



IN THE GENERAL ASSEMBLY STATE OF _____

Physician Profiling Programs and Network Determination Act

1 Be it enacted by the People of the State of _____, represented in the General
2 Assembly:

3 **Section 1. Title.** This Act shall be known and may be cited as the “Physician Profiling
4 Programs and Network Determination Act.”

5 **Section 2. Purpose.** The Legislature hereby finds and declares that:

- 6 (a) Programs that are used to measure physicians’ performance based on quality and
7 cost efficiency (physician profiling programs) is a complex and rapidly evolving
8 development;
- 9 (b) Physician profiling programs are being used to provide information to consumers
10 regarding physicians’ and medical groups’ quality and cost efficiency
11 performance;
- 12 (c) Physician profiling programs are also being used to determine physicians’ or
13 medical groups’ participatory status in provider narrow or tiered networks;
- 14 (d) To ensure that consumers receive reliable, valid, meaningful and accurate
15 information when making important health care decisions, e.g., such as selecting
16 a physician or medical group based on the physician’s or medical group’s
17 purported quality or cost efficiency performance, and that a physician’s or
18 medical group’s participatory status in the provider networks that furnish services

1 to consumers accurately reflects the physician's or medical group's actual quality
2 and cost efficiency performance, it is critical that physician profiling programs
3 use accurate, meaningful, and statistically valid measures, methodologies and
4 data;

5 (e) Because those using physician profiling programs may have a financial interest in
6 steering patients away from high-quality physicians that care for
7 disproportionately sick patients or reducing the size of the physician network to
8 limit access to care, the profit motive may affect the results of physician profiling
9 programs. This is a potential conflict of interest, requiring disclosure, scrutiny
10 and oversight. The independence, integrity, and verifiable nature of the profiling
11 process are paramount;

12 (f) No physician should be profiled based on cost alone. Cost-efficiency cannot be
13 measured without consideration of patient-specific characteristics and health care
14 outcomes. Higher physician charges and increased frequency of outpatient
15 utilization of services may be cost-efficient where they result in less mortality,
16 morbidity, hospitalization, absenteeism, and increased productivity or quality of
17 life;

18 (g) Physicians who practice in a medical group regularly employ inter-specialty
19 cooperation and team-based care to best coordinate medical services for patients.
20 Therefore it is administratively infeasible to segregate individual physician
21 performance from that of the group as a whole. It would be misleading to the
22 public to provide such individual physician data. No physician profiling program
23 should publicly disclose or otherwise use for any network or reimbursement

1 purpose the ranking of individual physician members of a medical group that
2 participates in a physician profiling program. All physicians in a group practice
3 should receive the same ranking as that of the group as a whole, to be identified
4 as such; and

5 (h) Profiling systems which fail to meet the accuracy, transparency, due process and
6 external validation and oversight requirements established by this legislation
7 create an unreasonable risk of patient confusion and deception, unjustified and
8 injurious disruption of physician-patient relationships, and unfair disparagement
9 of qualified physicians' reputations.

10 **Section 3. Definitions.**

11 **Economic criteria** means measures used to determine physician resource utilization or
12 costs of care for specified health care services or sets of such services.

13 **Material Change** means any change to a physician profiling program which, to a
14 reasonable person, might have any negative impact on a physician or medical group.
15 Such a negative impact includes, but is not limited to, a change in the physician's or
16 medical groups' participation in a narrow network or a tiered network.

17 **Narrow network** means reduced or selective provider network that is smaller than a
18 larger provider network and from which providers who participate in the larger network
19 may be excluded.

20 **Physician profiling program** means a system that compares, rates, ranks, measures,
21 tiers, or classifies a physician's or physician group's performance, quality or cost of care
22 against objective standards, subjective standards or the practice of other physicians, and

1 shall include quality improvement programs, pay for performance programs, public
2 reporting on physician performance or ratings and the use of tiered or narrowed networks.

3 **Provider Network** means a group of providers contracted with a health insurer, carrier,
4 or other entity to provide health care services patients.

5 **Quality criteria** are measures used to determine physician quality of care, that is, the
6 degree to which health services for individuals and populations increase the likelihood of
7 the desired health outcomes, consistent with current professional knowledge.

8 **Tiered network** means A provider network in which a providers are assigned to, or
9 placed in, different benefit tiers based on the results of one or more physician profiling
10 programs, and in which patients pay the cost-sharing (copayment, coinsurance or
11 deductible) associated with a provider assigned benefit tier or tiers.

