

1 OPEN EXECUTIVE SESSION TO CONSIDER AN ORIGINAL BILL
2 ENTITLED THE AUDIT AND APPEAL FAIRNESS, INTEGRITY, AND
3 REFORMS IN MEDICARE ACT OF 2015
4 WEDNESDAY, JUNE 3, 2015
5 U.S. Senate,
6 Committee on Finance,
7 Washington, DC.

8 The meeting was convened, pursuant to notice, at
9 10:03 a.m., in Room 215, Dirksen Senate Office Building,
10 Hon. Orrin G. Hatch (chairman of the committee)
11 presiding.

12 Present: Senators Grassley, Roberts, Thune, Burr,
13 Isakson, Heller, Scott, Wyden, Stabenow, Cantwell,
14 Nelson, Carper, Cardin, Brown, Bennet, Casey, and Warner.

15 Also present: Republican Staff: Chris Campbell,
16 Staff Director; Mark Prater, Deputy Staff Director and
17 Chief Tax Counsel; Joshua Blume, Professional Staff
18 Member; Jill Wright, Detailee; and Kimberly Brandt, Chief
19 Healthcare Investigative Counsel. Democratic Staff:
20 Joshua Sheinkman, Staff Director; Jocelyn Moore, Deputy
21 Staff Director; Michael Evans, General Counsel; Elizabeth
22 Jurinka, Chief Health Advisor; and Matt Kazan, Senior
23 Health Policy Advisor. Non-Designated Staff: Joshua
24 LeVasseur, Chief Clerk and Historian; and Bryan Palmer,
25 Deputy Clerk.

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1 OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR
2 FROM UTAH, CHAIRMAN, COMMITTEE ON FINANCE

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4 The Chairman. Good morning. The Committee will
5 come to order.

6 Today the Committee has before it a Chairman's mark
7 of the Audit and Appeal Fairness, Integrity and Reforms
8 in Medicare Act of 2015, as modified.

9 Many of us here on the Finance Committee are deeply
10 concerned about Medicare improper payments and the
11 overall solvency of the Medicare Trust Fund. A recent
12 GAO report found that in fiscal year 2014 alone, Medicare
13 covered health services for approximately 54 million
14 elderly and disabled beneficiaries at a cost of \$603
15 billion, with a "b." Of that figure, an estimated \$60
16 billion, or approximately 10 percent, apparently were
17 improperly paid, averaging more than \$1,000 in improper
18 payments for every Medicare beneficiary.

19 The large number of Medicare improper payments has
20 led to an increased number of audits to identify and
21 recapture those funds. While auditors for the Centers
22 for Medicare and Medicaid Services have been reasonably
23 successful in their mission to conduct audits on the more
24 than 1 billion claims submitted to Medicare every year,
25 they face an uphill battle in their efforts to recover

1 improper Medicare payments.

2 In 2013, for example, CMS auditors recovered over \$3
3 billion and while this may sound like a large number, it
4 represents only a small fraction of the improper payments
5 made that particular year.

6 An unintended consequence of the increasing number
7 of audits has been a dramatic increase in the number of
8 Medicare appeals. We held a hearing on this topic this
9 past April where we discussed a number of pressing issues
10 facing the Medicare appeals system.

11 Currently, there are so many appeals being filed
12 that the Office of Medicare Hearings and Appeals cannot
13 even docket them for 20 to 24 weeks. In fiscal year
14 2009, the majority of appeals were processed within 94
15 days. In fiscal year 2015, it will take, on average, 604
16 days to process an appeal.

17 This is an incredibly frustrating amount of time not
18 only for physicians and other health care providers, but
19 for beneficiaries, many of whom are living on fixed
20 incomes.

21 Adding to this problem is the fact that large
22 portions of the initial payment determinations are
23 reversed on appeal. The Department of Health and Human
24 Services' Office of Inspector General reported that of
25 the 41,000 appeals made to administrative law judges in

1 fiscal year 2012, over 60 percent were partially or fully
2 favorable to the defendant. Such a high rate of
3 reversals raises questions about the quality of initial
4 determinations and whether providers and beneficiaries
5 are facing undue burdens on the front end.

6 In order to safeguard beneficiaries and ensure the
7 solvency of the Medicare Trust Fund, we need to address
8 these issues now. That is why Senator Wyden and I have
9 introduced this bipartisan bill, the Audit and Appeal
10 Fairness, Integrity and Reforms in Medicare, or AAFIRM,
11 Act of 2015. If enacted, this bill will improve
12 oversight of the Medicare audits and appeals process to
13 more effectively address the staggering Medicare appeals
14 backlog and it will lay the groundwork to a more level
15 playing field, reducing the burden on providers and
16 suppliers and giving auditors the tools necessary to
17 better protect the Medicare Trust Fund.

18 The AAFIRM Act will address these issues in three
19 ways. First, it will improve CMS oversight and require
20 better coordination between the agency and audit
21 contractors. It will ensure that all parties receive
22 transparent data regarding review practices and appeal
23 outcomes at each level of review.

24 Second, the bill will require that CMS create new
25 incentives to improve auditor accuracy. It will also

1 require that CMS create a independent ombudsman for
2 Medicare reviews and appeals to help resolve complaints
3 made by appellants and those considering appeal.

