority, taxpayers will no longer bail out large financial institutions. This makes it imperative that they have sufficient capital to stand on their own in times of adversity.

During the crisis, FDIC-insured subsidiary banks became the source of strength both to the holding companies and holding company affiliates. Far from being a source of strength to banks as Congress intended, holding companies became a source of weakness requiring federal support. If, in the future, bank holding companies are to become sources of financial stability for insured banks, then they cannot operate under consolidated capital requirements that are numerically lower and qualitatively less stringent than those applying to insured banks. This amendment would address this issue by requiring bank holding companies to operate under capital standards at least as stringent as those applying to banks.

The crisis also demonstrated the dangers of excessive leverage undertaken by large nonbanks outside of the scope of federal bank regulation. Notable examples included the excessive leverage of the largest investment banks during the run-up to the crisis, and the extremely high leverage of Fannie Mae and Freddie Mac. To remedy this and prevent regulatory gaps and arbitrage, large nonbank financial institutions deemed to be systemic must be held to the same, or higher, capital standards as those applying to banks and bank holding companies. Again, the amendment accomplishes this goal simply and directly.

Finally, and more broadly, the crisis identified the dangers of a regulatory mindset focused exclusively on the soundness of individual banks without reference to the ''big picture.'' For example, an individual overnight repo may be safe, but widespread financing of illiquid securities with overnight repos left the system vulnerable to a liquidity crisis. A financial system-wide view requires regulators, working in conjunction with the new Financial Services Oversight Panel, to develop capital regulations to address the risks of activities that affect the broader financial system, beyond the bank that is engaging in the activity.

We at the FDIC remain committed to working with you towards a stronger financial system. This amendment will be an important step in accomplishing this goal.

If you have further questions or comments, please do not hesitate to contact me or Paul Nash, Deputy for External Affairs.

Sincerely,

SHEILA C. BAIR,
Chairman.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I now send to the desk a modification of amendment No. 3739.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BROWNBACK. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 3789, AS MODIFIED, TO AMENDMENT NO. 3739

Mr. BROWNBACK. Mr. President, as I understand, we had an agreement I was going to call up an amendment and then it could be set aside, just to get it pending.

With that, I ask unanimous consent that the pending business be set aside and that amendment No. 3789 be called up as the pending business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BROWNBACK. Mr. President, I send a modification to my amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment as modified.

The legislative clerk read as follows:

The Senator form Kansas [Mr. BROWNBACK] proposes an amendment numbered 3789, as modified, to amendment No. 3739.

Mr. BROWNBACK. I ask further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To provide for an exclusion from the authority of the Bureau of Consumer Financial Protection for certain automobile manufacturers, and for other purposes)

At the end of subtitle B of title X, add the following:

SEC. 1030. EXCLUSION FOR AUTO DEALERS.

(a) IN GENERAL.—The Director and the Bureau may not exercise any rulemaking, supervisory, enforcement, or any other authority, including authority to order assessments over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

(b) CERTAIN FUNCTIONS EXCEPTED.—The provisions of subsection (a) shall not apply to any person, to the extent that such person—

(1) provides consumers with any services related to residential or commercial mortgages and self-financing transactions involving real property;

(2) operates a line of business that involves the extension of retail credit or retail leases involving motor vehicles, and in which—

(A) the extension of retail credit or retail leases are provided directly to consumers; and

(B) the contract governing such extension of retail credit or retail leases is not predominantly assigned to a third-party finance or leasing source; or

(3) offers or provides a consumer financial product or service not involving or related to the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service.

(c) NO IMPACT ON PRIOR AUTHORITY.—Nothing in this section shall be construed to modify, limit, or supersede the rulemaking or enforcement authority over motor vehicle dealers that could be exercised by any Federal department or agency on the day before the date of enactment of this Act.

(d) NO TRANSFER OF CERTAIN AUTHORITY.—Notwithstanding any other provision of this Act, the consumer financial protection functions of the Board of Governors and the Federal Trade Commission shall not be transferred to the Director or the Bureau to the extent such functions are with respect to a person described under subsection (a).

(e) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) MOTOR VEHICLE.—The term ''motor vehicle'' means—

(A) any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

(B) recreational boats and marine equipment;

(C) motorcycles;

(D) motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in sections 571.3 and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and

(E) other vehicles that are titled and sold through dealers.

(2) MOTOR VEHICLE DEALER.—The term ''motor vehicle dealer'' means any person or resident in the United States, or any territory of the United States, who is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles.

AMENDMENT NO. 3883 TO AMENDMENT NO. 3739

Mr. BROWNBACK. Mr. President, I ask unanimous consent that the pending business be set aside and that amendment No. 3883, on behalf of Senator SNOWE, be called up as the pending business.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report.

The legislative clerk read as follows:

The Senator from Kansas [Mr. BROWNBACK], for Ms. SNOWE and Mr. PRYOR, proposes an amendment numbered 3883 to amendment No. 3739.

The amendment is as follows:

(Purpose: To ensure small business fairness and regulatory transparency)

At the appropriate place, insert the following:

SEC. ____. SMALL BUSINESS FAIRNESS AND REGULATORY TRANSPARENCY.

(a) PANEL REQUIREMENT.—Section 609(d) of title 5, United States Code, is amended by striking ''means the'' and all that follows and inserting the following: ''means—

''(1) the Environmental Protection Agency;

''(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

''(3) the Occupational Safety and Health Administration of the Department of Labor.''.

(b) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Section 603 of title 5, United States Code, is amended by adding at the end the following:

''(d)(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

''(A) any projected increase in the cost of credit for small entities;

''(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

''(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

''(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

''(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

''(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).''.

(c) FINAL REGULATORY FLEXIBILITY ANALYSIS.—Section 604(a) of title 5, United States Code, is amended—

(1) in paragraph (4), by striking ''and'' at the end;

(2) in paragraph (5), by striking the period at the end and inserting ''; and''; and

(3) by adding at the end the following:

''(6) for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.''.

Mr. BROWNBACK. I want to thank my colleagues for getting these amendments pending. I would note that the amendment I called up is the one to exempt auto dealers from the consumer financial products commission created in this bill.

These are auto loans already covered under the bill by whoever is doing the financing. If the auto dealers themselves are doing the financing, then they would be covered under the consumer financial products commission.

What this amendment attempts to do is say, let's regulate auto loans, but let's regulate them by who is doing the loan, not just who is processing the paper.

It would be my hope that we would get the broad bipartisan support of my colleagues. We do have bipartisan support for this amendment. I will look forward to a full debate on it tomorrow. But in the interest of time this evening I will not be talking further on it.

I am happy to enter into a time agreement with the managers on this tomorrow to debate and get this amendment for a vote tomorrow.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

AMENDMENT NO. 3776, AS MODIFIED, TO AMENDMENT NO. 3739

Mr. SPECTER. I call up amendment No. 3776, as modified.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report.

The legislative clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER], for himself, Mr. REED, Mr. KAUFMAN, Mr. DURBIN, Mr. HARKIN, Mr. LEAHY, Mr. LEVIN, Mr. MENENDEZ, Mr. WHITEHOUSE, Mr. FRANKEN, Mr. FEINGOLD, and Mr. MERKLEY, proposes an amendment numbered 3776, as modified, to amendment No. 3739.

Mr. SPECTER. I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment, as modified, is as follows:

On page 1004, between lines 11 and 12, insert the following:

SEC. 929D. PRIVATE CIVIL ACTION FOR AIDING AND ABETTING.

Section 20(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78t(e)) is amended—

(1) in the subsection heading, by striking ''PROSECUTION OF'' and inserting ''ACTIONS AGAINST'';

(2) by striking ''For purposes'' and inserting the following:

''(1) ACTIONS BROUGHT BY COMMISSION.—For purposes''; and

(3) by adding at the end the following:

''(2) PRIVATE CIVIL ACTIONS.—For purposes of any private civil action implied under this title, any person that knowingly provides substantial assistance to another person in violation of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of this title to the same extent as the person to whom such assistance is provided. For purposes of this paragraph, a person acts knowingly only if the person has actual knowledge of the improper conduct underlying the violation described in the preceding sentence and the persons role in assisting that conduct.'.

Mr. SPECTER. Mr. President, I have offered this amendment on behalf of quite a number of Senators—Senator REED, Senator KAUFMAN, Senator DURBIN, Senator HARKIN, Senator LEAHY, Senator LEVIN, Senator MENENDEZ, Senator WHITEHOUSE, Senator FRANKEN, Senator FEINGOLD, Senator MERKLEY, and myself.

This amendment provides that the decisions of the Supreme Court of the United States limiting claims under the securities acts for aiding and abetting will be overturned by this legislation.

This amendment is very similar to an amendment which was offered in the 107th Congress by Senator SHELBY, the ranking member of the Banking Committee. For many years, the federal law provided a private right of action against aiders and abettors.

