

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS (NCOIL)

**PROPOSED MODEL ACT CONCERNING REGULATION OF THE
SECONDARY MARKET IN PHYSICIAN DISCOUNTS**

To be reviewed by the NCOIL Health, Long-Term Care, and Health Retirement Issues Committee on March 1, 2007.

Sponsored by Sen. Joseph Crisco (CT) and Rep. George Keiser (ND)

Section 1. {Title}

This Act shall be known and may be cited as the “Regulation of the Secondary Market in Physician Discounts Act.”

Section 2. {Purpose}

The Legislature hereby finds and declares that:

- (a) The unregulated secondary discount market is not only increasingly sophisticated, but has evolved in a part of the system that lacks transparency.
- (b) The number of intermediary entities involved in the health care claims payment process is also increasing dramatically. “Rental network PPOs” exist to market a physician’s contractually discounted rates primarily to third-party payers, such as insurance brokers, third-party administrators, local or regional PPOs, or self-insured employers. Rental network PPOs may also rent their networks and associated discounts to entities such as “network brokers,” “repricers” or “aggregators” whose sole purpose is finding and applying the lowest discounted rates, often without physician authorization. Many of these entities provide no value whatsoever, but exist for the sole purpose of trafficking in physician discounts.
- (c) In this era of consumer-driven healthcare, patients are having an increasingly difficult time assessing the true cost of their health care. While the discounter profits from covertly undercutting the appropriate payment to the physician, it shares little if any information regarding its actions with the patient or physician.
- (d) Without this information, it becomes extremely difficult for individual physicians to detect and/or identify how much they are going to be paid for a particular service and by whom, and for patients to determine their share of the cost of their medical care. As a result, the patient oftentimes pays a greater portion of the total bill and the payer ends up paying less.

(e) Shining a light on this unregulated activity is the only way to ensure that patients have accurate real-time information at their disposal to make those critical well-informed decisions, as they relate to the spending of their health care dollars, and at the same time, allow physicians to take back some much needed control over their practice environment.

Section 3. {Definitions}

(a) A “covered entity” includes, but is not limited to, any entity responsible for payment or coordination of health care services, including but not limited to all entities that pay or administer claims on behalf of other entities.

(b) A “contracting agent” means a covered entity engaged, for monetary or other consideration, in the act of leasing, selling, transferring, aggregating, assigning or conveying, a physician or physician panel to provide health care services to beneficiaries.

(c) A “payer” means a self-insured employer, health care service plan, insurer, or other entity that assumes the risk for payment of claims or reimbursement for services provided by contracted physicians.

Section 4. {Requirements}

(a) A contracting agent shall register with [ENTER NAME OF APPROPRIATE STATE AGENCY].

(b) A contract between a physician and a contracting agent shall comply with all of the following requirements:

- (1) Contain within the contract itself all material terms consistent with [NAME OF STATE] law.
- (2) Clearly and in a separate section, name any payer eligible to claim a discounted rate.
 - a. Any payers seeking eligibility to claim a discounted rate, directly or indirectly, subsequent to the original execution of the contract must be added to the contract through a separate amendment to the contract that is signed by the physician.
 - b. Any amendment naming additional payers shall be presented to the physician for signature ninety (90) days prior to any anticipated disclosure, lease, sale, transfer, aggregation, assignment, or conveyance of the physician’s discounted rate.
- (3) Identify and highlight all amendments made to the contract.
- (4) Contain a provision identifying the right of the physician to affirmatively opt in and/or opt out of any agreements to lease, sell,

transfer, aggregate, assign or convey a physician panel and associated discounts without penalty, sanction, or retaliation of any kind.

- (5) Contain provisions informing the physician of his or her contracting and payment rights, as specified in [SPECIFY REGULATIONS AND/OR STATUTE].
- (6) Contain a provision fully disclosing any access fee or other remuneration the contracting agent may receive and the specific benefits and service the contracting agent will provide.
- (7) Contain a provision that requires the contracting agent to obligate any payer or covered entity, through contract, to not further disclose, lease, sell, transfer, aggregate, assign or convey the physician panel and associated discounts to any other payer or entity; and
- (8) Contain a provision that requires upon the termination of the physician-contracting agent contract, the contracting agent to notify each payer or covered entity that the payer or covered entity, is no longer authorized to:
 - a. Access the physician's discounted rate; or
 - b. Disclose, lease, sell, transfer, aggregate, assign, or convey the physician's discounted rate.