4 Finally, the bill will make needed reforms to the
5 Medicare appeals process to address the appeals backlog
6 without sacrificing quality. It will raise the amount in
7 controversy for review by an ALJ to match the amount for
8 review by a district court.

9 In addition, the bill will create a new Medicare
10 magistrate program for cases with lower costs, allowing
11 senior attorneys with expertise in Medicare law and
12 policies to adjudicate cases in the same way as ALJs.

13 It will also allow for the use of sampling and
14 extrapolation with the appellant's consent to expedite
15 the appeals process. And the bill will establish a
16 voluntary alternate dispute resolution process for
17 multiple pending claims with similar issues to be settled
18 as a unit instead of as individual appeals.

19 These improvements will address the appeals backlog
20 and ensure that the Medicare Trust Fund is protected
21 without creating undue burdens for health care providers
22 and suppliers.

23 I wish to express my personal thanks to Ranking
24 Member Wyden for working with me on this effort and for
25 making this a true bipartisan markup. I encourage my

1 colleague to help us to move forwards on the AAFIRM Act
2 through today's markup process as cleanly and efficiently
3 as possible.

4 I will turn to Senator Wyden for his opening remarks
5 at this time.

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1 OPENING STATEMENT OF HON. RON WYDEN, A U.S. SENATOR FROM
2 OREGON

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4 Senator Wyden. Thank you very much, Mr. Chairman.
5 I have appreciated the chance to work with you as you.
6 As you and I have talked, I have been tackling these
7 issues since the days when I was the director of the Gray
8 Panthers and the fact of the matter is over the years, it
9 has been possible to address some of the concerns and
10 then new ones have sprouted up.

11 In fact, the reason that we need this bipartisan
12 legislation is to deal with the tremendous backlog of
13 Medicare appeals that really does present a very
14 important and new challenge that has frustrated seniors
15 and their providers from one end of the country to
16 another.

17 As you noted, we held our hearing to look at this
18 broken Medicare appeals process back in April and today,
19 as a result of the work that you and I and our staffs
20 have done, we can put in front of the Committee a
21 bipartisan legislation.

22 You have made many points that I certainly agree
23 with, Mr. Chairman. So let me just highlight a couple
24 for our colleagues.

25 First, this is going to give the department, the

1 Health and Human Services Department the tools it needs
2 to try to finally get caught up in dealing with this
3 enormous increase in appeals.

4 Chief Judge Nancy Griswold of the Office of Medicare
5 Hearings and Appeals told the Committee her office
6 concurrently adjudicates 77,000 appeals in a year. This
7 falls well short of the 474,000 appeals that the office
8 received in 2014.

9 So, in effect, with this legislation we are putting
10 new tools into the department's toolbox so that the
11 agency can work efficiently and responsibly to get
12 through this claims backlog at a much quicker pace.

13 Second, Mr. Chairman, this legislation creates a
14 fresh, more efficient approach for the lower cost, less
15 complex cases to be considered by a different set of
16 hearing officers. This would allow HHS to use its
17 resources more efficiently and process more appeals.

18 Next, the legislation requires the Center for
19 Medicare and Medicaid Services to better coordinate
20 provider audits to ensure the entire process is more
21 transparent and efficient and my view is it is sensible
22 to create the ombuds position, as well, at the office.
23 It rewards providers who consistently bill correctly by
24 exempting them from what amounts to bureaucratic water
25 torture.

1 I think our colleagues, particularly Senator
2 Stabenow and Senator Heller, have made a number of very
3 good points in this area. The challenge is -- and I do
4 appreciate my colleagues from Michigan and Nevada making
5 this point -- the challenge here is to strike a balance
6 between rooting out the waste and, as I say, not putting
7 all these responsible providers through what I call
8 bureaucratic water torture.

9 I think with thoughtful work my colleagues have
10 done, and we are going to have a colloquy and talk about
11 next steps, as well, we are going to be in a position to
12 streamline the appeals and audits process so cases can be
13 resolved quickly and at the earliest possible step.

14 The last point I would mention, and, for me, this is
15 a little bit personal and I will not prolong it, I look
16 back at a lot of these cases that are more often than not
17 a senior citizen, a senior who is paying out of their
18 pocket while their appeal is being considered or one of
19 their providers who would much rather focus on being an
20 advocate for that senior patient rather than going
21 through this billing mess.

22 So this legislation gives us a chance today to
23 create an effective approach for a big challenge for
24 seniors and their providers.

25 Thank you very much, Mr. Chairman, for the chance to

1 work with you, for our colleagues and their suggestions,
2 and I hope that we will have a resounding bipartisan vote
3 for the legislation here in a bit.

4 The Chairman. Thank you, Senator.

5 I will now recognize Senators who want to make
6 opening statements. As always, I hope that most Senators
7 will choose to not give statements at this time to allow
8 us to move more quickly to the mark.

9 But that said, for any Senator who does want to give
10 an opening statement, I would ask that they limit their
11 comments to no more than 3 minutes. So we will turn the
12 time over to anybody who wants to make any comments.

13 Senator Brown?

14 Senator Brown. Mr. Chairman, thank you. I do not
15 always do these, but I need to today or want to because
16 of the work that you all have done on this bill and the
17 cooperation that you have extended to all of us.

