

113<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 2240

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.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Medicare Choices Em-  
5 powerment and Protection Act”.

1 **SEC. 2. MEDICARE ADVANCE DIRECTIVE CERTIFICATION**  
 2 **PROGRAM.**

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

6 “MEDICARE ADVANCE DIRECTIVE CERTIFICATION  
 7 PROGRAM

8 “SEC. 1849. (a) IN GENERAL.—

9 “(1) ESTABLISHMENT OF PROGRAM.—The Sec-  
 10 retary shall establish and implement an Advance Di-  
 11 rective Certification Program (in this section re-  
 12 ferred to as the ‘Program’) under which the Sec-  
 13 retary shall encourage eligible beneficiaries to adopt  
 14 and maintain certified advance directives to guide  
 15 the delivery of health care to such beneficiaries. The  
 16 Secretary shall implement the Program within 3  
 17 years of the date of enactment of this section.

18 “(2) DEFINITIONS.—In this section:

19 “(A) CERTIFIED ADVANCE DIRECTIVE.—  
 20 The term ‘certified advance directive’ means  
 21 any written or electronically stored statement  
 22 by an eligible beneficiary that—

23 “(i) provides instructions that outline  
 24 the kind of medical treatments and care  
 25 that such beneficiary would want or not  
 26 want under particular conditions, and may

1 also include the identification of a health  
2 care proxy or legal representative to make  
3 medical treatment decisions for the bene-  
4 ficiary if the beneficiary becomes unable to  
5 make or communicate those decisions; and

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

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

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

20 “(4) BEST PRACTICES.—In establishing and im-  
21 plementing the Program, the Secretary shall con-  
22 sider best practices within existing advance directive  
23 registry technologies, programs, and systems, includ-  
24 ing web-based or cloud-based advance directive tech-  
25 nologies, which may utilize time and date stamps,

1 video, or other innovative measures to protect the  
2 authenticity, improve the quality, and enhance the  
3 security of such directives.

4 “(5) STATE LAW.—This section shall in no way  
5 supercede, abrogate, or otherwise interfere with  
6 State law governing advance directives.

7 “(b) REGISTRATION.—

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

18 “(2) REQUIRED INFORMATION.—In addition to  
19 such other information as the Secretary may deem  
20 appropriate, an eligible beneficiary seeking to reg-  
21 ister a certified advance directive under the program  
22 shall indicate where the advance directive is main-  
23 tained.

1           “(3) REGISTRATION PERIODS.—The procedures  
2 established under paragraph (1) shall provide that  
3 registration under the Program shall occur during—

4           “(A) an eligible beneficiary’s initial Part C  
5 enrollment as described in paragraph (1) of sec-  
6 tion 1851(e); and

7           “(B) the annual, coordinated election pe-  
8 riod under paragraph (3) of such section.

9           “(4) PRIVACY AND SECURITY.—

10           “(A) IN GENERAL.—The Secretary shall  
11 ensure that all aspects of the registration sys-  
12 tem comply with the Federal regulations (con-  
13 cerning the privacy of individually identifiable  
14 health information) promulgated under section  
15 264(c) of the Health Insurance Portability and  
16 Accountability Act of 1996.

17           “(B) ACCESS.—The Secretary shall utilize  
18 standardized data protections and privacy  
19 standards, including the Federal regulations de-  
20 scribed in paragraph (1), to ensure that the  
21 registration record of an eligible beneficiary can  
22 only be accessed by—

23           “(i) the beneficiary, through the proc-  
24 ess established under paragraph (1); and

1           “(ii) providers of services and sup-  
2           pliers participating under this title,  
3           through a process established by the Sec-  
4           retary.

5           “(c) ACCREDITATION.—

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

8           “(A) grant accreditation to advance direc-  
9           tive vendors and other entities providing ad-  
10          vance directives that meet the accreditation cri-  
11          teria established under paragraph (2); and

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

16          “(2) ACCREDITATION CRITERIA.—The Sec-  
17          retary shall establish accreditation criteria for ad-  
18          vance directive vendors and other entities providing  
19          advance directives that seek to offer advance direc-  
20          tives to be certified under the Program. Such cri-  
21          teria shall include the following:

22          “(A) PROCESS FOR ADOPTING ADVANCE  
23          DIRECTIVE.—The advance directive vendor or  
24          other entity providing an advance directive shall

1 allow a beneficiary to create, adopt, modify, and  
2 terminate an advance directive—

3 “(i) through an online process; and

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

7 “(B) ACCESS.—The advance directive ven-  
8 dor or other entity providing an advance direc-  
9 tive shall maintain advance directives in such a  
10 way that—

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

20 “(ii) in the case of an eligible bene-  
21 ficiary who has adopted an advance direc-  
22 tive with such vendor or entity or any fam-  
23 ily member, legal representative, or health  
24 care proxy legally designated by such bene-  
25 ficiary who is unable or unwilling to use

1 the online access under subparagraph (A),  
2 such individual is able to obtain a hard  
3 copy of the beneficiary’s advance directive  
4 for the purposes of viewing and sharing  
5 such advance directive; and

6 “(iii) providers of services and sup-  
7 pliers participating under this title have  
8 near real-time access to the advance direc-  
9 tive of an eligible beneficiary who has  
10 adopted an advance directive with such  
11 vendor or entity.