As of 1994, every circuit of the federal courts of appeals had included civil liability in a private lawsuit under the securities laws. In a radical departure in 1994, the Supreme Court held, in Central Bank of Denver, that aiders and abettors are not liable in private suits.

The Court's 5-to-4 decision in Stoneridge in 2008 complicated the matter even further, where the Supreme Court held that if the defendant did not make representations directly to the person buying or selling the securities, that the individual was not liable, even if he himself had engaged in fraudulent conduct.

This is a subject I have long been interested in. Back in 2007, I wrote to President Bush concerning the failure of the Solicitor General's office to file a brief that was requested by the Securities and Exchange Commission in the Stoneridge case. The Securities and Exchange Commission was very concerned about that. I urged that the Solicitor General take action.

I ask unanimous consent that a copy of this letter to the President be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. Mr. President, the absence of civil liability is striking in this situation, because there is criminal liability for aiding and abetting under the federal criminal code.

I know of no situation where there is criminal liability for conduct, but it does not give rise to a civil claim for relief or a civil cause of action. During a hearing on this subject, a very distinguished scholar, Professor Coffee of the Columbia Law School, pointed out how unusual that was in his experience, much broader than mine, that this was anomalous.

In the case of Refco Securities Litigation, reported at 609 F. Supp. 2d 304 (S.D.N.Y. 2009), Judge Gerald Lynch made the same point:

It is perhaps dismaying that participants in a fraudulent scheme who may even have committed criminal acts are not answerable in damages to the victims of the fraud. . . . There are accomplices and there are accomplices: after all, in the criminal context when the Godfather orders a hit, he is only an accomplice to murder-one who ''counsels, commands, induces or procures,'' but he is nonetheless liable as a principal for the commission of the crime. Likewise, some civil accomplices are deeply and indispensably implicated in wrongful conduct.

But on the current state of the law, there is no accountability for civil damages for aiders and abettors.

Prof. John Coffee made this point in our hearing:

Does anyone really believe today that in this post-Madoff world, that the SEC, by itself, can adequately deter most secondary participants in securities fraud?

Even when the SEC sues, moreover, its remedial authority is very limited. It can neither recover losses for injured investors nor deter fraud in the first place.

A comparative impact of private lawsuits has noted that in the Enron case, the private litigants recovered $7.3 billion, and the SEC recovered $450 million. In the WorldCom case, private litigants recovered $6.85 billion; the SEC recovered only $750 million. In the Dynegy case, private litigants recovered $474 million, the SEC $198 million. In the AOL-Time Warner case, private litigants recovered $3.1 billion, and the SEC recovered $360 million.

According to testimony given on my aiding-and-abetting legislation last year before the Subcommittee on Crime, the SEC recovered a mere $8 billion from security law violators since enactment of Sarbanes-Oxley in 2002, whereas the private litigants in Enron alone recovered $7.3 billion. So the impact of the private lawsuits is very important.

We have seen the extraordinary impact of Wall Street fraud: the losses of 6½ million jobs, the reduction of the gross national product enormously. This private right of action is a very important part of keeping Wall Street

honest with the litigation which it has produced.

There has been a letter filed by a number of entities in opposition to the amendment, headed by the U.S. Chamber of Commerce, raising a point that, ''The provision would subject defendants to liability whether or not they have any idea that the conduct they are assisting is wrongful.''

Well, that is a gross misstatement of what this bill does. This amendment has been very narrowly drawn. It applies only to those who knowingly provide substantial assistance to the primary violator.

The scienter standard is more defendant-protective than the standard set forth in Senator SHELBY's legislation which he introduced in the 107th Congress. The scienter standard in the Shelby bill was ''recklessness,'' not ''knowingly acted upon.'' The ''knowingly'' scienter standard in the amendment is identical to the restrictive standard in 15 U.S.C. 78(t)(e) governing aiding-and-abetting actions brought by the Securities and Exchange Commission.

In order to eliminate any conceivable doubt, a modification has been added to the amendment as originally filed, specifying: ''For purposes of this paragraph, a person acts knowingly only if the person has actual knowledge of the improper conduct underlying the violation described in the preceding sentence and the person's role in assisting that conduct.''

So, in essence, here we have a very tightly drawn amendment. It had been introduced earlier as S. 1551. I thank the distinguished chairman of the committee for his accommodation in listing this amendment for argument. This is a very important amendment. There are a lot of amendments pending. But I do believe that among the matters to be considered in this bill, this is one of the most important. You have a lot of people very badly damaged by these security fraudulent actions. The Securities and Exchange Commission is limited in personnel and staff to act on them. These private rights of action have long been a source of enormous aid in enforcing the law in antitrust cases and Securities Act cases. Private prosecutions are enormously important.

By way of footnote, this is a subject of a law school comment that I wrote many years ago at Yale about the background for private action. It is a very important supplement to what public officials and public agencies can do.

I urge my colleagues to support this amendment.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, August 3, 2007.

The PRESIDENT,
Washington, DC.

DEAR MR. PRESIDENT: I am writing to express my concern about the Solicitor General's failure to file a brief that was requested by the Securities and Exchange Commission in Stoneridge Investment Partners v. Scientific Atlanta. The outcome of Stoneridge will also determine whether tens of thousands of Enron investors will secure a day in court. Earlier this year, the SEC voted to file an amicus brief in Stoneridge in favor of scheme liability, which is the same position the Commission has previously taken in similar cases in lower courts, including the Enron case. It has been reported that the Solicitor General did not file the brief, based on your views, and that the Solicitor General may actually file an amicus brief arguing the opposite position recommended by the SEC.

The SEC is an independent agency and its attorneys can represent the agency in trial courts and courts of appeals. The SEC, however, cannot represent itself at the Supreme Court of the United States—it must convince the Solicitor General to represent the SEC's position. Independence, when used to describe an administrative agency, connotes independence from the President and the ability to take positions or engage in actions that do not necessarily reflect the policies and views of the Administration.

Chairman Cox, in response to questions about the SEC's vote to file an amicus brief in Stoneridge, stated at a Congressional hearing on June 26, 2007, that the ''law has to have some objective meaning. It can't be just a question of how we all feel about it'' and that laws should not change with the change in political composition of the Commission. He explained that he did ''not think that there's anywhere where it could be more important for there to be predictability and clarity in rulemaking than when it comes to our capital markets, because so much is at stake that people have to make big bets on whether or not what they're doing is the right thing to do. . . . I think we do a great disservice when we are anything but clear and predictable, rule-based and law-based.'' I agree with Chairman Cox.

On the issue of predictability in the law, I note what happened to shareholders who were defrauded by Enron when they brought a lawsuit charging certain Enron executives and directors—along with the company's accountants, law firm and banks—with violation of federal securities laws. The alleged violations included massive insider trading while making false and misleading statements about Enron's financial performance. The shareholders reached a settlement with several financial institutions, but while claims were still pending against a number of additional institutions, in March 2007, the Court of Appeals for the Fifth Circuit granted the banks complete immunity from liability. The court acknowledged that the banks' conduct was ''hardly praiseworthy,'' but it ruled that because the banks themselves did not make any false statements about their conduct to the shareholders they could not be held liable, even if they knowingly participated in the scheme to defraud. In an extraordinary admission, the court acknowledged that the ruling runs afoul of ''justice and fair play.'' The ruling also is at odds with the position of the SEC, with its wealth of specialized knowledge on the issues of contention in both the Enron case and Stoneridge, and with rulings of other courts.

The Solicitor General is entitled to aid the Court in its interpretation of the law, and I applaud his close attention to this critical case. I am concerned, however, that he has been unable to articulate a legal position—either for or against the plaintiffs—that is independent from the Administration's policy preferences. As you have often said, substantive changes to the law should be made through the legislative process, not through the courts.

Thank you for attention to this matter.

Sincerely,

ARLEN SPECTER.

Mr. SPECTER. I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

AMENDMENTS NOS. 3823, 3932, AND 3808 TO AMENDMENT NO. 3739

Mr. DODD. Mr. President, I ask unanimous consent, if I may, that the pending amendments be set aside and that it be in order to call up the following amendments and that once reported by number, they be set aside:

Senator LEAHY's amendment No. 3823; Senator DURBIN's amendment No. 3932, and Senator FRANKEN's amendment No. 3808.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report the amendments by number.

The assistant legislative clerk read as follows:

The Senator from Connecticut [Mr. DODD] proposes amendments en bloc numbered 3823, 3932, and 3808.

The amendments are as follows:

AMENDMENT NO. 3823

(Purpose: To restore the application of the Federal antitrust laws to the business of health insurance to protect competition and consumers)

At the end of the amendment, insert the following:

SEC. _____. HEALTH INSURANCE INDUSTRY ANTITRUST ENFORCEMENT ACT.

(a) SHORT TITLE.—This section may be cited as the ''Health Insurance Industry Antitrust Enforcement Act''.

