

116TH CONGRESS  
1ST SESSION

# S. 618

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

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 28, 2019

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

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## 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 not later  
 17 than 3 years after the date of enactment of this sec-  
 18 tion.

19 “(2) DEFINITIONS.—In this section:

20 “(A) CERTIFIED ADVANCE DIRECTIVE.—  
 21 The term ‘certified advance directive’ means  
 22 any electronically stored statement by an eligi-  
 23 ble beneficiary which—

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

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

7 “(ii) is executed in accordance with  
8 the law governing advance directives of the  
9 State involved; and

10 “(iii) is offered by an entity that has  
11 received accreditation from the Secretary  
12 under this section.

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

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

1           “(4) BEST PRACTICES.—In establishing and im-  
2           plementing the Program, the Secretary shall con-  
3           sider—

4                   “(A) best practices within existing advance  
5           directive registry technologies, programs, and  
6           systems, including web-based or cloud-based ad-  
7           vance directive technologies—

8                           “(i) which may utilize time and date  
9           stamps, video, or other innovative meas-  
10          ures to protect the authenticity, improve  
11          the quality, and enhance the security of  
12          such directives; and

13                           “(ii) which may utilize secure email  
14          and messaging technologies and nationally  
15          recognized health care information tech-  
16          nology standards to improve the accessi-  
17          bility and interoperability of such direc-  
18          tives; and

19                   “(B) best practices for educating bene-  
20          ficiaries on means for communicating bene-  
21          ficiaries’ authenticated wishes to applicable  
22          family members, legal representatives, providers  
23          or health care proxies, including the use of  
24          email or other mail formats as well as access

1 through mobile devices (as defined by the Sec-  
2 retary).

3 “(5) ENROLLMENT AND DISENROLLMENT.—

4 The Secretary shall establish procedures for eligible  
5 beneficiaries to enroll and disenroll under the Pro-  
6 gram. Such procedures shall ensure that enrollment  
7 and disenrollment is available through an online  
8 process. The Secretary shall also establish proce-  
9 dures to ensure Program participants can update or  
10 amend an advance directive in a timely and secure  
11 manner.

12 “(6) STATE LAW.—This section shall in no way  
13 supercede, abrogate, or otherwise interfere with  
14 State law governing advance directives. Under the  
15 Program, the Secretary shall establish a process  
16 under which the Secretary is required to verify that  
17 digital advance directive vendors or other entities  
18 providing a digital advance directive participating in  
19 the program enable those using their services to  
20 complete advance directives that fully comply with  
21 the law governing advance directives of the State in-  
22 volved.

23 “(7) DISPLAY OF STATUTORY AND ALTER-  
24 NATIVE ADVANCE DIRECTIVE FORMS.—Under the  
25 Program, the Centers for Medicare & Medicaid Serv-

1       ices shall provide, through a clearinghouse website,  
2       links to statutory and alternative advance directive  
3       forms and a State-by-State index to such forms to  
4       allow a beneficiary to create, adopt, modify, and ter-  
5       minate an advance directive with any content per-  
6       mitted or required, and in any form authorized by  
7       a State, in accordance with the requirements of sub-  
8       paragraphs (C) through (E) of subsection (e)(1) and  
9       subsection (e)(2).

10           “(8) ACCESS IN CASES OF DISPUTE OVER  
11       TREATMENT.—Under the Program:

12           “(A) SPECIAL ACCESS.—The Secretary  
13       shall establish a process whereby, with respect  
14       to a beneficiary with a certified advance direc-  
15       tive, a person described in subparagraph (B)  
16       may obtain access to the beneficiary’s advance  
17       directive for the purposes of viewing and shar-  
18       ing such advance directive when—

19           “(i) the provisions of the advance di-  
20       rective have come into force under the ap-  
21       plicable State’s law because the beneficiary  
22       has become incapable of making health  
23       care decisions or under other cir-  
24       cumstances provided under State law; and

1           “(ii) at least one person described in  
2           subparagraph (B) is questioning or dis-  
3           puting the provision, withholding, or with-  
4           drawal of medical treatment, food, or  
5           fluids with respect to the beneficiary.

6           “(B) INTERESTED INDIVIDUALS.—A per-  
7           son described in this subparagraph, with re-  
8           spect to a beneficiary, is—

9           “(i) any individual who is a member  
10          of any class of persons who, under the ap-  
11          plicable State’s law, would potentially be  
12          eligible to serve as a health care decision  
13          maker for the beneficiary if an advance di-  
14          rective had not been executed regardless of  
15          whether higher priority for such eligibility  
16          would be accorded to another individual or  
17          individuals; and

18          “(ii) if the applicable State’s law does  
19          not designate persons or classes of persons  
20          described in clause (i), any person related  
21          within the third degree of consanguinity or  
22          affinity to the beneficiary.