18 I appreciate, first of all, your support of the
19 three amendments that I submitted and thank you for
20 incorporating them into the mark.

21 This mark reflects a good deal of bipartisan and
22 bicameral collaboration. It is a strong legislative
23 package that will go a long way toward reducing backlog
24 and making the appeals process more efficient for the
25 future.

1 Our main concern, however, that all we are doing
2 today is focused on ways to reduce the backlog instead of
3 fixing the underlying issues that continue to plague the
4 audit and appeals system at Medicare, with this bill we
5 are doing a good thing.

6 We are taking steps to expedite claims processing,
7 but we are not getting at the core problem of deluge of
8 appeals. In fact, the backlog is scheduled to reach 1
9 million claims by the end of the fiscal year, the next
10 fiscal year.

11 There are bills out there that could address these
12 underlying issues and fix these problems once and for
13 all, including my Improving Access to Medicare Coverage
14 Act. We will hear about this issue, we all do on a
15 regular basis, under current Medicare policy, a
16 beneficiary must have an inpatient hospital stay of at
17 least 3 days in order for Medicare to cover skilled
18 nursing care.

19 Patients who receive hospital care on what is called
20 observation status do not qualify for this benefit even
21 if their hospital stay lasts longer than 3 days. It
22 creates a perverse situation.

23 Two people can be hospitalized for the same problem,
24 but how their hospital stay is coded affects whether or
25 not Medicare will cover their post-acute care in a

1 skilled nursing facility.

2 We recently heard about an 88-year-old woman in
3 Ohio. She broke her back, hospitalized for a week. She
4 received care under observation status. Now, she will
5 either be forced to pay for her skilled nursing care out
6 of pocket or to file a claim and navigate her way through
7 the Medicare appeals process, all while she tries to
8 recover at the age of 88 from a broken back.

9 Earlier this year, I introduced a bipartisan bill
10 with Senator Collins and Senator Capito and Senator
11 Nelson on this Committee. Our legislation will make a
12 simple fix to Medicare to allow overnight stays in the
13 hospital to count toward that 3-day requirement.

14 When seniors are transferred from hospital to a
15 nursing home for further care, they should be able to
16 focus on their recovery, of course, instead of navigating
17 the Medicare appeals process and the technicalities that
18 could lead to high medical bills.

19 Our legislation will help ensure that seniors
20 receive the care they need without incurring unexpected
21 and unfair costs.

22 Mr. Chairman and Senator Wyden, I ask that you
23 commit to working with me to get this underlying issue
24 solved to help alleviate the appeals process for these
25 beneficiaries. The Aging Committee has already held two

1 hearings. The Finance Committee has yet to consider this
2 legislation. Our staffs have been talking. I am
3 appreciative of that.

4 We need to do more to fix this backlog. We owe it
5 to our beneficiaries and providers and taxpayers to do
6 something about the underlying policy.

7 That being said, Mr. Chairman, I appreciate the
8 progress we are making today on dealing with the backlog.

9 The Chairman. Thank you, Senator.

10 Anybody else? Senator Roberts?

11 Senator Roberts. Mr. Chairman, I was not going to
12 make a statement, but Senator Brown has really touched on
13 a problem that is especially crucial in the rural health
14 care delivery system and I thank him for his comments.

15 I want to thank the Chairman and the Ranking Member
16 for holding this markup.

17 Nobody likes to be audited. But as good stewards of
18 taxpayer dollars, we must work to strike a balance
19 between reducing improper payments within Medicare and
20 ensuring that we are not overly burdening our providers
21 with these audits and subsequent appeals.

22 We have to ensure that we are providing the
23 necessary resources to educate our hospitals, our home
24 health care agencies and other providers on how to
25 improve their billing practices, not solely chase down

1 errors after the fact.

2 We need more transparency and more accountability in
3 this process. We need to ensure we have a system where
4 our providers are not having to waste valuable time and
5 resources on an appeals process, in essence, spending
6 money to get the money back that was theirs in the first
7 place.

8 The Chairman's mark is a very good step forward.

9 Senator Brown made that comment about the overnight
10 stay with an elderly lady. We have the two midnight
11 rule, which means if grandma comes in the hospital with a
12 sprained ankle, all of a sudden has heart palpitations
13 and so the doctor says "I think she ought to stay more
14 than 2 nights" and then that becomes a real problem with
15 the RAC people, the recovery audit contractors.

16 Hospitals come in and tell me they win their appeals
17 90 percent of the time. Then the auditors come in and
18 tell us their decisions are upheld the vast majority of
19 the time. I do not know which is truth, but I will bet
20 on our hospital administrators, our beleaguered hospital
21 administrators.

22 There is distrust between the two. That is why we
23 need more transparency in this process, as the Chairman's
24 mark requires. They have a saying in the First District
25 of Kansas, way out west, and in the rest of the State,

1 that here comes the RAC people. I am not sure exactly
2 what that means, but it is not good. It is like the
3 Tewksburys and the Grahams or the Hatfields and McCoys or
4 a sheep and cattle war.

5 This is not a good situation and it is endangering
6 the rural health care delivery system. I would love to
7 meet some RAC people. They come in, they make these
8 determinations, hospitals appeal, they get their money
9 back 90 percent of the time, we think.