(b) RESTORING THE APPLICATION OF ANTITRUST LAWS TO HEALTH SECTOR INSURERS.—

(1) AMENDMENT TO MCCARRAN-FERGUSON ACT.—Section 3 of the Act of March 9, 1945 (15 U.S.C. 1013), commonly known as the McCarran-Ferguson Act, is amended by adding at the end the following:

''(c) Nothing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance. For purposes of the preceding sentence, the term 'antitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.''.

(2) RELATED PROVISION.—For purposes of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section applies to unfair methods of competition, section 3(c) of the McCarran-Ferguson Act shall apply with respect to the business of health insurance without regard to whether such business is carried on for profit, notwithstanding the definition of ''Corporation'' contained in section 4 of the Federal Trade Commission Act.

AMENDMENT NO. 3932

(Purpose: To ensure that the fees that small businesses and other entities are charged for accepting debit cards are reasonable and proportional to the costs incurred, and to limit payment card networks from imposing anti-competitive restrictions on small businesses and other entities that accept payment cards)

At the end of subtitle G of title X, add the following:

SEC. 1077. REASONABLE FEES AND RULES FOR PAYMENT CARD TRANSACTIONS.

The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

(1) by redesignating sections 920 and 921 as sections 921 and 922, respectively; and

(2) by inserting after section 919 the following:

"SEC. 920. REASONABLE FEES AND RULES FOR PAYMENT CARD TRANSACTIONS.

''(a) REASONABLE INTERCHANGE TRANSACTION FEES FOR ELECTRONIC DEBIT TRANSACTIONS.—

''(1) REGULATORY AUTHORITY.—The Board shall have authority to establish rules, pursuant to section 553 of title 5, United States Code, regarding any interchange transaction fee that an issuer or payment card network may charge with respect to an electronic debit transaction.

''(2) REASONABLE FEES.—The amount of any interchange transaction fee that an issuer or payment card network may charge with respect to an electronic debit transaction shall be reasonable and proportional to the actual cost incurred by the issuer or payment card network with respect to the transaction.

''(3) RULEMAKING REQUIRED.—The Board shall issue final rules, not later than 9 months after the date of enactment of the Consumer Financial Protection Act of 2010, to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the actual cost incurred by the issuer or payment card network with respect to the transaction.

''(4) CONSIDERATIONS.—In issuing rules required by this section, the Board shall—

''(A) consider the functional similarity between—

''(i) electronic debit transactions; and

''(ii) checking transactions that are required within the Federal Reserve bank system to clear at par;

''(B) distinguish between—

''(i) the actual incremental cost incurred by an issuer or payment card network for the role of the issuer or the payment card network in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered under paragraph (2); and

''(ii) other costs incurred by an issuer or payment card network which are not specific to a particular electronic debit transaction, which costs shall not be considered under paragraph (2); and

''(C) consult, as appropriate, with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Administrator of the Small Business Administration, and the Director of the Bureau of Consumer Financial Protection.

''(5) EXEMPTION FOR SMALL ISSUERS.—This subsection shall not apply to issuers that, together with affiliates, have assets of less than $1,000,000,000, and the Board shall exempt such issuers from rules issued under paragraph (3).

''(6) EFFECTIVE DATE.—Paragraph (2) shall become effective 12 months after the date of enactment of the Consumer Financial Protection Act of 2010.

''(b) LIMITATION ON ANTI-COMPETITIVE PAYMENT CARD NETWORK RESTRICTIONS.—

''(1) NO RESTRICTIONS ON OFFERING DISCOUNTS FOR USE OF A COMPETING PAYMENT CARD NETWORK.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment through the use of a card or device of another payment card network.

''(2) NO RESTRICTIONS ON OFFERING DISCOUNTS FOR USE OF A FORM OF PAYMENT.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, check, debit card, or credit card.

''(3) NO RESTRICTIONS ON SETTING TRANSACTION MINIMUMS OR MAXIMUMS.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to set a minimum or maximum dollar value for the acceptance by that person of any form of payment.

''(c) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

''(1) DEBIT CARD.—The term 'debit card'—

''(A) means any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account for the purpose of transferring money between accounts or obtaining goods or services, whether authorization is based on signature, PIN, or other means;

''(B) includes general use prepaid cards, as that term is defined in section 915(a)(2)(A) (15 U.S.C. 16931–1(a)(2)(A)); and

''(C) does not include paper checks.

''(2) CREDIT CARD.—The term 'credit card' has the same meaning as in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

''(3) DISCOUNT.—The term 'discount'—

''(A) means a reduction made from the price that customers are informed is the regular price; and

''(B) does not include any means of increasing the price that customers are informed is the regular price.

''(4) ELECTRONIC DEBIT TRANSACTION.—The term 'electronic debit transaction' means a transaction in which a person uses a debit card to debit an asset account.

''(5) INTERCHANGE TRANSACTION FEE.—The term 'interchange transaction fee' means any fee established by a payment card network that has been established for the purpose of compensating an issuer or payment card network for its involvement in an electronic debit transaction.

''(6) ISSUER.—The term 'issuer' means any person who issues a debit card, or the agent of such person with respect to such card.

''(7) PAYMENT CARD NETWORK.—The term 'payment card network' means an entity that directly, or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software that route information and data to conduct transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card, credit card or other device that may be used to carry out debit or credit transactions.''.

AMENDMENT NO. 3808

(Purpose: To instruct the Securities and Exchange Commission to establish a self-regulatory organization to assign credit rating agencies to provide initial credit ratings)

(The amendment is printed in the RECORD of Tuesday, May 4, 2010, under ''Text of Amendments.'')

The PRESIDING OFFICER. The Senator from Alabama.

AMENDMENT NO. 3832 TO AMENDMENT NO. 3739

(Purpose: To provide an orderly and transparent bankruptcy process for non-bank financial institutions and prohibit bailout authority)

Mr. SESSIONS. Mr. President, I wish to call up amendment No. 3832 and ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will report.

The assistant bill clerk read as follows:

The Senator from Alabama [Mr. SESSIONS], for himself, Mr. BUNNING, Mr. DEMINT, Mr. ENSIGN, Mr. BROWN of Massachusetts, proposes an amendment numbered 3832 to amendment No. 3739.

Mr. SESSIONS. I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The amendment is printed in the RECORD of Wednesday, May 5, 2010, under ''Text of Amendments.'')

Mr. SESSIONS. Mr. President, they say the proof is in the pudding. The proof is an ultimate test of an idea or an evaluation. It literally means you can show us a wonderful recipe and tell us about the fine ingredients, but we want to know what it tastes like in the end. The actual result is what is important. So I think the American people know that in the bill we are dealing with today, we are still too involved in the maneuvering of the dissolution of companies that fail. We create special procedures for larger companies than we do for routine companies throughout the country. The pudding tastes bad.

My colleagues tell us this bill has the right ingredients, but the ultimate result, I think, is to provide government-funded bailouts in some way or another, through another name, actually now called orderly liquidation authority. I understand the provisions are better perhaps than they were when the discussions began and are more rigorous in some ways. I still feel more needs to be done to create the kind of integrity and the consistency and the principled approach to dissolution of a failed corporation that good law requires.

The legislation before us provides the government with vast, sweeping regulatory authority. I know a lot of people in the country—and I respect my good friend, Senator DODD. He is such a fabulous Senator and so knowledgeable about these areas. But I talked to my car dealers and they have to meet with State regulatory loan officers and they have always had to deal with State legislation and control and certain Federal rules apply. But what this legislation does is, it is one more example of an expansive mentality as far as fixing a discrete problem, which started out to be fixing Wall Street, too big to fail, and now we have a historic alteration of the respect we get for State and local government to manage lending matters. We have the Federal Government now doing that under this consumer title. I am not sure we have fully thought that through. I don't think it is necessary, frankly.

Some of the regulatory authority that was involved in controlling financial institutions that were part of the financial crisis we faced, I think, was

because this regulatory authority caused or failed to prevent the crisis. It may have even made it worse. Instead of ending too big to fail, this legislation, I am afraid, institutionalizes it.

Professor John Taylor, the author of the Taylor rule, which, because it was violated, probably helped precipitate this crisis. If his rule had been followed carefully by the Federal Reserve, I think we would have had a far less serious problem than we had. He is a professor of economics at Stanford University. He is well respected. He made this point clear in a recent editorial in the Wall Street Journal. This is what John B. Taylor, the Taylor rule author, observed:

> The financial crisis of 2008 demonstrates why it is dangerous for the orderly liquidation section of the Dodd bill to institutionalize such a process by giving the government even more discretion and power to take over businesses.

He goes on to say:

> The proposed liquidation process would have the unintended consequence of increasing the incentive for creditors and other counterparties to run whenever there is a rumor that the government official is thinking about intervening.

He goes on to describe other reasons why he thinks the language as we have it is unwise.