23          “(b) REGISTRATION.—

24                 “(1) IN GENERAL.—The Secretary shall estab-  
25                 lish procedures for an eligible beneficiary to register

1 such beneficiary’s adoption of a certified advance di-  
2 rective under the Program. Such procedures shall  
3 ensure that registration is available through an on-  
4 line process. The Secretary shall also establish pro-  
5 cedures to ensure Program participants can update  
6 previously registered information that is no longer  
7 accurate and indicate that an advance directive has  
8 been terminated.

9 “(2) REQUIRED INFORMATION.—In addition to  
10 such other information as the Secretary may deem  
11 appropriate, an eligible beneficiary seeking to reg-  
12 ister a certified advance directive under the Program  
13 shall indicate where the advance directive is main-  
14 tained or how it may be accessed.

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

18 “(A) an eligible beneficiary’s initial enroll-  
19 ment under an MA plan under part C as de-  
20 scribed in paragraph (1) of section 1851(e);  
21 and

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

24 “(4) PRIVACY AND SECURITY.—



1           “(A) IN GENERAL.—The Secretary shall  
2 ensure that all aspects of the registration sys-  
3 tem comply with the Federal regulations (con-  
4 cerning the privacy of individually identifiable  
5 health information) promulgated under section  
6 264(c) of the Health Insurance Portability and  
7 Accountability Act of 1996 subject to the access  
8 authorized under subsection (a)(8), in accord-  
9 ance with subsection (c)(2)(E).

10           “(B) ACCESS.—The Secretary shall utilize  
11 standardized data protections and privacy  
12 standards, including the Federal regulations de-  
13 scribed in paragraph (1), to ensure that the  
14 registration record of an eligible beneficiary can  
15 only be accessed by—

16                   “(i) the beneficiary, through the proc-  
17 ess established under paragraph (1);

18                   “(ii) those authorized to access the  
19 advance directive under subsection (a)(8)  
20 and subsection (c)(2)(E); and

21                   “(iii) providers of services and sup-  
22 pliers participating under this title,  
23 through a process established by the Sec-  
24 retary.

25           “(c) ACCREDITATION.—

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

3           “(A) grant accreditation to advance direc-  
4 tive vendors and other entities providing ad-  
5 vance directives that meet the accreditation cri-  
6 teria established under paragraph (2); and

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

11           “(2) ACCREDITATION CRITERIA.—The Sec-  
12 retary, in consultation with the General Accounting  
13 Office, shall establish accreditation criteria for ad-  
14 vance directive vendors and other entities providing  
15 advance directives that seek to offer advance direc-  
16 tives to be certified under the Program. Such cri-  
17 teria shall consist of the following:

18           “(A) PROCESS FOR ADOPTING ADVANCE  
19 DIRECTIVE.—The advance directive vendor or  
20 other entity providing an advance directive shall  
21 allow a beneficiary to create, adopt, modify, and  
22 terminate an advance directive through an on-  
23 line process.

24           “(B) VENDORS.—The advance directive  
25 vendor or other entity providing an advance di-

1           rective shall comply with an annual quality re-  
2           view to be conducted by the Secretary.

3           “(C) USE OF STATUTORY AND ALTER-  
4           NATIVE ADVANCE DIRECTIVE FORMS.—The ad-  
5           vance directive vendor or other entity providing  
6           an advance directive shall enable a beneficiary  
7           to access, complete, modify, and adopt any ad-  
8           vance directive applicable to the State indicated  
9           by the beneficiary who is posted as provided  
10          under subparagraphs (C) through (E) of sub-  
11          section (e)(1) and of subsection (e)(2).