12 **Section 4. Prohibition on unapproved profiling programs.**

13 No profiling results of any physician profiling program may be disclosed to the public or
14 used for any network or reimbursement purposes, including but not limited to,
15 determining a physician's or medical group's participatory status in a tiered or narrow
16 network, unless and until the physician profiling program has been approved by the
17 independent oversight entity as provided for by this Act.

18 **Section 5. Physician profiling program requirements.**

19 (a) Developing criteria – the quality and economic criteria used to evaluate a
20 physician's or medical group's performance by any physician profiling program
21 shall be developed in collaboration with practicing physicians and their
22 professional organizations. To the extent feasible, profiling programs shall use
23 standardized quality and cost measures, and shall reduce the administrative

1 burden on physician practices. Physician profiling programs shall not be based on
2 cost alone, but must consider quality measures, such that the costs of health care
3 services are considered in the context of professional standards of care, and the
4 resulting mortality, morbidity, productivity and quality of life.

5 (b) Quality criteria – physician profiling programs shall comply with the following
6 requirements when they evaluate a physician’s or medical group’s quality of
7 care:

8 (i) Use measures that are based on specialty appropriate nationally-
9 recognized, evidence-based medical guidelines or nationally
10 recognized, consensus-based guidelines.

11 (1) Where available, these measures shall be endorsed by the
12 National Quality Forum (“NQF”) and developed by the
13 Physician Consortium for Quality Improvement or other
14 entities whose work in the area of physician quality
15 performance is generally accepted within the health care
16 industry.

17 (2) Professional certification or accreditation may be used in
18 determining physician quality of care, but shall not be solely
19 relied upon as the determinant of physician quality.

20 (ii) Use a statistically valid number of disease state or specialty specific
21 cases, subject to review and approval by the independent oversight
22 entity, to produce accurate and reliable measurements.

- 1 (iii) Ensure that statistically valid risk adjustment is used to account for
2 the characteristics of the physician's or medical group's patient
3 population, including case mix, severity of patients' conditions, co-
4 morbidities, outlier episodes and other factors, subject to review and
5 approval by the independent oversight entity. With respect to
6 process measures, these factors shall be considered in evaluating
7 patient compliance rates and whether compliance with a measure is
8 not indicated, contraindicated, or rejected by the patient.
- 9 (iv) Determine which physician(s) shall be held reasonably accountable
10 for a patient's care, subject to review and approval by the
11 independent oversight entity.
- 12 (v) Ensure that patient preferences are respected, and that physician
13 ratings are not adversely affected by patient noncompliance with a
14 physician's referral, treatment recommendation or plan of care.
- 15 (vi) Ensure that the quality measurement system in no way disincent
16 physicians from providing preventive care, or from treating sicker,
17 economically underprivileged or minority patients.
- 18 (vii) Publicly report or otherwise use quality rankings at the medical
19 group level rather than at the individual physician level where the
20 individual physician is practicing as part of a medical group, and
21 clearly identify such ranking as a group score.
- 22 (c) Economic criteria – physician profiling programs that evaluate a physician's
23 cost-efficiency shall comply with the following requirements:

- 1 (i) Compare physicians within the same specialty within the same
2 geographical market.
- 3 (ii) Use a statistically valid number of patient episodes of care, subject to
4 review and approval by the independent oversight entity, to produce
5 accurate and reliable measurements and profiling information of a
6 physician's cost-efficiency.
- 7 (iii) Ensure that statistically valid risk adjustment is used to account for the
8 characteristics of a physician's patient population, including case mix,
9 severity of patients' conditions, co-morbidities, outlier episodes and
10 other factors, subject to review and approval by the independent
11 oversight entity.
- 12 (iv) Determine appropriate rules for attribution for cost-efficiency, subject
13 to review and approval of the independent oversight entity.
- 14 (v) Ensure that patient preferences are respected, and that physician
15 ratings are not adversely affected by patient noncompliance with a
16 physician's referral, treatment recommendation or plan of care.
- 17 (vi) Ensure that the cost-efficiency measurement system in no way
18 disincentivizes physicians from providing preventive care or from treating
19 sicker, economically underprivileged or minority patients.
- 20 (vii) Publicly report or otherwise use cost-efficiency rankings at the
21 medical group practice level rather than at the individual physician
22 level where the individual physician is practicing as part of a medical
23 group, and clearly identify such ranking as a group score.

1 (d) Data accuracy – physician profiling programs shall ensure that the data relied
2 upon are accurate, including a consideration of whether medical record
3 verification is appropriate and necessary, and the most current, considering the
4 necessity to attain adequate sample size, subject to the review and approval of the
5 independent oversight authority. To the extent available, physician profiling
6 programs shall use aggregated data rather than the data specific to a particular
7 health insurer or other payer.