10 Now, on the other hand, if you have 10 percent
11 fraud, we have to get after that. I understand that.
12 But in terms of trust, that really gets at the trust and
13 the problem with our providers out there in that they
14 have lost faith in their government, not only with the
15 RAC people, but all the other regs and all the other
16 paperwork, saying, "Look, I am out here trying to save my
17 critical access hospitals," and we have over 80 of them
18 in Kansas, and then here come the RAC people. I think
19 they put the hospital people on the RAC. I think that is
20 about the best way I could describe it.

21 I have a little feeling about this, Mr. Chairman,
22 but I really want to thank you for this mark and let us
23 work on this.

24 Senator Brown, thank you for your comments.

25 The Chairman. Thanks so much.

1 Senator Burr?

2 Senator Burr. Mr. Chairman, thank you and thank
3 Ranking Member Wyden.

4 Mr. Chairman, I consistently hear concerns from
5 constituents back home about the current state of the
6 audit and appeals process. So I am pleased the Committee
7 is undertaking this task.

8 These concerns transcend providers and suppliers and
9 today's markup is an important step in responding to
10 those specific concerns.

11 Audits have an important role to play in Medicare's
12 program integrity, but we need to make sure that we are
13 striking the right balance. We also need to make sure
14 the appeals process actually works.

15 Through the candid input of our constituents and
16 stakeholders, the Committee has diagnosed many of the
17 challenges surrounding the current audit and appeals
18 process and the Chairman's mark before us today reflects
19 this input and is responsive, I think, to those
20 challenges.

21 I want to thank the Chairman and the Ranking Member
22 for working with me to include both of my amendments in
23 the Chairman's modified mark. I heard significant
24 concerns from my constituents regarding the burdens that
25 the current 4-year look-back period can present.

1 I am glad that the Chairman's modified mark will
2 assess the burdens the current look-back period presents
3 for providers and suppliers as the Secretary studies the
4 impact of shortening the look-back period and that this
5 study will be made public.

6 It is important that providers and suppliers be
7 consulted as part of this study and making the study
8 public will be very informative to everyone impacted by
9 the current audit process.

10 Mr. Chairman, I have more of an opening statement.
11 I would ask unanimous consent that it be included in the
12 record.

13 The Chairman. Without objection, it will be.

14 [The prepared statement of Senator Burr appears at
15 the end of the transcript.]

16 Senator Burr. But I once again want to highlight
17 and thank the Chairman and the Ranking Member. This is a
18 really, really important issue that we get our hands
19 around and it is vitally important that we get it right.
20 We cannot get it right unless everybody on this Committee
21 supports what we do and my hope is that we will work
22 toward that.

23 The Chairman. Thanks, Senator. We appreciate it.

24 Senator Casey has a comment and then we will move to
25 the mark or to Senator Stabenow.

1 Senator Casey. Mr. Chairman, I know we may not
2 have a quorum yet. So in light of that, I will do a
3 short opening.

4 The Chairman. Fine. Any other?

5 The Committee has before it the Chairman's mark of
6 the AAFIRM Act, along with the modification drawn from
7 amendments filed by the Committee members, which has been
8 agreed upon between Senator Wyden and myself and which is
9 hereby incorporated into the Chairman's mark.

10 The next order of business is to walk through the
11 mark and answer any questions. Toward that end, I
12 recognize Kim Brandt, Chief Oversight Counsel from the
13 Majority staff of the Finance Committee, and Matt Kazan,
14 the Senior Health Policy Analyst from the Democratic
15 staff.

16 Ms. Brandt and Mr. Kazan, would you briefly describe
17 the mark for us?

18 Ms. Brandt. Thank you, Mr. Chairman.

19 Medicare audits and appeals currently pose a large
20 burden for health care providers and for government audit
21 contractors seeking to reduce the amount of improper
22 payments in the Federal health care programs. As you and
23 Senator Wyden have noted in your opening statements, this
24 bill seeks to increase coordination and oversight of
25 these audit contractors while implementing new strategies

1 to address the growing number of audit determination
2 appeals that delay taxpayer dollars from reaching the
3 correct source.

4 This act would lay the groundwork for creating a
5 more level playing field that would reduce the burden on
6 providers and would give auditors the tools necessary to
7 better protect the Medicare Trust Fund.

8 The end goal is to provide a more streamlined,
9 efficient and effective end-to-end process which meets
10 the needs of all participants through many of the things
11 that you all articulated in your statements.

12 With that, I am going to turn it over to Mr. Kazan
13 to give a high level walkthrough of the modifications.

14 Mr. Kazan. Mr. Chairman, I will run through
15 quickly the modifications to the mark. On page 12 of the
16 mark, a paragraph is added. On page 13, a typographic
17 error is corrected.

18 On page 14 of the mark, Brown Amendment No. 1 is
19 accepted. On page 14 of the mark, an addition is made to
20 the mark to correct a typographical error. On page 15 of
21 the mark, Burr Amendment No. 2, as modified, is accepted.

22 On page 15 of the mark, Brown Amendment No. 2 is
23 accepted. On page 15 of the mark, a correction of a
24 typographical error is made. On page 15 of the mark,
25 Carper Amendment No. 1, as modified, is included. On

1 page 15 of the mark, Cardin Amendment No. 1, as modified,
2 is accepted into the mark.