12          “(D) ACCESS.—The advance directive ven-  
13          dor or other entity providing an advance direc-  
14          tive shall maintain advance directives in such a  
15          way that—

16                 “(i) an eligible beneficiary who has  
17                 adopted an advance directive with such  
18                 vendor or entity and any family member,  
19                 legal representative, or health care proxy  
20                 legally designated by such beneficiary has  
21                 direct, has near real-time online access to  
22                 the beneficiary’s advance directive for pur-  
23                 poses of viewing and sharing such advance  
24                 directive, including communication of the  
25                 advance directive and corresponding bene-

1            beneficiary's wishes using nationally recognized  
2            health care information technology data  
3            content and data transport standards spec-  
4            ified by the Secretary;

5            “(ii) in the case of an eligible bene-  
6            ficiary who has adopted an advance direc-  
7            tive with such vendor or entity or any fam-  
8            ily member, legal representative, or health  
9            care proxy legally designated by such bene-  
10          ficiary who is unable or unwilling to use  
11          the online access under subparagraph (A),  
12          such individual is able to obtain a hard  
13          copy of the beneficiary's advance directive  
14          for the purposes of viewing and sharing  
15          such advance directive; and

16          “(iii) providers of services and sup-  
17          pliers participating under this title have  
18          near real-time online access to the advance  
19          directive of an eligible beneficiary who has  
20          adopted an advance directive with such  
21          vendor or entity, including communication  
22          of the advance directive and corresponding  
23          beneficiary's wishes through secure email  
24          and messaging technologies and nationally  
25          recognized health care information tech-

1 nology standards specified by the Secretary  
2 to improve the accessibility and interoper-  
3 ability of such directives.

4 “(E) PRIVACY PROTECTIONS.—

5 “(i) IN GENERAL.—The advance di-  
6 rective vendor or other entity providing an  
7 advance directive shall comply with the  
8 Federal regulations (concerning the privacy  
9 of individually identifiable health informa-  
10 tion) promulgated under section 264(e) of  
11 the Health Insurance Portability and Ac-  
12 countability Act of 1996 (42 U.S.C.  
13 1320d–2 note), subject to the access au-  
14 thorized under subparagraph (D) and sub-  
15 section (a)(8).

16 “(ii) ACCESS.—Such vendor or entity  
17 shall utilize standardized data protections  
18 and privacy standards, including the Fed-  
19 eral regulations described in clause (i), to  
20 ensure that the content of an eligible bene-  
21 ficiary’s advance directive is owned and  
22 maintained by the beneficiary and can only  
23 be accessed by those authorized to access  
24 the advance directive under subparagraph  
25 (D) and subsection (a)(8).

1           “(F) SECURITY AND TESTING.—The ad-  
2 vance directive vendor or other entity providing  
3 an advance directive shall certify that—

4           “(i) all data management and data  
5 transfer elements involved in adopting,  
6 maintaining, and accessing the advance di-  
7 rective have successfully passed rigorous  
8 independent testing regarding standards of  
9 timeliness, accuracy, and efficiency;

10           “(ii) the data management and data  
11 transfer elements involved in adopting,  
12 maintaining, and accessing the advance di-  
13 rective meet widely accepted industry secu-  
14 rity standards; and

15           “(iii) the system that provides access  
16 to the advance directive has passed real-  
17 time tests simulating a realistic volume of  
18 beneficiaries and providers accessing ad-  
19 vance directives simultaneously.

20           “(G) CERTIFIED ADVANCE DIRECTIVES.—  
21 The advance directive vendor or other entity  
22 providing an advance directive shall agree to  
23 offer certified advance directives (as defined in  
24 subsection (a)(2)(A)).

25           “(H) BENEFICIARY SURVEYS.—

1           “(i) IN GENERAL.—The advance di-  
2           rective vendor or other entity providing an  
3           advance directive shall agree to administer  
4           annual beneficiary surveys on the informa-  
5           tion described in clause (ii) and submit the  
6           results of such surveys to the Centers for  
7           Medicare & Medicaid Services.

8           “(ii) INFORMATION.—The information  
9           described in this clause, with respect to an  
10          annual beneficiary survey and certified ad-  
11          vance directive of a beneficiary, is the fol-  
12          lowing:

13                   “(I) Whether the beneficiary had  
14                   to pay any third party for the cre-  
15                   ation, storage, or retrieval of the cer-  
16                   tified advance directive.

17                   “(II) Whether the beneficiary  
18                   had a health care encounter or emer-  
19                   gency that required the location, ac-  
20                   cess, retrieval, or consultation of the  
21                   certified advance directive and if so,  
22                   whether the certified advance directive  
23                   was accessible in online and in near  
24                   real-time, as required under this sec-  
25                   tion.

1                   “(III) Whether the certified ad-  
2                   vance directive was actionable.

3                   “(IV) Whether medical personnel  
4                   followed the certified advance direc-  
5                   tive.

