To amend title XVIII of the Social Security Act to encourage Medicare beneficiaries to voluntarily adopt advance directives guiding the medical care they receive.

IN THE SENATE OF THE UNITED STATES

APRIL 10, 2014

Mr. COONS (for Mr. COBURN (for himself, Mr. COONS, and Mr. BLUMENTHAL)) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend title XVIII of the Social Security Act to encourage Medicare beneficiaries to voluntarily adopt advance directives guiding the medical care they receive.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Medicare Choices Empowerment and Protection Act”.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,

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Part B of title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.) is amended by adding at the end the following new section:

“MEDICARE ADVANCE DIRECTIVE CERTIFICATION PROGRAM

“SEC. 1849. (a) In General.—

“(1) Establishment of Program.—The Secretary shall establish and implement an Advance Directive Certification Program (in this section referred to as the ‘Program’) under which the Secretary shall encourage eligible beneficiaries to adopt and maintain certified advance directives to guide the delivery of health care to such beneficiaries. The Secretary shall implement the Program within 3 years of the date of enactment of this section.

“(2) Definitions.—In this section:

“(A) Certified advance directive.—The term ‘certified advance directive’ means any written or electronically stored statement by an eligible beneficiary that—

“(i) provides instructions that outline the kind of medical treatments and care that such beneficiary would want or not want under particular conditions, and may
also include the identification of a health
care proxy or legal representative to make
medical treatment decisions for the benefi-
ciary if the beneficiary becomes unable to
make or communicate those decisions; and

“(ii) is offered by an entity that has
received accreditation from the Secretary
under this section.

“(B) ELIGIBLE BENEFICIARY.—The term
‘eligible beneficiary’ means an individual en-
rrolled under this part.

“(3) VOLUNTARY.—Participation in the Pro-
gram shall be voluntary with respect to the eligible
beneficiary and an eligible beneficiary who has reg-
istered a certified advance directive under the Pro-
gram may terminate such directive at any time.
Nothing in this section shall require an eligible bene-
ficiary to adopt or maintain a certified advance di-
rective.

“(4) BEST PRACTICES.—In establishing and im-
plementing the Program, the Secretary shall con-
sider best practices within existing advance directive
registry technologies, programs, and systems, includ-
ing web-based or cloud-based advance directive tech-
nologies, which may utilize time and date stamps,
video, or other innovative measures to protect the
authenticity, improve the quality, and enhance the
security of such directives.

“(5) State law.—This section shall in no way
supersede, abrogate, or otherwise interfere with
State law governing advance directives.

“(b) Registration.—

“(1) In general.—The Secretary shall estab-
lish procedures for an eligible beneficiary to register
such beneficiary’s adoption of a certified advance di-
rective under the Program. Such procedures shall
ensure that registration is available both through an
online and manual process. The Secretary shall also
establish procedures to ensure Program participants
can update previously registered information that is
no longer accurate and indicate that an advance di-
rective has been terminated.

“(2) Required information.—In addition to
such other information as the Secretary may deem
appropriate, an eligible beneficiary seeking to reg-
ister a certified advance directive under the program
shall indicate where the advance directive is main-
tained.
“(3) Registration periods.—The procedures established under paragraph (1) shall provide that registration under the Program shall occur during—

“(A) an eligible beneficiary’s initial Part C enrollment as described in paragraph (1) of section 1851(e); and

“(B) the annual, coordinated election period under paragraph (3) of such section.

“(4) Privacy and security.—

“(A) In general.—The Secretary shall ensure that all aspects of the registration system comply with the Federal regulations (concerning the privacy of individually identifiable health information) promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996.

“(B) Access.—The Secretary shall utilize standardized data protections and privacy standards, including the Federal regulations described in paragraph (1), to ensure that the registration record of an eligible beneficiary can only be accessed by—

“(i) the beneficiary, through the process established under paragraph (1); and
“(ii) providers of services and suppliers participating under this title, through a process established by the Secretary.

“(c) ACCREDITATION.—

“(1) IN GENERAL.—Under the Program, the Secretary shall—

“(A) grant accreditation to advance directive vendors and other entities providing advance directives that meet the accreditation criteria established under paragraph (2); and

“(B) establish a process whereby advance directive vendors and other entities providing advance directives may obtain accreditation under this subsection.

“(2) ACCREDITATION CRITERIA.—The Secretary shall establish accreditation criteria for advance directive vendors and other entities providing advance directives that seek to offer advance directives to be certified under the Program. Such criteria shall include the following:

“(A) PROCESS FOR ADOPTING ADVANCE DIRECTIVE.—The advance directive vendor or other entity providing an advance directive shall
allow a beneficiary to create, adopt, modify, and terminate an advance directive—

“(i) through an online process; and

“(ii) as an alternative to the online process, through a manual process that employs paper documents.