3 On page 16 of the mark, typographical errors are
4 corrected. On page 16 of the mark, Brown Amendment No. 3
5 is accepted.

6 On page 18 of the mark, Burr Amendment No. 1, as
7 modified, is accepted into the mark. On page 18 of the
8 mark, Stabenow Amendment No, 2, as modified, is accepted
9 into the mark. On page 18 of the mark, Stabenow
10 Amendment No. 2, as modified, is accepted into the mark.

11 Finally, on page 19 of the mark, a typographical
12 error is corrected.

13 The Chairman. I understand that two Senators,
14 Senator Casey and Senator Carper, would like to make
15 short statements. So at this point, we interrupt to do
16 that. Sorry, I must have misconstrued that.

17 Senator Casey. Mr. Chairman, I will put a fuller
18 statement in the record.

19 The Chairman. All right. That will be fine.

20 Senator Casey. Thank you.

21 [The prepared statement of Senator Casey appears at
22 the end of the transcript.]

23 The Chairman. Senator Carper?

24 Senator Carper. I do have a short statement for
25 the record and I will have an even shorter statement to

1 give you right now.

2 For some people, this is like why do we care about
3 this stuff. This is like green eye shades kind of
4 material and legislation.

5 I will tell you, here is why we need to be concerned
6 about it. Our budget deficit, which peaked out at \$1.4
7 trillion about 6 years ago, has dropped to close to \$400
8 billion this year and it is still way too much.

9 Last year GAO reported that something called
10 improper payments, mistakes, accounting errors, fraud,
11 improper payments totaled \$125 billion in 1 year. Out of
12 that, \$45 billion is attributable to Medicare. And there
13 is a requirement under the law for agencies in the
14 Federal Government to try to identify improper payments,
15 stop making improper payments, go out and recover moneys
16 that are inappropriately paid, and that is the law.

17 The question is how do we do that in a way that does
18 not cause enormous heartache for the health care
19 providers; how do we do it in a way that just is not
20 incredibly complex and difficult. And this legislation
21 helps thread the needle in a very smart way.

22 I just applaud both of you, Mr. Chairman and Senator
23 Wyden, applaud you, our staffs who have worked on this to
24 find the right balance.

25 We are going to reduce improper payments. I hope we

1 are going to reduce some of the headaches that are caused
2 by these recoveries that are necessary. The headaches
3 are not necessary, the recoveries are necessary.

4 Thank you.

5 [The prepared statement of Senator Carper appears at
6 the end of the transcript.]

7 The Chairman. Thank you, Senator. I am glad we
8 allowed you to make that statement. Very good.

9 [Laughter.]

10 The Chairman. Do Senators have any questions
11 regarding the mark at this point?

12 [No Response.]

13 The Chairman. If not, I would like to recognize
14 Senator Wyden for any comments he has on the mark and
15 then recognize Senators later.

16 Senator Wyden. No further comment, Mr. Chairman.

17 The Chairman. Does anybody have any questions on
18 the mark at all?

19 [No Response.]

20 The Chairman. All right. Then if there are no
21 further questions, the Chairman's mark is now open to
22 amendment.

23 Are there any amendments?

24 Senator Grassley?

25 Senator Grassley. I have an amendment with Senator

1 Warner and I am sure Senator Warner wants to speak about
2 this, as well.

3 It is an amendment that we will offer and withdraw,
4 but we want to bring it to your attention because we
5 think it is very, very important.

6 This amendment is the contents of S.829, the
7 Medicare Orthotics and Prosthetics Improvement Act. It
8 is a bill that Senator Warner and I introduced earlier
9 this year to set standards for the orthotics and
10 prosthetics industry.

11 The provisions in our bill would make sure that only
12 licensed and accredited practitioners would be eligible
13 to receive Medicare reimbursement.

14 Also, our bill would raise the bar on quality by
15 ensuring not only qualified practitioners would be
16 eligible for Medicare payments, especially for complex
17 orthotics and prosthetics devices, our bill would ensure
18 beneficiaries access to orthotics and prosthetics by
19 making sure that CMS follows congressional intent on a
20 number of laws already governing these devices.

21 Finally and most relevant to the Chairman's mark,
22 our bill would clarify Medicare policies by ensuring that
23 the clinical notes of orthotics and prosthetics
24 practitioners would be considered as part of the medical
25 record when determining whether these devices are

1 reasonable and necessary.

2 This issue has resulted in a flood of Medicare
3 contractor audits with ensuing appeals. At the end of
4 the road, these appeals are overturned at the
5 administrative judge level, but often many years later.

6 Our bill would provide much needed clarification and
7 in doing so will help reduce the enormous inflow of
8 appeals.

9 So, Mr. Chairman, our bill will benefit the people
10 who rely upon these practitioners for their health and
11 mobility and it will protect the taxpayers at the risk of
12 paying for lesser providers.

13 So I would withdraw this amendment after colleague,
14 Senator Warner, speaks, if he wants, and I would ask then
15 that the Chairman and Ranking Member would work with the
16 two of us and hopefully others on the Committee to
17 further improve the orthotics and prosthetics care
18 provided to Medicare beneficiaries.