12 “(C) PRIVACY PROTECTIONS.—

13 “(i) IN GENERAL.—The advance di-  
14 rective vendor or other entity providing an  
15 advance directive shall comply with the  
16 Federal regulations (concerning the privacy  
17 of individually identifiable health informa-  
18 tion) promulgated under section 264(c) of  
19 the Health Insurance Portability and Ac-  
20 countability Act of 1996 (42 U.S.C.  
21 1320d–2 note).

22 “(ii) ACCESS.—Such vendor or entity  
23 shall utilize standardized data protections  
24 and privacy standards, including the Fed-  
25 eral regulations described in paragraph

1 (1), to ensure that the content of an eligi-  
2 ble beneficiary's advance directive is owned  
3 and maintained by the beneficiary and can  
4 only be accessed by—

5 “(I) the beneficiary or the bene-  
6 ficiary's designee pursuant to clauses  
7 (i) and (ii) of subparagraph (A); and

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

11 “(D) SECURITY AND TESTING.—The ad-  
12 vance directive vendor or other entity providing  
13 an advance directive shall certify that—

14 “(i) all data management and data  
15 transfer elements involved in adopting,  
16 maintaining, and accessing the advance di-  
17 rective have successfully passed rigorous  
18 independent testing regarding standards of  
19 timeliness, accuracy, and efficiency;

20 “(ii) the data management and data  
21 transfer elements involved in adopting,  
22 maintaining, and accessing the advance di-  
23 rective meet widely accepted industry secu-  
24 rity standards; and

1           “(iii) the system that provides access  
2           to the advance directive has passed real-  
3           time tests simulating a realistic volume of  
4           beneficiaries and providers accessing ad-  
5           vance directives simultaneously.

6           “(E) CERTIFIED ADVANCE DIRECTIVES.—  
7           The advance directive vendor or other entity  
8           providing an advance directive shall agree to  
9           offer certified advance directives (as defined in  
10          subsection (a)(2)(A)).

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

13          “(d) INCENTIVE.—

14           “(1) IN GENERAL.—The Secretary shall make a  
15           one-time payment of the amount specified in para-  
16           graph (2) to each eligible beneficiary that adopts a  
17           certified advance directive and registers such direc-  
18           tive with the Program.

19           “(2) AMOUNT.—

20           “(A) IN GENERAL.—For purposes of para-  
21           graph (1), the amount specified in this para-  
22           graph is—

23           “(i) for a beneficiary who registers a  
24           certified advance directive with the Pro-  
25           gram in 2015—

1                   “(I) in the case of a beneficiary  
2                   that creates, adopts, and registers a  
3                   certified advance directive using on-  
4                   line processes only, \$75; or

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

9                   “(ii) for a beneficiary who registers a  
10                  certified advance directive with the Pro-  
11                  gram in a subsequent year, the amount  
12                  specified in this paragraph for the pre-  
13                  ceding year increased by the percentage in-  
14                  crease in the Chained Consumer Price  
15                  Index for All Urban Consumers (as pub-  
16                  lished by the Bureau of Labor Statistics of  
17                  the Department of Labor) over the pre-  
18                  ceding year.

19                  “(B) ROUNDING.—If any amount deter-  
20                  mined under subparagraph (A) is not a multiple  
21                  of 10 cents, such amount shall be rounded to  
22                  the nearest multiple of 10 cents.

23                  “(3) ADMINISTRATION.—The Secretary shall,  
24                  through a full notice and comment rulemaking proc-  
25                  ess, establish procedures for—

1           “(A) making the incentive payment di-  
2           rectly to the eligible beneficiary or a personal  
3           account maintained by the beneficiary at a fi-  
4           nancial institution that has been designated by  
5           the beneficiary, and ensuring that no other enti-  
6           ty receives the payment on the beneficiary’s be-  
7           half; and

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

11          “(e) EDUCATION AND OUTREACH.—The Secretary  
12          shall work with stakeholders to conduct appropriate edu-  
13          cational and outreach activities under the Program, in-  
14          cluding—

15               “(1) the inclusion of detailed information re-  
16               garding the personal benefits of adopting a certified  
17               advance directive and participating in the Program  
18               in the Medicare and You handbook under section  
19               1804; and

20               “(2) the inclusion of detailed information re-  
21               garding the personal benefits of adopting a certified  
22               advance directive and participating in the Program  
23               and an explanation of how the Program works  
24               (which may include sample certified advance direc-  
25               tives, links to the websites of certified advance direc-

1       tive vendors, other entities providing advance direc-  
2       tives, and stakeholder organizations, and such other  
3       information as the Secretary determines useful) on  
4       the Internet website of the Centers for Medicare &  
5       Medicaid Services.

6       “(f) CONSULTATION.—In establishing and imple-  
7       menting the Program, the Secretary shall consult with,  
8       and solicit feedback from, a broad array of stakeholders  
9       representing the interests of eligible beneficiaries, health  
10      care providers, the advance directive industry and advance  
11      directive vendors, and faith-based organizations. Such  
12      stakeholders shall include physicians, nurses, hospital rep-  
13      resentatives, palliative and hospice caregivers, advance di-  
14      rective companies and vendors, patients’ rights groups,  
15      health information privacy experts, elder law experts, sen-  
16      ior groups, counselors, chaplains, clergy, ethicists, various  
17      other members of the faith community, and other individ-  
18      uals and entities that the Secretary determines appro-  
19      priate.”.

○