that Congress has prohibited. Indeed, FAA recognized that slot auctions would constitute a user fee when it proposed to institute such a fee in 1980, and again in 1986 when it decided not to do so. FAA also appeared to recognize that slot auctions would constitute a user fee in 2006 and 2007 when, in the face of the annual appropriations restrictions, it promised to and did seek legislation authorizing it to conduct the auctions. FAA's April 2008 proposal in fact acknowledges that because of the appropriations restriction, FAA ''continues to believe that it cannot rely on a market-based [slot] allocation method under a purely regulatory approach, which is why it explicitly sought legislation on this matter.'' 73 Fed. Reg. at 20846, 20852.

FAA suggests that because it will conduct the Newark auction by solicitation of bids for slot leases, rather than by issuance of a new regulation, the language of the 2008 Consolidated Appropriations Act—which prohibits ''any regulation'' imposing new aviation user fees—does not apply. 2008 FAA Brief at 61 n. 36. Contrary to FAA's suggestion, because the auction would, in effect, amount to a user fee under IOAA, and IOAA requires agencies to prescribe regulations to impose new user fees, see 31 U.S.C. §9701(b), implementation of the auction would require a new regulation. FAA cannot elude the requirements of otherwise applicable law simply by failing to follow the law's requirements. ''It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly.'' Forest Products Laboratory Agreement with University of Wisconsin, 55 Comp. Gen. 1059 (1976).

FAA points to examples of other agencies auctioning or charging market-based fees for use of public lands or other public ''property.'' 2008 FAA Brief at 48–49. These are inapposite because unlike FAA, those agencies had specific statutory authority for their activities. See, e.g, 16 U.S.C. §472a (U.S. Department of Agriculture auction of timber rights on National Forest Service land); 43 U.S.C. §315b (U.S. Department of Interior issuance of grazing permits for public lands for ''reasonable fees''). FAA's most analogous example is the Federal Communications Commission's auction of license rights to the electromagnetic spectrum. Again, however, Congress has specifically authorized the FCC to conduct such auctions, including specifying the conditions necessary for auction, bidder qualifications, and treatment of auction proceeds. See 47 U.S.C. §309(j). As discussed above, despite FAA's specific requests, Congress has given FAA no comparable auction authority.

Finally, even if Congress were to remove the annual appropriations restriction that prohibits FAA from promulgating new aviation user fees, without other specific authority, it could impose only a cost-based fee, not the type of market-based fee it seeks to obtain by auctioning slots to the highest bidder. Under IOAA, when an agency is but one actor in the marketplace, it acts in a commercial, non-governmental capacity and may charge a fee based on the market price of the service provided. When instead an agency exercises its sovereign power and regulates activities based on public policy goals—as FAA would be acting, if it were to auction slots—it acts in a regulatory capacity, and user fees are limited to the agency's costs of providing the specific benefit to the individual recipient. If FAA's fee were based on market value and exceeded its cost of providing the slot to the recipient airline, the fee could rise to the level of a tax. A tax would be beyond IOAA's grant of authority and FAA would have to have some other Congressionally-delegated authority to impose it. *National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336, 341 (1974); National Park Service—Special Park Use Fees, B–307319, Aug. 23, 2007.

CONCLUSION

We conclude that FAA may not auction slots under its property disposition authority, user fee authority, or any other authority, and thus also may not retain or use proceeds of any such auctions. Going forward with the planned Newark auction or any other auction would be without legal basis, and if FAA conducted an auction and retained and used the proceeds, GAO would raise significant exceptions, under its account settlement authority, 31 U.S.C. §3526, for violations of the ''purpose statute,'' 31 U.S.C. §1301(a), and the Antideficiency Act, 31 U.S.C. §1341(a)(1)(A).

If there are questions concerning these matters, please contact Managing Associate General Counsel Susan. D. Sawtelle at (202) 512–6417 or Managing Associate General Counsel Susan A. Poling at (202) 512–2667. Assistant General Counsels David Hooper and Thomas H. Armstrong, Senior Attorney Bert Japikse, and Staff Attorney James Murphy also participated in preparing this opinion.