19 The Chairman. Thank you, Senator.

20 Senator Warner?

21 Senator Warner. Thank you, Mr. Chairman. I want
22 to thank my friend, Senator Grassley, for taking the lead
23 on this important legislation. I think he has spoken to
24 the issue, but clearly orthotics and prosthetics, like
25 other areas, attract good actors and bad actors and we

1 are simply saying we ought to have clarification and
2 particularly in terms of minimum standards for the good
3 actors and move away from this appeals process which
4 takes an undue amount of time and, quite honestly, is not
5 resulting in any kind of overturning or exposing the kind
6 of fraud that we know exists, but I think would be better
7 exposed and better dealt with through the system we are
8 putting forward.

9 So I would echo what Senator Grassley said and hope
10 at some point we can work with you and the Ranking Member
11 to take up this issue.

12 The Chairman. Thank you both.

13 As I understand it, you are going to withdraw the
14 amendment.

15 Senator Grassley. Yes. But I would like to have
16 you say whether or not you are going to work with us or
17 not.

18 [Laughter.]

19 The Chairman. Well, we will think it over here.

20 [Laughter.]

21 The Chairman. We will be glad to work with you on
22 it. I agree those are areas that need some work.

23 Senator Warner. Maybe, Mr. Chairman, the fact is
24 we may all need these at some point and we want to make
25 sure we can be serviced by the right folks.

1 The Chairman. For those of us who need them.

2 Senator Stabenow, I understand you have an
3 amendment.

4 Senator Stabenow. Thank you, Mr. Chairman. I do
5 have an amendment. I will offer and withdraw and speak
6 about it in a second, but first I want to thank you for
7 an amendment that is in the mark and stress that I hope
8 this is an area that we will take further action on down
9 the road.

10 This is an excellent bill. Congratulations to you
11 and to the Ranking Member, very important subject matter.
12 I appreciate the fact that an amendment of mine that
13 requires the Secretary of HHS to come back to us within 6
14 months with recommendations as to how the recovery
15 auditors are paid, I appreciate that that is in there.

16 This is, I think, a very important follow-up that we
17 need to do. I was surprised, I was not aware until we
18 got into this that the recovery auditors are paid on a
19 percentage. So the more audits they do, the more they
20 get paid, and I think that is a questionable way to do
21 that, particularly when we are talking about how do we
22 make the system more efficient on the end.

23 It seems to me we also need to look at the beginning
24 of how many of these appeals are coming into the system.

25 So I appreciate very much your willingness to

1 include the amendment. I hope that when HHS comes back
2 to us with a recommendation that we will take further
3 action to move to a different kind of payment system.

4 I think that what they do, the recovery auditors are
5 an integral part of the system. It is very important
6 what they do. But I do question having an incentive-
7 based system for this kind of work. So I hope we will be
8 able to deal with that.

9 Then the amendment that I have, and Senator Heller
10 has a similar amendment dealing with the same kind of
11 area, goes to the kind of information that the recovery
12 auditors are able to get. Under certain circumstances,
13 they can request medical records beyond the current
14 statutory limits and these documents are time-consuming,
15 challenging for everyone from our largest hospitals to
16 small rural hospitals, and my amendment would struck that
17 language because we have not really seen where the case
18 has been made for them having that authority.

19 I appreciate that is not included, but I would like
20 very much to work with you going forward and I know
21 Senator Heller has similar kinds of issues to raise in
22 terms of the scope of whether is looked at.

23 We want the system to work. We definitely need to
24 have integrity in the system, but it is that balance that
25 I know we are all trying to strike.

1 The Chairman. Thank you, Senator. I understand
2 you will withdraw the amendment.

3 Senator Stabenow. I do withdraw it.

4 The Chairman. I thank you.

5 Let us turn to Senator Thune next.

6 Senator Thune. Thank you, Mr. Chairman. I want
7 to, now that I have heard Senator Grassley get a
8 commitment from the Chair to work with him on this, get
9 that.

10 I have got a couple of amendments, as well, and I
11 will withdraw them. I want to speak just briefly to it,
12 but there is a section 4 in the Chairman's mark that
13 creates an expedited procedure for appeals with no
14 material fact in dispute and it permits a new Medicare
15 magistrate, under section 2, or an ALJ, administrative
16 law judge, to issue decisions without holding a formal
17 hearing, which would expedite review of pending appeals.

18 The first amendment that I offer and withdraw today
19 in order to discuss this matter further with the
20 department would recognize that critical access hospitals
21 often operate on the margins and that the current backlog
22 of appeals is harmful to these hospitals.

23 It recognizes this issue by directing the Secretary
24 of HHS to create a system in which ALJs or Medicare
25 magistrates prioritize appeals by critical access

1 hospitals that are not processed or concluded within 120
2 days of receipt at the hearing level.

3 For many critical access hospitals, this expedited
4 process would ensure that they are able to have greater
5 clarity on reimbursement in a more timely manner.

6 I do appreciate, in withdrawing this amendment, the
7 Committee's commitment, which I will assume is there, to
8 include report language that prioritizes appeals from
9 critical access hospitals to ensure that the Department
10 of Health and Human Services indeed recognizes the unique
11 challenges that these hospitals face when they are
12 dealing with audits and appeals.