6           “(d) INCENTIVE.—

7                   “(1) IN GENERAL.—The Secretary shall make a  
8                   one-time payment of the amount specified in para-  
9                   graph (2) to each eligible beneficiary who adopts a  
10                  certified advance directive and registers such direc-  
11                  tive with the Program.

12                  “(2) AMOUNT.—

13                   “(A) IN GENERAL.—For purposes of para-  
14                   graph (1), the amount specified in this para-  
15                   graph is—

16                   “(i) for a beneficiary who registers a  
17                   certified advance directive with the Pro-  
18                   gram in 2019, \$75; or

19                   “(ii) for a beneficiary who registers a  
20                   certified advance directive with the Pro-  
21                   gram in a subsequent year, the amount  
22                   specified in this paragraph for the pre-  
23                   ceding year increased by the percentage in-  
24                   crease in the Chained Consumer Price  
25                   Index for All Urban Consumers (as pub-



1           lished by the Bureau of Labor Statistics of  
2           the Department of Labor) over the pre-  
3           ceding year.

4           “(B) ROUNDING.—If any amount deter-  
5           mined under subparagraph (A) is not a multiple  
6           of 10 cents, such amount shall be rounded to  
7           the nearest multiple of 10 cents.

8           “(3) FUNDING.—For purposes of carrying out  
9           this subsection, the Secretary shall provide for the  
10          transfer, from the Federal Supplementary Medical  
11          Insurance Trust Fund under section 1841, of such  
12          sums as the Secretary determines necessary.

13          “(4) ADMINISTRATION.—The Secretary shall,  
14          through a full notice and comment rulemaking pro-  
15          cess, establish procedures for—

16                 “(A) making the incentive payment di-  
17                 rectly to the eligible beneficiary or a personal  
18                 account maintained by the beneficiary at a fi-  
19                 nancial institution that has been designated by  
20                 the beneficiary, and ensuring that no other enti-  
21                 ty receives the payment on the beneficiary’s be-  
22                 half; and

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

1 “(e) EDUCATION AND OUTREACH.—

2 “(1) IN GENERAL.—The Secretary shall provide  
3 for—

4 “(A) the inclusion of the statement set  
5 forth in paragraph (3) in the Medicare and You  
6 handbook under section 1804 and on a clear-  
7 inghouse website linked to the Internet website  
8 of the Centers for Medicare & Medicaid Serv-  
9 ices;

10 “(B) the promotion of the benefits of elec-  
11 tronic advance directives services, as they be-  
12 come available, through the use of mass com-  
13 munications and other means;

14 “(C) the inclusion, under the heading  
15 ‘Statutory Advance Directive Forms’, of any  
16 relevant forms, whether mandatory or optional,  
17 specified in the statues or regulations of the  
18 States to be displayed on a clearinghouse  
19 website;

20 “(D) the inclusion, under the heading ‘Al-  
21 ternative Advance Directive Forms’, on a sepa-  
22 rate clearinghouse website, and in accordance  
23 with paragraph (2)—

24 “(i) of other advance directive forms  
25 submitted to the Secretary by individuals

1 and groups in an electronic format speci-  
 2 fied by the Secretary for which the submit-  
 3 ting entity includes, for each form sub-  
 4 mitted, an opinion by an attorney licensed  
 5 to practice in the relevant State dem-  
 6 onstrating that the submitted form com-  
 7 plies with the law of that State; and

8 “(ii) of the following disclaimer, which  
 9 shall be prominently posted on the website:

10 ‘This website includes for your consider-  
 11 ation alternative advance directive forms  
 12 submitted by individuals or groups reflect-  
 13 ing different perspectives on advance  
 14 health care decisions which you may wish  
 15 to review before completing your own ad-  
 16 vance directive.’; and

17 “(E) the inclusion of a user-friendly index  
 18 on the clearinghouse website by State and, in  
 19 the case of the ‘Alternative Advance Directive  
 20 Forms’, by the name of the provider, so that a  
 21 user may readily access those statutory and al-  
 22 ternative forms.

23 “(2) ALTERNATIVE ADVANCE DIRECTIVE  
 24 FORMS.—

1           “(A) IN GENERAL.—For purposes of para-  
2 graph (1)(D), the following shall apply:

3           “(i) Not later than 60 days after re-  
4 ceiving an advance directive form sub-  
5 mitted under such paragraph, the Sec-  
6 retary shall either post the submitted form  
7 on a clearinghouse website or provide to  
8 the submitting entity a detailed expla-  
9 nation of the basis for the Secretary’s de-  
10 termination that the submitted form does  
11 not comply with relevant State or Federal  
12 law, which determination shall be subject  
13 to judicial review under section 702 of title  
14 5 of the United States Code; and

15           “(ii) the Secretary shall either remove  
16 or refuse to post any submitted form if  
17 provided with an official determination by  
18 the Attorney General of the applicable  
19 State that the form is not in compliance  
20 with State law, subject to applicable State  
21 law described in subparagraph (B).