Peter Wallison, former general counsel to the Treasury Department, voiced his strong opposition to the proposed legislation saying:

> Not only does the Dodd bill establish too big to fail as a national policy, but it makes the idea real by creating a system for bailing out large financial companies if they get into trouble. Of course, ''bailing out'' is not the phrase used in the bill; the preferred language there is ''orderly liquidation.''

So Mr. Wallison makes clear—I will not go on and quote all of his remarks, but he makes clear why he believes this is a dangerous institutionalization of special privileges for large companies. I think the Dodd amendment signals to creditors they will get a better deal if they lend to the big regulated firms, and this is what Mr. Wallison says:

> They believe they will get a better deal if they lend to the big regulated firms rather than lending to the small competitors. The bill does this by making it possible for creditors to be fully paid when a too-big-to-fail financial firm is liquidated, even though this would not happen in bankruptcy.

Mr. Wallison hits the nail on the head, I am afraid. Select creditors—those with good lobbyists or those otherwise deemed too big to fail—will definitely get a better deal under the backroom process of orderly liquidation than they would in bankruptcy.

Let me be clear. The unhealthy government connection to Wall Street can only be eliminated, I think, through the legitimate utilization of historic bankruptcy process. ''Orderly liquidation,'' as defined here, will not achieve the result.

When the legislation was first introduced, Senator LEAHY wrote the Judicial Conference of the United States—that is the Chief Justice and his Judicial Conference group of judges there—and asked him for their views on the legislation. The Judicial Conference responded that the bill failed the ultimate test. They said:

> This is a substantial change to bankruptcy law because it would create a new structure within the bankruptcy courts and remove a class of cases from the jurisdiction of the Bankruptcy Code. The legislation, by assigning to the FDIC the responsibility for resolving the affairs of an insolvent firm, appears to provide a substitute for a bankruptcy proceeding.

That is a significant statement. This is the Supreme Court, the Judicial Conference, giving us their insight into this.

The letter goes on to say:

> This could be especially problematic if creditors have changed position based on rulings in the course of the bankruptcy proceeding. The legislation does not envision—

Let me continue to quote this:

> The legislation does not envision objection, participation, or input from the bankruptcy creditors whose rights will be affected in the course of appointing the FDIC as a receiver.

In other words, the normal process by which creditors and others can participate, object, cross-examine, is cut short.

The letter goes on to say:

> Indeed, the legislation proposes to deal with this petition in a sealed manner—

Not in a public, open manner, where lawyers cross-examine witnesses under oath, but in a sealed manner, the Judicial Conference says.

It goes on to say:

> Only the Secretary and the affected financial firm would be noticed and given the opportunity of a hearing. The financial position of affected creditors may have been changed within the context of the firm's bankruptcy case in such a way that the creditors' rights may have been changed dramatically.

They go on to say this could raise constitutional questions. They said:

> Any resulting due process challenges—

They are talking about the due process clause of the U.S. Constitution—

> would impose a significant burden on the courts to resolve novel issues.

In addition, they go on to say this:

> We note that petitions under this title involving financial firms would be filed in a single judicial district.

Delaware.

> The Judicial Conference favors distribution of cases in other courts.

Well, I think the Judicial Conference is making clear one thing in its correspondence. Bankruptcy, with its rules and procedures, not orderly liquidation authority, is the best way to approach dissolving a financial institution. We are not talking about banks. Banks would be still contained within the FDIC. They have a long history of being able to resolve banks in financial trouble. But I think—I can only say I share the opinion of the Judicial Conference. I think it is shared by a number of presidents of the Federal Reserve banks.

In recent testimony on a panel before the Joint Economic Committee, Charles I. Plosser, president of the Federal Reserve Bank of Philadelphia, stated the following:

> I believe the most credible way to do this would be to amend the bankruptcy code to deal with nonbank financial firms and bank holding companies. Expanding the bank resolution process established under the FDIC Improvement Act as the current Senate bill does would give regulators and policymakers the opportunity to exercise a great deal of discretion in a liquidation or restructuring to reward some creditors and not others. A bankruptcy proceeding would follow the rule of law and thus would be less susceptible to manipulation by private parties or the political process.

So that is the opinion of the president of the Federal Reserve Bank of Philadelphia. Does anybody think that dissolution of GM and other companies and all the things they have gone through was not politically manipulated? Anybody who has closely followed it does, and that is one of the things that outraged Americans. They are angry that big companies got special procedures for their failure to pay their debts, where the average small company, mid-sized company, even large company in America would be subject to the rigors and the fairness and the order of established bankruptcy law.

So the president of the Federal Reserve of Philadelphia said it would be less susceptible to manipulation by private parties for the political process. Amen. That is true. You get a bankruptcy judge, he has a 14-year term. They are used to handling these cases, and they can handle them. Mr. Plosser goes on to say, limiting government choices and leaving resolutions to the rule of law and the court system, in my view, is the best way to end bailouts—limit unhealthy risk taking and extinguish the notion that some institutions are too big to fail. That is what the president of a Federal Reserve bank said. I could not agree more. That is why I have introduced the Bankruptcy Integrity and Accountability Act, which I believe we will be able to vote on tomorrow.

There is no greater legal system than the one we have in America. It is a system that is admired not only because it is efficient, in most instances, but because it is fundamentally fair. You know when you walk into a courtroom that you are going to get the same treatment as other parties, whether you are a mom-and-pop organization or big AIG. The amendment I have offered would provide that same type of security.

One issue that has been raised by a number of experts is a lack of confidence in the FDIC to adequately handle these kinds of dissolutions. I share those concerns. Professor Wallison stated:

> The absence of any expertise in resolving failed nonbank financial institutions anywhere in the Federal Government is one strong reason for relying on bankruptcy for

most failures. If there is likely to be expertise anywhere in resolving failed financial institutions, it would be in the bankruptcy courts.

I agree. Bankruptcy as the first choice for disposing of a failed nonbank financial institution would avoid a number of problems. These are problems that are associated with creating a government resolution authority. Governments are, by nature, political. It would assure that the prebankruptcy creditors take losses of some kind, avoiding the moral hazard and maintaining market discipline. In other words, if you don't feel like and don't have to take a loss by an improvident investment, it encourages you to make more risky investments, creating danger of more improvident financial activities in the future. The rules will be known in advance under bankruptcy. So creditors will be aware of their rights as well as the risks.

Creditors will decide whether they believe a company has prospects to repay them, and it would outweigh the risk of throwing good money after bad in helping maintain the company in bankruptcy. Bankruptcy judges look forward and try to save companies. They stop litigation that can shut down a company. They give the company a chance to reorganize and succeed and pay all their creditors. That is always their goal. But good bankruptcy judges know from history that many companies can't be saved. The best thing to do is shut them down before they lose anymore money and distribute the remaining assets equally and fairly according to established rules of priority as part of the bankruptcy process. That is what bankruptcy is.

In the amendment I have offered, we make sure the necessary expertise for dissolving these institutions is available. We allow the Federal Stability Oversight Council, the proper functional regulator, the Federal Reserve, and the Department of Treasury to file legal briefs in the court if they need to to make sure their voice is heard concerning relevant issues. This would allow the court to gain valuable information and insight. We also concentrate Federal bankruptcy expertise by limiting venue in the cases to the 12 districts with the Federal Reserve Banks. This is something we vetted with professors and bankruptcy experts. Harvey Miller, the renowned bankruptcy expert, looked at this provision and told us he believes it is properly tailored to provide the necessary expertise to address these types of cases.

I believe it is something the Judicial Conference of the United States would agree is better than limiting it to just one court—a situation they raised as problematic. On substance, I think we can't overemphasize how the resolution authority fails the ultimate test.

Professor David Skeel wrote an opinion piece in the Wall Street Journal with Mr. Wallison on April 7 of this year, in which they asked this question:

> Which system is more likely to eliminate the moral hazard of too big to fail?

They concluded that bankruptcy was the answer. They posit:

> In a bankruptcy, as in the Lehman case, the creditors learned when they lend to weak companies, they have to be careful. The Dodd bill would teach the opposite lesson.

Let me highlight for my colleagues what I believe this amendment does and why I think it is necessary.

First, the amendment protects against systemic risk by eliminating the moral hazard that arises when financial companies and their investors think the government will bail them out. Under the Dodd approach, the approach of this legislation, financial company management and shareholders could have an incentive to seek resolution authority, thus gaining access to taxpayer bailouts. Under the Bankruptcy Integrity and Accountability Act, which I have offered, the only option for insolvent companies would be through the bankruptcy process, and they can survive bankruptcy. But if they are not able to survive it, they should not survive it. That process would be either reorganization or liquidation.

There is a process for that to be established. Under this system, all costs of reorganizing or liquidating a company are paid by the private sector, by the failing company, and those who chose to do business with the failing company.

Thus, unlike under the Dodd bill, there will be no federally administered resolution authority with access to bailout funds, or borrowed money from the Treasury, Federal debt guarantees, or any other kinds of tool that politicians might access to bail out some politically empowered private company, and to avoid the day of reckoning that rightly should fall upon companies who can no longer operate effectively.