(c) A contracting agent that proposes to sell, lease, assign, transfer or convey a physician's name, contracted rate or any other information must have a direct contract with the physician.

(d) A contracting agent shall ensure through contract terms that all payers to which it has leased, sold, transferred, aggregated, assigned or conveyed a physician panel and its associated discounts comply with the underlying contract between the contracting agent and the physician and pay the physician pursuant to the rates of payment and methodology set forth in the underlying contract.

(e) A contracting agent shall not lease, sell, transfer, aggregate, assign or convey its physician panel and associated discounts or any other contractual obligation to any entity that is not a payer.

(f) The contract between the contacting agent and physician will neither authorize nor require the physician to consent to the sale of his or her name and contracted rates for use with more than a single product or line of business.

(g) The contract between the contracting agent and the physician will neither authorize nor require the physician to consent to the sale of his or her name and contracted rate more than once.

(h) After receiving information from a contracted physician that a payer to whom a contracting agent has leased, sold, transferred, aggregated, assigned or conveyed

its physician panel and associated discounts is not complying with the terms of the underlying contract, including, but not limited to, statutory requirements for timely and accurate payment of claims, and the contracted physician has fulfilled the appeal or grievance process described in the underlying agreement, if any, without satisfaction, the contracting agent shall, within 45 days, do at least one of the following:

- (1) Ensure the payer causes correct payment to be made to the physician.
- (2) Ensure the payer otherwise complies with the terms of the underlying contract or terminate the contracting agent's agreement with the payer.
- (3) Assume direct responsibility for the payment of the claim in question by paying the physician the amount owed under the contract and in the manner required by [NAME THE STATE] law.

(i) A contracting agent shall require those payers and covered entities that are by contract eligible to claim a physician's contracted rates to cease claiming entitlement to those rates upon termination of the underlying contract between the contracting agent and the physician or upon termination of the physician's authorization for the payer to pay the contracted reimbursement rate as permitted under the terms of the contract between the contracting agent and the physician.

(j) Beginning on [FILL IN THE DATE] any explanation of benefits and/or remittance advice issued in [NAME OF STATE], in electronic or paper format, shall include the identity of the entity authorized to have leased, sold, transferred, aggregated, assigned or conveyed the physician's name and associated discount.

(k) Beginning on [FILL IN THE DATE] a payer, or any representative of the payer, processing claims or claims payments, shall clearly identify, in electronic or paper format, on the explanation of benefits and/or remittance advice, the entity assuming financial risk for services and the identity of the contracting agent through which the payment rate and any discount are claimed. A copy of the underlying contract must be provided to the physician upon request.

(l) Beginning on [FILL IN THE DATE], where the covered entity, contracting agent, or payer issues member or subscriber identification cards, the cards shall, in a clear and legible manner, identify any third-party entity, including any contracting agent, responsible for paying claims and any third-party entity, including a contracting agent, whose contract with a payer controls or otherwise affects reimbursement for claims filed pursuant to the subscriber contract.

(m) No payer, payer representative, administrator of claims payment, or other third party acting on behalf of a payer shall be eligible to claim or otherwise proffer a physician's specific contracted rate for services except to the extent that the rate is based on the contract that directly controls payment for services

provided to that patient and is reflected on the explanation of benefits and/or remittance advice and on any patient identification card issued to the patient.

(n) Nothing in the contract between the contracting agent and the physician shall supersede the provisions of this Act.

(o) Anti-Retaliation. In coordination with relevant state law, no covered entity may retaliate against a physician for exercising the right of action provided under this Act.

(p) Rule Making; Administrative Fines, Penalties; Cease and Desist Authority. The Commissioner of Insurance shall adopt regulations as necessary for the implementation and administration of this Act. Upon finding a contracting agent, insurer, or other entity in violation of this Act, the Commissioner of Insurance may issue a cease and desist order to prevent violation of this Act and shall issue fines and penalties of no less than \$1,000 per violation. The Commissioner of Insurance shall adopt an administrative remedy process for parties to pursue their rights, including but not limited to the recoupment of payment lost by a physician, due to an unauthorized agreement to lease, sell, transfer, aggregate, assign or convey a physician panel and associated discount arrangement in violation with this Act.

(q) Private Right of Action. Nothing in this Act prohibits or limits any claim or action for a claim that the physician has against a covered entity or contracting agent. All applicable administrative fines and penalties apply.

Section 5. {Effective Date}

This Act shall become effective immediately upon being enacted into law.

Section 6. {Severability}

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