8 (e) Disclosure to patients. If the performance results of physician profiling program
9 concerning a physician or medical group are to be disclosed to the public, the
10 physician profiling program shall conspicuously disclose to patients the
11 following information on the internet and in other relevant materials:

12 (i) Information explaining the physician rating system, including the basis
13 upon which physician performance is measured and the statistical
14 likelihood the rating is accurate;

15 (ii) Limitations of the data used to measure physician performance;

16 (iii) How the ratings affect the physician, including but not limited to a
17 physician’s network participation statutes, including but not limited to,
18 the physician’s participation in a narrow network a tiered network;

19 (iv) The quality and economic criteria used in the rating system, including
20 the measurements for each criterion and its relative weight in the
21 overall evaluation;

22 (v) A conspicuous written disclaimer as follows:

1 “Physician performance ratings should only be used as a guide to
2 choosing a physician. You should talk to your doctor before making a
3 health care decision based on the rating. Ratings may be inaccurate
4 and should not be used as the sole basis for selecting a doctor.”

5 (vi)How the patient may contact the independent oversight entity to
6 register complaints about the system.

7 (f) Disclosure to Physicians – physician profiling programs shall comply with the
8 following requirements:

9 (i) Disclose the methodologies, criteria, data, and analysis used to
10 evaluate physicians’ quality performance and cost-efficiency,
11 including but not limited to the statistical difference between each
12 rating and the statistical confidence level of each rating, at least 180
13 days before implementing or making any material change to any
14 physician profiling program.

15 (ii) Disclose the profile to the physician, including the patient-specific data
16 and analysis used to create the profile, and recommendations on how
17 the physician can improve the physician’s score, at least 90 days prior
18 to its public disclosure, or other use, e.g., the physician’s network
19 participation status, including but not limited to, that status with
20 respect to a narrow or tiered network.

21 (iii)Provide physicians with the opportunity to correct errors, submit
22 additional information for consideration, and seek review of data and
23 performance ratings.

1 (iv) Provide physicians with the following due process appeal rights to
2 challenge a profiling determination at least 60 days prior to its public
3 disclosure, or other use, e.g., the physician's network participation
4 status, including but not limited to, that status with respect to a narrow
5 or tiered network:

6 (1) The opportunity to submit a written appeal;

7 (2) The suspension of the initial or modified quality and cost-
8 efficiency rating and any associated determination concerning
9 network participation status when a timely appeal is made; and

10 (3) The opportunity for review by the independent oversight entity
11 to assess the appeal decision.

12 (v) Ensure that the profiling program does not in any way disparage or
13 negatively affect any physician who is not profiled because of
14 insufficient data.

15 (vi) Provide these disclosures, correction opportunities and appeal rights
16 with respect to the initial and any subsequent profiling determination.

17 (g) Oversight – The [STATE AGENCY] shall contract with an independent
18 oversight entity, which shall be an organization qualified to oversee physician
19 profiling programs and exempt from taxation pursuant to section 501(c)(3) of the
20 Internal Revenue Code, to administer this Act as follows:

21 (i) Physician, payer and consumer organizations shall be allowed to
22 provide input into the selection and ongoing evaluation of the
23 qualified, independent oversight entity.

1 (ii) [STATE AGENCY] shall provide a written report with its initial
2 selection and each subsequent decision concerning the independent
3 oversight entity and any successor entity, which report lists the
4 qualifications of the entity to perform these responsibilities, and
5 responds to the comments received by the organizations on the
6 selection or evaluation of the oversight entity.

7 (iii) The independent oversight entity, any experts it designates to conduct
8 a review, or any officer, director, or employee of the independent
9 oversight entity shall not have any material professional, familial, or
10 financial affiliation, as determined by the [STATE AGENCY] with
11 any of the following:

- 12 (1) the physician profiling program;
- 13 (2) any officer, director, or employee of the physician profiling
14 program; or
- 15 (3) the physician or the physician medical group being profiled.

16 (iv) In order to contract with the [STATE AGENCY] for purposes of this
17 article, the independent oversight entity shall meet the following
18 requirements:

- 19 (1) The entity shall not be an affiliate or a subsidiary of, nor in any
20 way be owned or controlled by a health plan, a trade
21 association of health plans, a trade association of employers, a
22 trade association of hospitals, or a trade association of
23 physicians. A board member, director, officer, or employee of

1 the entity shall not serve as a board member, director, officer or
2 employee of a health plan, a trade association of health plans, a
3 trade association of employers, a trade association of hospitals,
4 or a trade association of physicians. A board member, director,
5 officer, or employee of a health plan, a trade association of
6 health plans, a trade association of employers, a trade
7 association of hospitals, or a trade association of physicians
8 shall not serve as a board member, director, officer or
9 employee of the entity.