Under this bill, there will be no Federal Reserve section 13(3) authority with which the Fed can pump taxpayer money into firms to rescue them from insolvency.

The second way this amendment would reduce systemic risk is by protecting against the threat that derivatives contracts will cause one company's failure to cascade through the financial sector like falling dominoes. Under the current Bankruptcy Code, derivatives contracts are exempt from the automatic stay that prohibits the collection of debts outside the bankruptcy court. Virtually all other debts are stayed when the bankruptcy process occurs. As a result of this event, derivatives counterparties can demand collateral and satisfaction of the debt, and it can create a run on a failing companies' assets as more and more derivative counterparties demand their collateral. Because of the interconnectedness of financial firms and the derivatives holdings, a run on the failing firm's assets can cause failure to cascade through the financial system as party after party becomes exposed to succeeding demands on collateral. This is a problem that has been raised. This amendment would stop that danger by allowing debtors, with the consent of a new Federal Stability Oversight Council, to invoke the automatic bankruptcy stay against derivatives obligations when the facts show that the debtor's failure could genuinely trigger cascading systemic risk. This would alter bankruptcy law to deal with these large financial institutions, where derivatives can play a complicating factor, and this would give the kind of discretion I think would help avoid that.

Finally, the Bankruptcy Integrity and Accountability Act would reduce systemic risk because a new chapter 14 bankruptcy procedure will apply to all nonbank financial institutions regardless of the size. Under the act, everyone will get the same protection. Nobody will have access to special Washington favors. This, too, protects against systemic risk. Under the approach of the Dodd legislation, there will be special rules for those companies that are wealthy and powerful enough to be determined too big to fail. Those special rules will include a publicly funded and government-administered resolution authority that affords the financial firms the right to fail without facing under oath their creditors and without bearing the costs of the proceedings. Also included will be the right to access taxpayer funds for the payment of certain private debts of the firm.

This special system, created by the bill before us, would create incentives for smaller companies to consolidate until they, too, are too big to fail. As a result, risk would be concentrated even more so in a few hands that the failure of one company can threaten to bring down the entire financial system. In place of this created system under the Dodd legislation, a system that protects large companies more than all others, our amendment would create a fair and equal system for the failure of all financial institutions, regardless of their size. As a result, financial institutions would have no incentives to become larger, and thereby increasing the risk that one company's failure will cause the failure of the entire financial sector.

There is one critical aspect of the bankruptcy process that we can't overlook and cannot be overstated. When people loan money to or buy stock or buy bonds in a corporation, or otherwise provide credit, they have an expectation that if that company fails to prosper and is unable to pay all the debts the company owes, that the company at least will be hauled into bankruptcy court, and they will have an opportunity to present their claims and to receive whatever fair proportion of the money that is still left in the company as their payment.

It may be 10 cents on a dollar, or it may be 90 cents. They understand that

bankruptcy judges have the authority to allow the company to continue to operate, to stay or stop people from filing lawsuits against the company to collect debts, to allow the company a period of time to operate, to evaluate whether they can pay off more debtors by continuing to operate than shutting the company down. If a bankruptcy court sees the company is so badly in financial crisis that it is going to collapse anyway, the court can shut it down immediately before they can waste assets and rip off even more people. That is what a bankruptcy court does every day.

The Judicial Conference letter I referred to earlier notes that under the resolution process, some other problems might arise. They note this:

> The legislation does not envision objection, participation, or input from the bankruptcy creditors (whose rights will be affected) in the course of appointing the FDIC receiver.

It does this in a way unlike the classical way that company officials have to respond when their companies fail. What happens? The creditors all gather. The bankruptcy petition is filed, voluntarily or involuntarily, by the creditors. They are hauled in by a Federal bankruptcy judge who has a 14-year term and specializes in bankruptcy matters. They are required to produce records and documents of the financial condition of the company. The CEO is called in to testify under oath. The bondholders, the stockholders, the creditors, secured and unsecured, the employees, and the workers all get to have lawyers, and they examine the witnesses who can be called. They can call their own witnesses and, in the result, you create a factual record that helps set the groundwork for the orderly priority setting of who is entitled to payment of the limited amount of money in the corporation.

This is what they do every day. This is what ought to happen. Executives prefer not to have to do that. They prefer, like AIG, to go over there and meet with the Federal Reserve, or with the Secretary of the Treasury, and sit down and wheel and deal and get $70 billion. And nobody is under oath, that I can see. None of this is done publicly, as it is in a bankruptcy proceeding. They get to continue to operate and have their fat salaries, when any other company would be out of there and would cease to exist.

This is the problem that upsets the American people, and they are right to be upset.

We do not need to provide special treatment for the people who created the financial crisis that has damaged this country for the next decade probably, and set off ramifications worldwide. I know a lot of this was systemic irresponsibility by a lot of people, but I have to say, the failure of these executives to manage their companies correctly—there are letters to this. They do not need to be provided a sweetheart process by which they can get money from the Treasury and keep their companies going and not be subjected to the same examination, the same requirement to produce documents and records to justify their existence that average corporations do. They need bankruptcy.

I believe America would be better if we do that. I believe our economy will be stronger and that there will be more certainty in the process. If they fail, they fail. If they loan money to a company that fails, they may lose some or all of it. That is just the way it is. It happens every day.

But some people on Wall Street convinced themselves and they convinced politicians and government officials that they were too big to fail. They were so large and were so important that they could not be treated like everybody else; they needed to be bailed out. The people who regulated them and the Secretary of the Treasury, a Wall Street maven himself, a Goldman Sachs guy, and others, met in secret and plotted this thing out and got us to pass legislation in Congress that said—my wife corrects me. She said: Quit saying ''got us'' when you voted against it. I voted against the legislation. Congress passed legislation to allow the Secretary of the Treasury to buy toxic mortgages and assets from bad banks that were in trouble—in a state of panic, if you want to know the truth.

What did they do? Ten days later they bought an insurance company, AIG. They put $70 billion in it, totally contrary to what we were told just a few days before and without the slightest hint of embarrassment.

The legislation we passed, the $700 billion TARP bailout, was the greatest abdication of congressional responsibility in the history of this Republic. We have never given one man—the Secretary of the Treasury—the power to deal with his friends and have $700 billion to deal with. It is an outrage really. That is why people are upset, and they have a right to be upset. I am upset.

All I am saying is, we have a regular process for dissolution of companies that get in trouble. If they cannot pay their bills, they ought to fail like any other company, and the big guys on Wall Street should not be given special treatment. This legislation will end bailouts and will put them in the same process that any corporation in America would be in if they failed to pay their debts in a responsible manner.

I urge my colleagues to consider the amendment. Remember that bankruptcy is a favored process by the Federal Reserve people, that the Judicial Conference of the United States Federal courts has raised questions about this legislation as it presently exists. I think the principled and appropriate way to deal with the dissolution of failed companies is through the bankruptcy process. Unlike orderly liquidation, bankruptcy passes the ultimate test. I urge my colleagues to support the amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, at some point fairly soon, I hope to be able to—at the request of the authors of the two amendments—propose two amendments I believe will be accepted. In fact, I know they will be accepted on a voice vote. There is some language being worked out. That will come before we adjourn for the evening.

We have also laid down—I believe there will be nine amendments tomorrow, equally divided between the minority and the majority, including the amendment we just heard proposed by my good friend from Alabama, Senator SESSIONS, along with others. It will be a busy day tomorrow.

Today we have done eight amendments, by the time we are finished, which is a good day's work. Obviously, more needs to be done. Five of them were done by recorded votes and three by voice votes. We hope they will be voice-voted.

I want to take a minute or so, if I may, to express my feelings about the Sessions amendment. First of all, I am joined in these sentiments by the chairman of the Judiciary Committee, Senator LEAHY, who opposes the Sessions amendment as well. Let me explain why I oppose this amendment.

I say this respectfully of Senator SESSIONS, who is a good friend. I noticed in his remarks he did not cite any bankruptcy lawyers opposed to the provisions in the bill. I am not terribly shocked that bankruptcy lawyers would be opposed to a provision in the bill short of bankruptcy, although the presumption is bankruptcy in titles I and II.

If my colleagues remember, it was the Shelby-Dodd amendment which we voted on a week ago—several days ago—that took care of the concerns people had about title I and title II of the bill which deals with the resolution mechanisms. Senators CORKER and WARNER worked very hard on those two provisions of the bill, as other members of the committee did. I want to briefly describe why those provisions are important and why they should remain intact.

Of course, we voted as a Senate 93 to 5 in favor of the Shelby-Dodd amendment, codifying the perfections, as Senator SHELBY described them, in those two titles.