“(B) Access.—The advance directive vendor or other entity providing an advance directive shall maintain advance directives in such a way that—

“(i) an eligible beneficiary who has adopted an advance directive with such vendor or entity and any family member, legal representative, or health care proxy legally designated by such beneficiary has direct, near real-time online access to the beneficiary’s advance directive for purposes of viewing and sharing such advance directive;

“(ii) in the case of an eligible beneficiary who has adopted an advance directive with such vendor or entity or any family member, legal representative, or health care proxy legally designated by such beneficiary who is unable or unwilling to use
the online access under subparagraph (A), such individual is able to obtain a hard copy of the beneficiary’s advance directive for the purposes of viewing and sharing such advance directive; and

“(iii) providers of services and suppliers participating under this title have near real-time access to the advance directive of an eligible beneficiary who has adopted an advance directive with such vendor or entity.

“(C) PRIVACY PROTECTIONS.—

“(i) IN GENERAL.—The advance directive vendor or other entity providing an advance directive shall comply with the Federal regulations (concerning the privacy of individually identifiable health information) promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–2 note).

“(ii) ACCESS.—Such vendor or entity shall utilize standardized data protections and privacy standards, including the Federal regulations described in paragraph
(1), to ensure that the content of an eligible beneficiary’s advance directive is owned and maintained by the beneficiary and can only be accessed by—

“(I) the beneficiary or the beneficiary’s designee pursuant to clauses (i) and (ii) of subparagraph (A); and

“(II) a provider of services or a supplier pursuant to subparagraph (A)(iii).

“(D) SECURITY AND TESTING.—The advance directive vendor or other entity providing an advance directive shall certify that—

“(i) all data management and data transfer elements involved in adopting, maintaining, and accessing the advance directive have successfully passed rigorous independent testing regarding standards of timeliness, accuracy, and efficiency;

“(ii) the data management and data transfer elements involved in adopting, maintaining, and accessing the advance directive meet widely accepted industry security standards; and
“(iii) the system that provides access to the advance directive has passed real-time tests simulating a realistic volume of beneficiaries and providers accessing advance directives simultaneously.

“(E) CERTIFIED ADVANCE DIRECTIVES.—

The advance directive vendor or other entity providing an advance directive shall agree to offer certified advance directives (as defined in subsection (a)(2)(A)).

“(F) OTHER.—Such other criteria as the Secretary may require.

“(d) INCENTIVE.—

“(1) IN GENERAL.—The Secretary shall make a one-time payment of the amount specified in paragraph (2) to each eligible beneficiary that adopts a certified advance directive and registers such directive with the Program.

“(2) AMOUNT.—

“(A) IN GENERAL.—For purposes of paragraph (1), the amount specified in this paragraph is—

“(i) for a beneficiary who registers a certified advance directive with the Program in 2015—
“(I) in the case of a beneficiary that creates, adopts, and registers a certified advance directive using online processes only, $75; or

“(II) in the case of a beneficiary that creates, adopts, or registers a certified advance directive using a manual process, $50; and

“(ii) for a beneficiary who registers a certified advance directive with the Program in a subsequent year, the amount specified in this paragraph for the preceding year increased by the percentage increase in the Chained Consumer Price Index for All Urban Consumers (as published by the Bureau of Labor Statistics of the Department of Labor) over the preceding year.

“(B) ROUNDING.—If any amount determined under subparagraph (A) is not a multiple of 10 cents, such amount shall be rounded to the nearest multiple of 10 cents.

“(3) ADMINISTRATION.—The Secretary shall, through a full notice and comment rulemaking process, establish procedures for—
“(A) making the incentive payment directly to the eligible beneficiary or a personal account maintained by the beneficiary at a financial institution that has been designated by the beneficiary, and ensuring that no other entity receives the payment on the beneficiary’s behalf; and

“(B) ensuring that a beneficiary does not receive an incentive payment under this section more than once.

“(e) EDUCATION AND OUTREACH.—The Secretary shall work with stakeholders to conduct appropriate educational and outreach activities under the Program, including—

“(1) the inclusion of detailed information regarding the personal benefits of adopting a certified advance directive and participating in the Program in the Medicare and You handbook under section 1804; and

“(2) the inclusion of detailed information regarding the personal benefits of adopting a certified advance directive and participating in the Program and an explanation of how the Program works (which may include sample certified advance directives, links to the websites of certified advance direc-
tive vendors, other entities providing advance directives, and stakeholder organizations, and such other information as the Secretary determines useful) on the Internet website of the Centers for Medicare & Medicaid Services.

“(f) CONSULTATION.—In establishing and implementing the Program, the Secretary shall consult with, and solicit feedback from, a broad array of stakeholders representing the interests of eligible beneficiaries, health care providers, the advance directive industry and advance directive vendors, and faith-based organizations. Such stakeholders shall include physicians, nurses, hospital representatives, palliative and hospice caregivers, advance directive companies and vendors, patients’ rights groups, health information privacy experts, elder law experts, senior groups, counselors, chaplains, clergy, ethicists, various other members of the faith community, and other individuals and entities that the Secretary determines appropriate.”.