13 So that is Amendment No. 1, again, which I would
14 withdraw.

15 The second amendment deals with section 2 of the
16 Chairman's mark, which establishes new positions for
17 Medicare magistrates that would be empowered to decide
18 appeals for controversies that are less than \$1,460.
19 This amendment, which I am also offering and withdrawing
20 at this time, would require the Secretary to appoint
21 these licensed attorneys as contactors as opposed to
22 appointing permanent Federal employees.

23 Since these new magistrate positions are being
24 created in order to address the appeals backlog,
25 contractors rather than Federal employees are in a better

1 position to fill this role and my amendment would permit
2 the size of the Federal workforce to expand and contract
3 as necessary.

4 As these new positions are being filled, it is my
5 hope that the Committee continues to conduct proper
6 oversight of these positions and, if necessary, revisit
7 how these positions are filled in the future. When
8 creating new positions to assume a preexisting problem,
9 we should be careful not to permanently expand the
10 Federal workforce.

11 So, again, I appreciate the Committee's commitment
12 to include report language indicating that it is not our
13 intention to permanently expand the Federal workforce and
14 withdraw this amendment and look forward to working with
15 you, Mr. Chairman, and Senator Wyden, as well as the rest
16 of the members of this Committee on this issue.

17 The Chairman. Thank you, Senator.

18 The last amendment, as I understand it, that will be
19 offered and withdrawn is Senator Heller.

20 Senator Heller. Mr. Chairman, thank you and
21 thanks, also, for holding this hearing. It is a great
22 piece of legislation. To you and the Ranking Member,
23 thanks for your hard work and effort.

24 I have Heller Amendment No. 1, which I will withdraw
25 at the end, but I would like to make a statement on it,

1 also.

2 I think it was appropriate that the Senator from
3 Kansas called them RAC people. We have probably a more
4 definitive way of calling them in Nevada, I think it is
5 zombies and if you have ever watched the movie Walking
6 Dead, it probably makes some sense, as these auditors
7 come into your establishment.

8 But the purpose of this amendment is to bring
9 efficiency to the Medicare program by adjusting the
10 number of audits a recovery audit contractor or, in this
11 case, a RAC could perform based on their performance
12 accuracy.

13 I have heard from smaller hospitals and doctors'
14 offices back in Nevada that these audits are relentless
15 and these audits are very aggressive. These auditors
16 keep coming back since they are being paid by the number
17 of audits that they conduct, not on their performance
18 accuracy.

19 To make matters worse, the small rural hospitals and
20 doctors' offices do not have time or the money to appeal
21 these audits, even though they know they are wrong and
22 that they could win in the appeals process.

23 When hospitals do have the money to go through the
24 appeals process, as mentioned several times here, they
25 have a success rate of about 72 percent. In other words,

1 these auditors are about as accurate as the TSA
2 screeners.

3 So by focusing on how accurate their program is, the
4 more success we will have at combating waste, fraud and
5 abuse in the Medicare program, the better protected
6 taxpayer dollars are.

7 So I believe the Medicare appeals process was
8 established with good intentions, but we need to measure
9 success by how accurate and how efficient the program
10 works, not by how much paperwork piles up.

11 So I look forward to working with my colleague from
12 Michigan and for her ideas. I think working with this
13 Committee, we can come up with some compromise language.

14 I want to thank you, Mr. Chairman, for the
15 opportunity, and to the Ranking Member, to provide this.
16 But at this moment, I would withdraw my amendment.

17 The Chairman. I thank the Senator. I thank all
18 the Senators for cooperating on this. This is a very
19 important bill.

20 If there is no further debate, I would entertain a
21 motion that the Committee order the bill reported with
22 the Chairman's mark.

23 Senator Wyden. I would so move, Mr. Chairman.

24 The Chairman. Does any Senator require a recorded
25 vote on this?

1 [No Response.]

2 The Chairman. If not, all those in favor will say
3 aye.

4 [A Chorus of Ayes.]

5 The Chairman. All those opposed will say no.

6 [A Chorus of Nays.]

7 The Chairman. The ayes have it and the resolution
8 is ordered reported.

9 I ask consent that the staff be granted authority to
10 make technical, conforming and budgetary changes.

11 Without objection, it is so ordered.

12 Let me just say I would like to thank my colleagues,
13 those in attendance and all of the staff that worked so
14 hard to move this bipartisan bill forward.

15 This is the fifth markup we have had this year and
16 as with each of the previous markups, we have been able
17 to move important legislation through the Committee with
18 strong bipartisan support.

19 I think that says quite a bit about the quality of
20 people we have working with us here on the Committee and
21 to the commitment each of you has in serving your
22 constituents in our country.

23 Now, the Senate Finance Committee has a long history
24 of working methodically to address important issues in a
25 bipartisan fashion. I am very glad that thus far, we

1 have been able to continue that tradition here in the
2 114th Congress.

3 So I look forward to working with all of you on the
4 challenges that lie ahead and want to thank all of you
5 once again.

6 With that, we will recess until further notice.

7 [Whereupon, at 10:41 a.m., the Committee was
8 recessed.]