I oppose the Sessions amendment to strike the language creating an orderly liquidation authority, language, as I said, that Senator SHELBY and I crafted together in order to end the too-big-to-fail argument once and for all. Most nonbank financial firms, including large and complex ones, will go through the normal bankruptcy process if they fail, and they should. That is the presumption in the bill.

The new liquidation authority Senator SHELBY and I crafted should be

used very rarely. It is a painful process to go through and would certainly not be the avenue of choice given the implications. We have put in some very high hurdles to trigger its use, including judicial review.

Moreover, the advance warning systems that we have included in our bill, and the tough new standards we impose on large financial companies, will put in place speed bumps so these companies slow down and become less risky and, therefore, avoid the very issue of bankruptcy or resolution. Early on we try to minimize those events from occurring.

When there is a financial crisis, however, bankruptcy may not be the best option. The experience of 2008, especially the bankruptcy of Lehman Brothers and its disastrous effects on our financial markets and our economy, has taught us we need a workable alternative to bankruptcy for the largest, most interconnected financial firms and that the alternative could not and should not be a bailout. Given the choices now, it is just bankruptcy or bailout. We tried to create an alternative under rare circumstances for a resolution mechanism.

Throughout 2009, the Banking Committee heard testimony from administration and other financial regulators, experts, stakeholders, and others who all agree the bankruptcy framework is poorly equipped to protect the Nation's financial stability if a very large and complex and interconnected financial firm goes under.

Why do we say that? It can be with a large financial firm that is interconnected there are many good, solid firms—it may be that a large interconnected firm will have an effect on some very solvent, well-run firms. Bankruptcy could bring all of these well-run companies down to their knees. None of us wants to be part of that. So we need an alternative other than just bailing out that firm when confronted with that kind of a choice.

If the only two choices are bankruptcy, which could take a lot of firms and businesses that are solid, well run, well managed, producing jobs, contributing to our economy—that is the alternative. Those firms then would be adversely and, unfortunately, affected through a bankruptcy process or bailout. Of course, no one wants to write a check for $700 billion again to bail out firms that are failing. The idea of a resolution mechanism under rare circumstances is the alternative choice which we collectively—Democrats and Republicans—after the long work of this committee believed was the alternative in our bill.

The Sessions amendment fails to recognize the fundamental difference between the new liquidation authority and bankruptcy. The new liquidation authority is intended to be an emergency exception to bankruptcy. The presumption, again, is bankruptcy. That is where we begin. But if under these rare circumstances that alternative would do more damage to the overall economy, despite our feelings about a mismanaged company, we need to have an alternative.

The new liquidation authority is intended to be an emergency exception to bankruptcy when necessary to protect the financial stability, the overall stability of the United States, and not to protect irresponsible creditors.

The Sessions amendment, like today's bankruptcy framework, is focused on protecting and repaying creditors of a failed financial firm. It does not provide the tools we need to protect taxpayers from the devastating effects of the next Lehman Brothers. That is why Senator SHELBY and I sought to create a liquidation process that would provide for the orderly wind-down of large, complex financial institutions, while still forcing shareholders to be wiped out, culpable management to be fired, and creditors to bear losses, in addition to a prohibition against those very managers who caused the failure from being involved for years afterwards in the financial services sector of our economy.

That is a rough road—shareholders get wiped out, creditors suffer, management gets fired, and they are banned from being involved in financial services. That is tough medicine if, in fact, they go the resolution route under our bill. But we need to have at least some mechanism other than just the two terrible alternatives of bankruptcy, that could cause broader financial problems, or a bailout. This is why Senator SHELBY and I sought to create this liquidation process.

Any payments under our bill to creditors above liquidation value will be clawed back, and large financial companies will be assessed, as necessary, to ensure that taxpayers do not lose a penny.

You may recall the debate we had about prepayment or postpayment. We had originally, at the suggestion of my Republican colleagues, a $50 billion upfront assessment on large institutions. Then there was a change of heart by many, and they said: No, you cannot have that out there because that looks like you are providing for a resolution mechanism rather than bankruptcy; the optics of that do not look good. I was never overly committed to that idea. The only reason I included it in the further draft of the bill is because I thought it brought Republican support to the legislation.

The irony is, some of the very people who were advocates of it one day changed their minds. So we took it out of the bill.

The thing I wanted to make sure of was that taxpayers would not be exposed. The House-passed legislation has $150 billion in a prepayment fund. Again, I heard my good friend from Massachusetts, the chairman of the House Financial Services Committee, Barney Frank, say he would like to take it out as well in light of some of the allegations made about the bill. We took that out. I know my colleague from Alabama referenced that and may not have been aware that was one of the provisions in the Shelby-Dodd amendment, to remove that prepayment fund created in the earlier draft of the bill.

Striking the orderly liquidation authority, as the Sessions amendment would, would do just the opposite of what the amendment's sponsors intend. It would ensure we face a repeat of the unacceptable choices between a disastrous bankruptcy where innocent, solvent, well-run companies could be caught in the vortex and drawn down and destroyed in the process or writing that big check that Americans are furious over. So we created this resolution authority to be used under very rare circumstances.

The Senate, of course, supported our proposal, the Shelby-Dodd approach, by a vote of 93 to 5. I urge my colleagues, both Democrats and Republicans, to reaffirm their support for ending the too-big-to-fail concept by rejecting the Sessions amendment.

I say that respectfully of my colleague of Alabama. He has been a longstanding member of the Judiciary Committee. He knows these issues well. And I understand his concerns. But I believe as Senator LEAHY will speak to, either directly or indirectly, this would do great damage to this bill and expose us once again to that taxpayer bailout, which none of us wants whatsoever. Because if bankruptcy would cause greater harm for our economy than the failure of one company, then what are we left with if we reject that idea and we are back to the bailout scenario? None of us wants to be in that situation ever again.

I urge, when the vote occurs tomorrow, that we reject the Sessions amendment. Stick with what we have written in this bill—which occurred over many months, by the way. This was not drafted over a weekend, I can tell you that. We have gone back literally months trying to get this right and listen to literally hundreds of people who brought their expertise and knowledge of this process to the table. It was purely a bipartisan effort in our committee, along with others, to craft the first two titles of our bill.

I urge, again, the rejection of the Sessions amendment when it occurs.

AMENDMENTS NOS. 3989 AND 3991

Mr. President, I ask unanimous consent that the Durbin and Franken amendments be considered withdrawn, and that the Durbin amendment No. 3989 and the Franken amendment No. 3991 be considered called up in their place.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendments are as follows:

(Purpose: To ensure that the fees that small businesses and other entities are charged for accepting debit cards and reasonable and proportional to the costs incurred, and to limit payment card networks from imposing anti-competitive restrictions on small businesses and other entities that accept payment cards)

At the end of subtitle G of title X, add the following:

SEC. 1077. REASONABLE FEES AND RULES FOR PAYMENT CARD TRANSACTIONS.

The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

(1) by redesignating sections 920 and 921 as sections 921 and 922, respectively; and

(2) by inserting after section 919 the following:

"SEC. 920. REASONABLE FEES AND RULES FOR PAYMENT CARD TRANSACTIONS.

''(a) REASONABLE INTERCHANGE TRANSACTION FEES FOR ELECTRONIC DEBIT TRANSACTIONS.—

''(1) REGULATORY AUTHORITY.—The Board shall have authority to establish rules, pursuant to section 553 of title 5, United States Code, regarding any interchange transaction fee that an issuer or payment card network may charge with respect to an electronic debit transaction.

''(2) REASONABLE FEES.—The amount of any interchange transaction fee that an issuer or payment card network may charge with respect to an electronic debit transaction shall be reasonable and proportional to the actual cost incurred by the issuer or payment card network with respect to the transaction.

''(3) RULEMAKING REQUIRED.—The Board shall issue final rules, not later than 9 months after the date of enactment of the Consumer Financial Protection Act of 2010, to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the actual cost incurred by the issuer or payment card network with respect to the transaction.

''(4) CONSIDERATIONS.—In issuing rules required by this section, the Board shall—

''(A) consider the functional similarity between—

''(i) electronic debit transactions; and

''(ii) checking transactions that are required within the Federal Reserve bank system to clear at par;

''(B) distinguish between—

''(i) the actual incremental cost incurred by an issuer or payment card network for the role of the issuer or the payment card network in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered under paragraph (2); and

''(ii) other costs incurred by an issuer or payment card network which are not specific to a particular electronic debit transaction, which costs shall not be considered under paragraph (2); and

''(C) consult, as appropriate, with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Administrator of the Small Business Administration, and the Director of the Bureau of Consumer Financial Protection.

''(5) EXEMPTION FOR SMALL ISSUERS.—This subsection shall not apply to issuers that, together with affiliates, have assets of less than $10,000,000,000, and the Board shall exempt such issuers from rules issued under paragraph (3).

''(6) EFFECTIVE DATE.—Paragraph (2) shall become effective 12 months after the date of enactment of the Consumer Financial Protection Act of 2010.