22           “(B) STATE LAW DESCRIBED.—For pur-  
23 poses of subparagraph (A), State law described  
24 in this subparagraph is—

1           “(i) a ruling by a court of the applica-  
2           ble State, or by a Federal court applying  
3           that State’s law, subject to subsequent rul-  
4           ings by a court or courts with authority to  
5           supercede that ruling; or

6           “(ii) a statute or regulation of the ap-  
7           plicable State that provides for a specific  
8           procedure for officially determining wheth-  
9           er particular advance directive forms com-  
10          ply with State law.

11           “(3) STATEMENT.—For purposes of paragraph  
12          (1)(A), the statement included in this paragraph is  
13          the following statement, with appropriate insertions  
14          in the bracketed segments updated at least annually:

15          “WHY YOU MAY WANT TO CONSIDER AN ‘AD-  
16          VANCE DIRECTIVE’ Do you ever worry what would  
17          happen if you became unable to make health care decisions  
18          for yourself because of an illness or injury? Do you hold  
19          certain values and beliefs with respect to your medical  
20          treatment that you would want to be upheld if you were  
21          unable to convey them yourself? That’s what an ‘advance  
22          directive’ is for. You can use it to give directions for your  
23          health care providers and family about your health care  
24          wishes that are to be followed if you are no longer able  
25          to speak for yourself. You can also name someone you

1 trust, like a family member or friend, to give health care  
2 directions for you when you can't do so yourself.

3       “You should consider carefully who to choose to  
4 speak for you and what directions you want to give to en-  
5 sure your representative clearly reflects your own values  
6 and treatment preferences. You should not feel pressured  
7 to violate your own values and preferences, and you are  
8 entitled to implement them without discrimination based  
9 on age or degree of disability.

10       “There are many resources to help you.

11       “By choosing the name of a State at [INSERT name  
12 of webpage for the index provided in paragraph (1)(E) of  
13 this subsection and its URL (and, on the clearinghouse  
14 website, include a hyperlink to it)], you can find sample  
15 advance directives for that State. You can see any sample  
16 or required forms given in State law, as well as others  
17 from individuals or groups with different viewpoints on ad-  
18 vance health care decisions which you may wish to review  
19 before completing your own advance directive.

20       “Below is contact information for the accredited ven-  
21 dor in your State who will arrange for your advance direc-  
22 tive to be confidentially kept online, where it can be seen  
23 by doctors who are treating you so they are made aware  
24 of your wishes. You can also give permission to certain  
25 other people, like family members or friends, you want to

1 be able to get a copy of your advance directive. If a dis-  
2 agreement about your treatment develops, depending on  
3 your State’s law certain other people may also be allowed  
4 to see it.

5       “‘This vendor can also help you create an advance di-  
6 rective online or with paper documents, if you wish. Online  
7 directives allow you to change or cancel one that no longer  
8 fits with your wishes in a more timely manner.

9       “‘[INSERT, name and contact information for cur-  
10 rently accredited advance directive vendor (and, on the  
11 clearinghouse website, hyperlinks to their website).]

12       “‘Although any adult who is capable of doing so can  
13 use these resources to complete an advance directive at  
14 any time, Medicare beneficiaries are particularly encour-  
15 aged to do so when enrolling in Medicare or during the  
16 annual enrollment period when you can choose among dif-  
17 ferent Medicare health insurance alternatives.

18       “‘In addition, some Medicare Advantage plans or sup-  
19 plemental insurance plans may offer a financial incentive  
20 or other additional benefits for creating an advance direc-  
21 tive online.

22       “‘By completing an advance directive you can not only  
23 make it more likely that your wishes about health care  
24 will be known if you are unable to tell them at the time,  
25 but also spare family, friends, and doctors the difficulty

1 of trying to figure out what you would have wanted. These  
2 are matters of the highest importance that can affect life-  
3 or-death decisions, as well as your future comfort and  
4 well-being. You are encouraged to think about them care-  
5 fully, and give serious consideration to recording your  
6 wishes in an advance directive.”.