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I N D E X

PAGE

STATEMENT OF:

THE HONORABLE ORRIN G. HATCH
A United States Senator
From the State of Utah 2

THE HONORABLE RON WYDEN
A United States Senator
From the State of Oregon 7

Senator Richard Burr
General Talking Points for the Chairman's Mark on Audit and Appeals
June 3, 2015

- I want to thank Chairman Hatch and Ranking Member Wyden for holding today's mark up on legislation to improve Medicare's audit and appeals processes. These are important bipartisan issues.
- I consistently hear concerns from my constituents back home about the current state of the audit and appeals processes so I am pleased that the Committee is tackling these issues. These concerns transcend providers and suppliers and today's markup is an important step in responding to these concerns.
- Audits have an important role to play in Medicare's program integrity, but we need to make sure we are striking the right balance. We also need to make sure that the appeals process is working well.
- Through the candid input of our constituents and stakeholders, the Committee has diagnosed many of the challenges surrounding the current audit and appeals processes and the Chairman's mark before us today reflects this input and is responsive to these challenges.
- I want to thank the Chairman and Ranking Member for working with me to include both of my amendments in the Chairman's modified mark. I have heard significant concerns from my constituents regarding the burdens that the current four year look-back period can present. I am glad that the Chairman's modified mark will assess the burdens the current look-back period presents for providers and suppliers as the Secretary studies the impact of shortening the look-back period, and that this study will be made public. It is important that providers and suppliers to be consulted as part of this study and making the study public will be very informative to everyone impacted by the current audit processes.
- The Chairman's mark includes a number of provisions to improve the audit processes, which is a good thing. One of these provisions is the requirement that the Secretary of HHS designate a point of contact to coordinate, oversee,

and perform a number of tasks to improve upon the existing and future audit integrity initiatives and to limit unnecessary provider and supplier burden.

- I'm pleased that my second amendment was also included, which clarifies that the Secretary's work with all review entity contractors to develop a uniform, consistent, and transparent review process to reduce provider and supplier burden to the greatest extent possible will include a uniform approach for review entity contractors to notify parties of pending review and requests for medical documentation; improved communication with providers and suppliers; methods for providing review results; and better refinement of reviews to target claims that are at the highest risk for improper payment or errors, as well as ensuring that the Secretary can also include other areas that will decrease provider and supplier burdens.
- There are many challenges facing our nation's providers and suppliers and I'm pleased that the Committee is working to restore a better balance to Medicare's audit and appeals processes. I look forward to continuing to work with my colleagues as the Committee moves forward with this legislation.

Statement of Senator Robert P. Casey, Jr.
June 3, 2015 Medicare Audits and Appeals Markup

I want to thank the Chairman and Ranking Member for bringing this important legislation up for consideration by the Committee. Creating a more efficient and effective auditing and appeals system for the Medicare program is important not just for providers and suppliers, but also for beneficiaries, who often appeal with pressing concerns that cannot abide long wait times.

It is clear that the current appeals system is overwhelmed. In FY 2013, the Office of Medicare Hearings and Appeals (OMHA) received more than 654,000 claims, up from just 60,000 two years earlier. In FY 2015, the average processing time for an appeal's decision is 560 days.

The current system is not working. Medicare's auditing contractors do invaluable work protecting the integrity of the program and saving the government millions of dollars. However, we need to do more to rationalize the audit and appeals system and provide better oversight to make sure audits are properly targeted and not overly burdensome. We also need to provide more resources and better structure to the appeals process to help adjudicators process appeals more quickly and accurately.

I look forward to working with you all today to help streamline the appeals system and create a better process for the benefit of all Medicare providers, suppliers and beneficiaries.

STATEMENT OF SENATOR TOM CARPER
Business Meeting to Consider
Audit and Appeal Fairness, Integrity, and Reforms in Medicare Act of 2015

I thank Chairman Hatch and Ranking Member Wyden for their hard work and dedication in drafting legislation to improve the Medicare audits and appeals process. I believe the chairman and ranking member have put together a strong bill that has found common ground on what is, at times, a contentious issue.

Without a doubt, we must ensure that Medicare continues to provide critical care to our nation's seniors and the disabled, but at the same time, we must find ways to contain the growth of health care costs. The latest estimates show that almost \$46 billion of Medicare fee-for-service expenditures were lost through improper payments during the last fiscal year. Unfortunately, that level has been increasing during the past few years, which underscores the need for smart and effective auditing.

I believe the bill before us today helps ensure the auditing process is effective, but also that Medicare audits are conducted fairly, and without undue burdens on health care providers.

In this spirit, I would like to offer a simple, but helpful, amendment that would improve the transparency of Medicare audits and oversight.

At times, health care providers face challenges when their claims are under audit. Claims under review by administrative law judges have a single web-based system for providers to determine the status of a claim. However, at other levels in the audit process, each contractor maintains a separate system. There is no centralized way for a provider to determine the status of a claim under audit, or even which audit contractor is reviewing the claim.

To improve this process, my amendment would create an Internet-based system that providers can use to find information on the status of claims under review. Since the Centers for Medicare and Medicaid Services already has an established operational electronic system for internally tracking claims under audit, creating a modified system for providers and others to access this information would not prove difficult.

I hope my colleagues will support my amendment and the overall legislation.