''(b) LIMITATION ON ANTI-COMPETITIVE PAYMENT CARD NETWORK RESTRICTIONS.—

''(1) NO RESTRICTIONS ON OFFERING DISCOUNTS FOR USE OF A COMPETING PAYMENT CARD NETWORK.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment through the use of a card or device of another payment card network.

''(2) NO RESTRICTIONS ON OFFERING DISCOUNTS FOR USE OF A FORM OF PAYMENT.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, check, debit card, or credit card.

''(3) NO RESTRICTIONS ON SETTING TRANSACTION MINIMUMS OR MAXIMUMS.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to set a minimum or maximum dollar value for the acceptance by that person of any form of payment.

''(c) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

''(1) DEBIT CARD.—The term 'debit card'—

''(A) means any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account for the purpose of transferring money between accounts or obtaining goods or services, whether authorization is based on signature, PIN, or other means;

''(B) includes general use prepaid cards, as that term is defined in section 915(a)(2)(A) (15 U.S.C. 1693l–1(a)(2)(A)); and

''(C) does not include paper checks.

''(2) CREDIT CARD.—The term 'credit card' has the same meaning as in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

''(3) DISCOUNT.—The term 'discount'—

''(A) means a reduction made from the price that customers are informed is the regular price; and

''(B) does not include any means of increasing the price that customers are informed is the regular price.

''(4) ELECTRONIC DEBIT TRANSACTION.—The term 'electronic debit transaction' means a transaction in which a person uses a debit card to debit an asset account.

''(5) INTERCHANGE TRANSACTION FEE.—The term 'interchange transaction fee' means any fee established by a payment card network that has been established for the purpose of compensating an issuer or payment card network for its involvement in an electronic debit transaction.

''(6) ISSUER.—The term 'issuer' means any person who issues a debit card, or the agent of such person with respect to such card.

''(7) PAYMENT CARD NETWORK.—The term 'payment card network' means an entity that directly, or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software that route information and data to conduct transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card, credit card or other device that may be used to carry out debit or credit transactions.''.

AMENDMENT NO. 3991

(Purpose: To instruct the Securities and Exchange Commission to establish a self-regulatory organization to assign credit rating agencies to provide initial credit ratings)

(The amendment is printed in today's RECORD under ''Text of Amendments.'')

AMENDMENTS NOS. 3956 AND 3992, AS MODIFIED

Mr. DODD. Mr. President, I ask unanimous consent that the Senate now resume consideration of the Landrieu amendment No. 3956 and the Crapo amendment No. 3992; that the Landrieu amendment be agreed to and the motion to reconsider be laid upon the table; that the Crapo amendment, No. 3992, be modified with the changes at the desk; that the amendment, as modified, be considered and agreed to, and the motion to reconsider be made and laid upon the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

Amendment No. (3956) was agreed to.

The amendment (No. 3992), as modified, was agreed to, as follows:

(Purpose: To provide for credit risk retention requirements for commercial mortgages)

On page 1047, strike line 23 and all that follows through ''(E)'' on line 24 and insert the following:

''(E) with respect to a commercial mortgage, specify the permissible types, forms, and amounts of risk retention that would meet the requirements of subparagraph (B), such as—

''(i) retention of a specified amount or percentage of the total credit risk of the asset;

''(ii) retention of the first-loss position by a third-party purchaser that specifically negotiates for the purchase of such first-loss position and provides due diligence on all individual assets in the pool before the issuance of the asset-backed securities;

''(iii) a determination by a Federal banking agency or the Commission that the underwriting standards and controls for the asset are adequate; and

''(iv) provision of adequate representations and warranties and related enforcement mechanisms; and

''(F)

Mr. DODD. Mr. President, again, I want to take a moment and express my gratitude to my colleagues. I want to thank Senator LANDRIEU. She was involved in a lot of this, so I want to thank her immensely for her contribution. She chairs the Small Business Committee of the Senate and she and my very good friend from Georgia, JOHNNY ISAKSON, crafted a very good amendment, which we just adopted. It is going to make our whole section dealing with underwriting a very important part of this bill, and I thank them for that.

I want to thank Senator MIKE CRAPO from Idaho, my colleague on the Banking Committee. He made a very constructive suggestion to this part of the bill. I want to thank his staff as well and the staff of Senator LANDRIEU, who did a very good job in working through the language this afternoon that allowed us to come to this conclusion. They both couldn't be here at this particular moment, late in the evening, so I am speaking on their behalves, but I thank them both.

Again, this is exactly what we are trying to achieve in this bill—which I know is taking a lot of time on the floor of the Senate—with the contributions of Republicans and Democrats—people such as JOHNNY ISAKSON and MIKE CRAPO, OLYMPIA SNOWE, SUSAN COLLINS, and so many others who have contributed to this product. We are dealing with a very complex area but a critically needed one for our Nation.

We are getting closer and closer to final passage of this bill. We have more amendments to consider, but my hope is that in the next few days we can wrap up the remaining amendments and have our opportunity to vote—to debate on these matters and then get to the point where we can cast our ballots in favor of what I hope will be an overwhelming vote in favor of financial reform in this legislation.

Tomorrow, as I mentioned earlier, there will be some nine amendments, at least, that we have set up for debate. I will be looking for time agreements on them. For those who may be listening at this late hour in their respective offices, I would urge them to work with us on time agreements, if they want a decent amount of time, but please do not ask for exaggerated amounts of time. There are still many more amendments to consider.

We are going to be here on Friday. We won't have votes on Friday, but I will want to get to all these matters. There will be amendments voted on tomorrow, and additional amendments before we finish tomorrow evening, and then on Friday I will be here to listen to debate, maybe lay down a remaining amendment to be considered on Monday when we come back.

My hope is that by Tuesday, no later than Tuesday—at the max maybe Wednesday—we could have final passage on this bill. I know there are other matters the majority leader wants to handle, and I can't thank him enough for providing the kind of window that has allowed this Senate to operate without tabling motions. We have only had one. We haven't had any second-degree amendments on any amendment so far, and no filibusters involved at all on a very major piece of legislation.

As I said earlier today, all of us at one time or another talk to students in our respective States, and they ask us about how the Senate functions, and we usually describe exactly what has happened. The unfortunate part is that it rarely does happen in this way. We are not done yet, so I realize we have not completed the process. But this is how this institution was intended to operate. People have a right to offer their amendments, to be heard, to debate them, and then to vote on critical issues facing our country. I never thought a few weeks ago we might actually get to this point where we are engaging in the business of the Senate, offering amendments, debating them, trying to modify where we can to agree on how best to do this.

There are 100 of us here trying to craft a piece of legislation that affects 300 million of our fellow citizens in this Nation, not to mention others beyond our own shores because we are setting rules by which we are going to operate. My hope is that these rules will be harmonized with others around the world so we can avoid the kind of catastrophes occurring in Europe as I speak here, as well as the problems that have emerged in the Asian markets and elsewhere. So this is more than just an ordinary undertaking.

Yesterday, in speaking to the Chairman of the Federal Reserve Board, he notified me during one of our debates that the central bankers of Europe, because of the availability of technology, were literally watching and monitoring the debate here on the floor of the Senate about a critical issue as it was occurring. That is how the world has changed. Today, the actions we take here not only affect what happens in our own country but elsewhere as well. This is a major undertaking, and I can't begin to express my gratitude to my fellow colleagues for the manner in which they have conducted this debate.

My thanks to majority leader HARRY REID in particular. Only through the majority leader can you create an environment that allows this to happen. That is the leadership that HARRY REID has demonstrated over and over and over again in his stewardship as the majority leader of this body. Again, with all the other things he has to grapple with and deal with—many other issues to confront here—this is the kind of leadership the American people expect to see, and he is providing it for our country.

Again, I thank as well my colleague from Alabama, Senator SHELBY, the ranking member, for his work and the staffs' work. Again I thank the floor staff and others in their respective offices.

Mr. President, I ask unanimous consent that the following article be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STUDY: DERIVATIVES RULES WOULD COST BANKS BILLIONS

Goldman Sachs could lose up to 41 percent of its earnings if Congress approves tighter regulation of the derivatives market, according to an analysis by Bernstein Research. That's equivalent to wiping away $3.9 billion in Goldman's earnings this year if the stricter regulations were in effect for the entire 12 months, according to a subsequent analysis of the numbers by DealBook using Bernstein's 2010 earnings-per-share estimates.

Other major banks, including Citigroup, Morgan Stanley, JPMorgan Chase and Bank of America, would also withstand cuts of billions of dollars in their earnings if the derivatives rules currently being considered by the Senate are put in place.

Estimating how stricter rules on derivatives would affect the bottom line of banks relies on some big assumptions, so Bernstein's estimates should be taken with some caveats. Nevertheless, the assumptions Bernstein makes in its analysis are probably as close to the mark as any, given the lack of disclosure by the banks on their trading activities.