Sincerely yours,

GARY L. KEPPLINGER,
General Counsel.

ETHOPIA

Mr. BROWNBACK. Mr. President, I would like to voice my support for the difficult work that Ethiopia is doing on the battlefield of the war on terror in the Horn of Africa. Ethiopia is a country of great importance to the United States, and is located in what some have called one of the roughest neighborhoods in the world. As one of our strongest allies in this complicated region, Ethiopia has shown promise in meeting both economic and security challenges.

Although Ethiopia remains one of the poorest countries in the world, it is developing a market-based economy which has experienced an impressive 10 percent annual growth since 2003. In addition, the Government of Ethiopia, in close collaboration with regional and international health organizations, has achieved some success in addressing global public health concerns, including the fight against HIV/AIDS, tuberculosis and malaria.

The US-Ethiopia bilateral relationship is strong and enduring. Ethiopia is a vital partner of the United States in the fight against terrorism, promoting regional stability and combating violent extremism. As a growing democracy, Ethiopia shares with the United States a common commitment to promoting freedom and human dignity.

With respect to Ethiopia's involvement in Somalia, it is important to understand that the U.S., U.N., E.U., and A.U., all have urged Ethiopia to remain in Somalia until replacement forces arrive or a stable government is formed. Ethiopian government officials have stated that while the Government of Ethiopia is anxious to remove their forces at the earliest possible time, it has delayed the withdrawal of troops from Somalia, at great political and economic cost, until replacement troops arrive to ensure the stability of Somalia's Transitional Federal Government.

Unfortunately, while several nations have pledged to send replacement troops under the auspices of the African Union, only a small fraction of those pledged have actually arrived. I am grateful that Ethiopia remains committed to securing stability and peace in Somalia, and hope that the full African Union contingent arrives soon to enable the safe withdrawal of Ethiopian forces.

Ethiopia faces a host of ongoing challenges both at home and abroad, and merits our support and assistance. I urge my colleagues to join me in recognizing the progress made by this Ethiopia in promoting the health and welfare of its people, and assisting in the war on terror in the Horn of Africa.

PATIENT SAFETY AND ABUSE PREVENTION ACT

Mr. KOHL. Mr. President, I speak today in support of the Patient Safety and Abuse Prevention Act, S. 1577. This bill takes needed, practical steps to protect seniors in nursing homes and other settings wherever long-term care services are delivered. The background check procedures used by most States today are inadequate to keep out thousands of criminals, who can and do take advantage of loopholes and gaps in State systems. This results in needless tragedies and terrible harm to seniors.

As chairman of the Senate Aging Committee, I have read and heard about too many of these stories. One young woman, Jennifer Coldren, testified earlier this year that her 90-year-old grandmother was brutally assaulted by a predator who had a criminal record that went unnoticed. If a more comprehensive background check had been done on this individual, he would not have been working in this nursing facility, and the course of Jennifer's life and her grandmother's life would not have been so horribly altered.

It is past time for the Federal Government to take the lead in asking States to improve their screening processes. To do so, States must improve their infrastructure. They must connect and coordinate their State registries, such as those established for sex offenders and child abusers. They must screen all long-term care workers, including those who work in private homes. They must require State police checks and checks against the FBI's national criminal history database.

We know that States will take these steps to improve their background check procedures if Congress incentivizes them to do so. Seven States did exactly that after we provided them with modest grants under a pilot program enacted as part of the Medicare Modernization Act of 2003. The dollar amounts required to get these States to expand and improve

their systems were modest, ranging from about $1.5 million to $3 million per State.

The results have been extremely impressive. At the close of the pilot program, more than 9,000 applications had been disqualified—because a comprehensive check showed that the applicant had a serious criminal history or a record of substantiated abuse. As a result, thousands of individuals who could have harmed our parents, grandparents, and loved ones have not been allowed to do so. And all seniors in these States who are receiving long-term care services—in Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin are now safer.