10 (2) The entity shall demonstrate that is has a quality assurance
11 mechanism in place that ensures that: (i) the experts retained
12 are qualified in the areas of physician quality and efficiency
13 measurement; (ii) conflict-of-interest policies and prohibitions
14 are in place to address the independence of the experts retained
15 to perform the reviews; (iii) the reviews provided are timely,
16 clear, credible, and monitored for quality on an ongoing basis;
17 and (iv) the confidential or proprietary information submitted
18 by the plan or the physician is not improperly disclosed.

19 (v) The selected independent oversight entity is responsible the following:

20 (1) Establishing the criteria necessary for assessment of
21 compliance with the terms and conditions set forth in this Act,
22 including but not limited to the minimum statistical confidence
23 level required before any profiling results may be used for

1 network or reimbursement purposes or disclosed to the public;
2 and monitoring of the physician profiling program's
3 compliance with terms and conditions set forth in this Act;

4 (2) Approving the methodologies, data collection and analysis,
5 disclosure and appeal processes, consistent with the terms and
6 conditions set forth in this Act, of any new or material
7 modification to an existing physician profiling program prior to
8 its implementation. Profiling programs in existence when this
9 legislation is enacted shall apply for review and approval
10 within 30 days, and shall cease using the physician profiling
11 program for network purposes, e.g., determining physicians'
12 participation status with respect to a narrow or tiered network,
13 reimbursement purposes, or publicly disclosing any profiling
14 results of any program which has not been approved by the
15 independent oversight entity within 90 days of its receipt of the
16 application;

17 (3) Resolving patient and physician complaints;

18 (4) Overseeing the physician appeals process;

19 (5) Posting the results of its review of each physician profiling
20 program on the internet, including its findings with respect to
21 each criteria it has established pursuant to subsection a; and

22 (6) Reporting and making recommendations to [STATE
23 AGENCY] as they relate to this Act.

1 (vi) Any determination reached by the independent oversight agency under
2 this Act shall be binding on the parties, and enforceable by the
3 [STATE AGENCY].

4 *Drafting Note:* States will need to address the issue of how to fund the
5 independent oversight entity. To the extent feasible, the funding structure should
6 not burden physicians, and should insulate the independent oversight entity from
7 undue influence by the funding source.

8 (h) Fines – Where it is established that there has been a willful and knowing refusal
9 by a physician profiling program to completely disclose the profiling data or
10 methodology to a physician at least 90 days prior to the publication or other use
11 for network or reimbursement purposes of any initial or subsequent profiling
12 determination or to provide the appeal rights required by this Act, or where it is
13 established that a false or misleading designation has been published to a third
14 party, the [STATE AGENCY] shall impose a fine of \$500 for each day that the
15 profiling program failed to disclose information and/or failed to provide the
16 appeal rights and/or \$500 for each day for each person or entity to which the false
17 or misleading designation is published. An internet posting shall be deemed to be
18 a disclosure to each person who has access to the physician network affected by
19 the physician profiling program. All profiling determinations published by a
20 physician profiling program that is not currently approved (or waiting to be
21 approved as provided by subsection (g) for profiling programs in existence when
22 this Act was enacted) by the independent oversight entity shall be deemed to be
23 false or misleading for the purposes of this section.

1 (i) Private Right of Action – Nothing in this Act prohibits or limits any claim or
2 action for a claim that the claimant has against any person or entity in violation of
3 this Act.

4 (j) Liability – In addition to any other liability which may apply, any person who
5 publicly discloses or otherwise uses for network or reimbursement purposes any
6 profiling results in violation of this Act shall be liable to the physician or
7 physician group for treble damages, attorneys’ fees, and any other appropriate
8 relief, including injunctive relief.

9 **Section 5. Applicability.** The Act applies to all physician profiling programs, including
10 any such programs used in connection with an Exchange.

11 **Section 6. Waiver Prohibited.** The provisions of this Act cannot be waived by contract,
12 and any contractual arrangements in conflict with the provisions of this act or that purport
13 to waive any requirements of this Act are null and void.

14 **Section 7. Effective Date.** This Act shall become effective immediately upon being
15 enacted into law.

16 **Section 8. Severability.** If any provision of this Act is held by a court to be invalid,
17 such invalidity shall not affect the remaining provisions of this Act, and to this end the
18 provisions of this Act are hereby declared severable.