For example, banks do not break down their trading revenue by function—so it is hard to find out what percentage of a bank's trading revenue comes from derivatives trading. Bernstein therefore has to estimate that number, fully knowing that it could fluctuate for each bank. It then estimated the percentage of profit that would be lost under the proposed derivatives regulations.

That required further assumptions, given that the legislation is pending and could be changed at any time. The big wild card is how much of the business would be taken public. If the bids and asks for over-the-counter derivatives transactions are forced into the open, the spreads that the banks make brokering the deals will fall. Estimating how much they will fall is difficult.

In performing their sensitivity analysis, Bernstein therefore had two major sliding assumptions: the percentage of trading revenue that each bank derives from derivatives trading and the percentage of that revenue that could be at risk of going away if strict derivatives legislation passes. The impact on the bottom line varies greatly, as some banks are more dependent on trading revenue than others.

Take Goldman Sachs. If the bank derives 30 percent of its trading revenue from derivatives and 50 percent of that amount is at risk of going away, the firm's total earnings would fall by 15 percent. That would be a $1.43 billion hit to the $9.53 billion that Bernstein estimates the bank will earn in 2010. Bernstein's worst-case scenario was if Goldman derived 60 percent of its revenue from derivatives trading, with 70 percent of that revenue at risk. Goldman would then be facing a 41 percent decline in its earnings, equivalent to a $3.9 billion hit to its earnings if calculated using 2010 estimates.

JPMorgan is a distant second. If it derives 30 percent of its trading revenue from derivatives and 50 percent of that revenue is at risk of going away, the firm's earnings would fall by 7 percent. That is equal to an $890 million hit to its 2010 estimated earnings of $12.74 billion. The worst-case scenario, using the same assumptions for Goldman, would cause a 14 percent hit to earnings, equivalent to a $1.78 billion reduction of its 2010 estimated earnings.

In a conference call with investors this month, Jamie Dimon, JPMorgan's chief executive, estimated that the proposed derivatives regulations could cost the bank several hundred million dollars to $2 billion in lost revenue. Given that the profit margin is high on derivatives trading, Bernstein's estimates seem to be somewhat on the mark.

Meanwhile, Morgan Stanley could have a 9 percent hit to its earnings if 30 percent of its trading revenue comes from derivatives and 50 percent of that revenue was at risk. Bernstein's worst case shows the bank losing 25 percent of its earnings, or $1.1 billion, based on 2010 estimates.

Citigroup and Bank of America would not be affected as significantly the other banks, because they derive a smaller proportion of their revenue from trading. Citi would see a 5 percent drop in the baseline scenario and a 15 percent drop in the worst-case scenario, equivalent to a $1.7 billion reduction in earnings, according to 2010 estimates.

Bank of America would take a 4 percent hit in the baseline scenario and an 11 percent hit in the worst-case scenario, equivalent to a $1 billion earnings reduction, according to 2010 estimates.

Mr. LEAHY. Mr. President, the Senate is engaging in a vigorous debate over how best to bring corporate accountability to Wall Street. The Senate's consideration of this legislation is

a significant step toward accomplishing that goal, and will ultimately ensure that we do not fall victim to those same pitfalls and corporate abuses that led to the recent financial disaster.

As we bring accountability through the Wall Street Reform bill, we must preserve the role of the antitrust laws to promote competition and transparency in the industry. Our Nation's antitrust laws exist to protect consumers, and we must ensure they apply fully to Wall Street. There is simply no reason to risk exempting any industry from laws that prohibit price fixing and anticompetitive behavior.

In other sectors, we have seen the problems that result from a lack of adequate antitrust oversight. The insurance industry, which enjoys a statutory exemption from the antitrust laws, is characterized by high levels of market concentration throughout the country. Millions of Americans suffer the consequences through unaffordably high health care costs, which may not reflect the price that would be set through true competition. For the past three Congresses, I have worked to repeal this six-decade-old exemption from the Federal antitrust laws. There is no justification for it, and I have urged the Senate to take up quickly and pass legislation that passed the House with an overwhelming bipartisan majority.

Statutory antitrust exemptions are rare because, as a general rule, when the antitrust laws are supplanted, competition, and therefore consumers, are harmed. Unfortunately, while I have been working in Congress to repeal unwarranted, special interest exemptions, an activist Supreme Court has been reading new exemptions into statutes where they do not exist. In Credit Suisse v. Billing, the Supreme Court created antitrust loopholes in securities law by holding that Congress implicitly exempted the antitrust laws. This Court-made exemption took away an important tool consumers had to hold Wall Street accountable for anticompetitive behavior. It is hard enough to bring back competition by repealing explicit exemptions, but now we must be attentive to those loopholes Congress never intended, as well.

In the wake of the Credit Suisse decision, we need to be vigilant when we enact comprehensive legislation such as Wall Street reform, to ensure there is no ambiguity that could prevent the antitrust laws from applying. When courts will read any silence on the part of Congress to imply an antitrust exemption, we need to be especially careful in how we craft our laws. Hardworking Americans demand this from their lawmakers.

To ensure there is no doubt about the role of the antitrust laws in this Wall Street reform bill, I am urging the Senate to include several antitrust protections in the Wall Street reform bill that the Senate is considering. First, the bill should include a comprehensive antitrust savings clause. Second, the bill should maintain Hart-Scott-Rodino antitrust merger review for those large financial acquisitions that are now subject to comprehensive Federal Reserve approval. Third, we should make explicit that the antitrust laws apply to those ''bridge'' acquisitions of failed firms that will be subject to an expedited emergency review. Finally, we need to preserve adequate competition safeguards in the derivatives exchange market.

These provisions to protect competition and consumers should be included in the final version of the Wall Street reform legislation that I hope the Senate will soon pass. Collectively, these provisions will ensure that antitrust authorities have a vital role in Wall Street oversight for years to come. For too long, large corporate interests have harmed the financial well-being of hardworking Americans. These financial institutions must be regulated, and including these antitrust provisions will ensure courts will not misread the intent of Congress and infer that the activity of Wall Street is exempted from the laws of competition.

Today, I also renew my call for the Senate to take up and pass my amendment to repeal the antitrust exemption for health insurance companies. I hope all Senators will join me in supporting that amendment.

EXECUTIVE SESSION

NOMINATION DISCHARGED

Mr. DODD. Mr. President, I ask unanimous consent that the Senate proceed to executive session and the Rules Committee be discharged from further consideration of PN1488, the nomination of Stephen Ayers to be Architect of the Capitol; and the Senate then proceed to the nomination; that the nomination be confirmed and the motion to reconsider be considered made and laid upon the table, and that the President be immediately notified of the Senate's action.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nomination considered and confirmed is as follows:

Stephen T. Ayers, of Maryland, to be Architect of the Capitol for the term of ten years, vice Alan M. Hantman, resigned.

Mr. DODD. Mr. President, let me add congratulations to Mr. Ayers. It is a very important job.

EXECUTIVE CALENDAR

Mr. DODD. Mr. President, I ask unanimous consent that the Senate consider Calendar Nos. 887, 888, 889, and 890; that the nominations be confirmed en bloc, and the motions to reconsider be laid upon the table en bloc; that no further motions be in order; that any statements relating to the nominations be printed in the RECORD; that the President be immediately notified of the Senate's action, and the Senate then resume legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nominations considered and confirmed en bloc are as follows:

DEPARTMENT OF JUSTICE

Parker Loren Carl, of Kentucky, to be United States Marshal for the Eastern District of Kentucky for the term of four years.

Gerald Sidney Holt, of Virginia, to be United States Marshal for the Western District of Virginia for the term of four years.

Robert R. Almonte, of Texas, to be United States Marshal for the Western District of Texas for the term of four years.

Jerry E. Martin, of Tennessee, to be United States Attorney for the Middle District of Tennessee for the term of four years.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will return to legislative session.

MORNING BUSINESS

Mr. DODD. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

MARIACHI CONFERENCE AND FESTIVAL

Mr. REID. Mr. President, I rise today in celebration of the Clark County School District's Seventh Annual International Mariachi Conference and Festival. This event promotes cultural awareness, positive citizenry and encourages students in the Las Vegas community to succeed academically via the performance of mariachi music.

The Clark County School District's Secondary Mariachi Education Program provides an annual 3-day Mariachi Conference and Festival where students from across the school district participate in 2 days of music and dance workshops taught by renowned, professional clinicians/performers of the mariachi and ballet folklórico art forms. In this setting, students learn and perform a variety of musical pieces that demonstrate the highest level of musicianship and performance possible for their level of experience. The Mariachi Conference and Festival culminates in a professional concert production in which all student participants display their musical talents and newly-acquired skills to an audience of proud parents, school district personnel, and at-large community members. Participation in this program is something to be proud of and I congratulate all who are instrumental in the development of this local initiative.

In 2002, the Clark County School District recruited Jesus Javier Trujillo to establish the Mariachi Education Program as a means to provide a creative