We have a responsibility to build on this record of resounding success. If we help States to take these steps I have outlined, we can reduce the terrible toll of elder abuse. If we do nothing, experts tell us abuse rates will continue to rise.

I am pleased to have Senator DOMENICI as a partner and many of my colleagues as cosponsors, including Senator LINCOLN of Arkansas and Senator COCHRAN of Mississippi. Thanks to the leadership of Senator BAUCUS and Senator GRASSLEY, the cost of this bill—$100 million over 3 years—is fully offset. With regard to all other Senators, the only offices that have expressed concerns are those of Senator COBURN of Oklahoma and Senator DEMINT of South Carolina. I appreciate the willingness of their staffs to meet with my staff and trust that they will be able to reach agreement shortly.

In closing, the Patient Safety and Abuse Prevention Act has made substantial progress during the 110th Congress. It is strongly endorsed by attorneys general across the country, by the business community, labor unions, and elder justice advocates. It has been thoroughly discussed in public hearings and also during a markup in the Senate Finance Committee, where it was unanimously approved. The administration has provided technical assistance on the bill. I hope that all Senators will recognize the wisdom of approving this measure. Failing to take action to protect our Nation's frailest citizens should be unacceptable to all of us.

PAYMENTS TO PHYSICIANS

Mr. GRASSLEY. Mr. President, I have been examining several doctors at universities across the country to see if they are complying with the financial disclosure policies of the National Institutes of Health. I ask unanimous consent to have printed in the RECORD my latest letter to Emory University regarding Dr. Charles B. Nemeroff and the Emory-GlaxoSmithKline-National Institute of Mental Health Initiative.

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

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC, October 2, 2008.

Hon. JAMES W. WAGNER, Ph.D.,
President, Emory University, Dowman Drive, Atlanta, GA.

DEAR DR. WAGNER: The United States Senate Committee on Finance (Committee) has jurisdiction over the Medicare and Medicaid programs and, accordingly, a responsibility to the more than 80 million Americans who receive healthcare coverage under these programs. As Ranking Member of the Committee, I have a duty to protect the health of Medicare and Medicaid beneficiaries and safeguard taxpayer dollars appropriated for these programs. The actions taken by thought leaders, like those at Emory University (Emory), often have profound impact upon the decisions made by taxpayer funded programs like Medicare and Medicaid and the way that patients are treated and funds expended.

I would like to expand on concerns I brought to your attention regarding problems with the disclosures of outside income filed with Emory by Dr. Charles Nemeroff, Chair of the Department of Psychiatry. I have previously cited discrepancies pertaining to Dr. Nemeroff's disclosures filed with Emory and reports that I received by several companies regarding payments made to Dr. Nemeroff. I also raised concerns about Dr. Nemeroff's conflicts of interest relating to several National Institutes of Health (NIH) grants.

Federal regulations place numerous requirements on a university or hospital when its researchers apply for NIH grants. These regulations are intended to ensure a level of objectivity in publicly funded research, and state in pertinent part that NIH investigators must disclose to their institution any ''significant financial interest'' that may appear to affect the results of a study. NIH interprets ''significant financial interest'' to mean at least $10,000 in value or five percent ownership in a single entity.

From the summer of 2003 until the summer of 2008, Dr. Nemeroff was the primary investigator on a collaborative grant between Emory, GlaxoSmithKline (GSK) and the National Institute of Mental Health (NIMH)—the Emory-GSK-NIMH Collaborative Mood Disorders Initiative (Initiative). This Initiative examined five novel GSK antidepressant candidates. The NIH budgeted approximately $3.95 million over this grant's five year period with about $1.35 million paid directly to Emory for overhead costs. Apparently, Dr. Nemeroff also received some payment for his salary from this grant, although the exact amount has not yet been made available to the Committee.

On several occasions during the life of this grant, it appears that Dr. Nemeroff failed to report to Emory that he was participating actively on the speaker's bureau for GSK. For instance, in an email regarding his outside activities dated October 1, 2003, Dr. Nemeroff wrote: . . . I have to dig up the agreement and send it to you, GSK no standing contract, I chair their ad board 2–3 times per year and I am paid per board meeting at a standard rate of $5K per weekend.

However, and based upon information in our possession, in 2003 GSK paid Dr. Nemeroff about $119,000 in speaking fees and expenses. Based upon information provided from Emory, Dr. Nemeroff did not report that he was giving promotional talks for GSK on Paxil and Lamictal.

On March 19, 2004, Dr. Nemeroff again addressed his relationship with GSK in response to questions from Emory's Conflicts of Interest (COI) Committee. Again, it appears that Dr. Nemeroff did not mention the fees he was receiving for promotional speaking on behalf of GSK. In a letter to the Assistant Dean for Administration, Dr. Nemeroff wrote: Apart from speaking at national symposia, such as the American Psychiatric Association, for which GSK might serve as a sponsor, my consultation to the company is limited to chairing their Paroxetine Advisory board and for that, I am remunerated $15,000 per year.

However, on March 16, 2004, three days prior to signing this letter, GSK paid Dr. Nemeroff $3,500 for a talk he gave on Paxil at the Citrus Club, a members only business establishment in Orlando, Florida. On March 17, 2004, he gave another $3,500 talk about Paxil in Kissimmee, Florida. The week after he signed this letter, Dr. Nemeroff gave three talks on Paxil, for $3,500 each, at various venues in New York State.

In June 2004, Emory's COI Committee released a report on Dr. Nemeroff's company sponsored grants and outside activities. Dr. Nemeroff was provided a copy of the report which stated in pertinent part:

The Committee concluded that you did not follow procedures and policies regarding the review of your consulting agreements and that you failed to disclose your potential conflicts of interest in research in your Annual Disclosure Form for 2002–2003, your Sponsored Projects Approval Forms, and your IRB and IACUC forms.

In response to this report, Dr. Nemeroff wrote a memorandum to the executive associate dean on July 6, 2004, explaining how he would manage his conflicts in the future. He included the last page of the COI Committee's report with his signature to indicate ''that I will follow the management plans for my conflicts of interest.'' As part of this management plan, Dr. Nemeroff wrote, ''In view of the NIMH/Emory/GSK grant, I shall limit my consulting to GSK to under $10,000/year and I have informed GSK of this policy.''

Barely a week after this promise, on July 12, 2004, GSK paid Dr. Nemeroff $3,500 in fees and $505.40 in expenses for a talk he gave regarding Paxil at the Larkspur Restaurant and Grill in Las Vegas, Nevada. The following day, Dr. Nemeroff gave two more talks in exchange for $7,000 from GSK ($3,500 per talk).

On July 19, 2004, Dr. Nemeroff received an invitation from the marketing team of Lamictal to attend their national advisory board meeting on November 15–16. Dr. Nemeroff responded by email: I cannot attend this meeting, unfortunately for two reasons. First I have a prior commitment presenting grand rounds at St. Louis University on the 16th and a chairs meeting at Emory on the 15th. Secondly because I serve as the Principal Investigator of the Emory/GSK/NIMH grant from NIH on Antidepressant Drug Discovery, I am very limited in my ability to consult with GSK as this is viewed as a conflict of interest.

Records supplied from GSK show that Dr. Nemeroff was most likely in St. Louis on the 16th of November. On November 17th, GSK paid Dr. Nemeroff $7,000 for two clinical roundtables at two physicians' offices in St. Louis, and $3,500 for a lecture he gave at Kemoll's Italian Restaurant.

On July 15, 2004, Emory's Office of the Dean sent Dr. Nemeroff a letter regarding the Emory-GSK-NIMH Collaborative Moods Disorders Initiative grant. The letter concerned the COI Committee's review of his relationship with GSK. The letter stated: The [COI] Committee understands that you serve on the GlaxoSmithKline Paroxetine Advisory Board and provide advice to GSK on their products that are already on the market. For these services, you receive approximately $15,000 annually. You do not have any stock options or equity interests in GSK.