

HOUSE No. 279

The Commonwealth of Massachusetts

PRESENTED BY:

Michael A. Costello

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to enable the formation of accountable care organizations.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: | DATE ADDED: |
|----------------------------|-------------------|------------------|
| <i>Michael A. Costello</i> | <i>1st Essex</i> | <i>1/13/2011</i> |
| <i>Robert L. Hedlund</i> | | <i>2/4/2011</i> |
| <i>Thomas P. Kennedy</i> | | <i>1/28/2011</i> |

HOUSE No. 279

By Mr. Costello of Newburyport, a petition (accompanied by bill, House, No. 279) of Michael A. Costello, Robert L. Hedlund and Thomas P. Kennedy for legislation to enable the formation by individual health care providers of accountable care organizations. Financial Services.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act to enable the formation of accountable care organizations.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1.

2 Chapter 111 of the General Laws, as appearing in the 2008 Official Edition, is hereby
3 amended by inserting at the end of section 204 the following :

4 (f) The provisions of this section shall apply to any committee formed by an individual
5 health care provider, physician group practice, licensed health care facility or any combination
6 thereof to perform the duties or functions of medical peer review as set forth in section one of
7 this chapter, notwithstanding the fact that the formation of the committee is not required by law
8 or regulation or that the individual, group or facility is not solely affiliated with a public hospital
9 or licensed hospital or nursing home or health maintenance organization.

10 Section 2.

11 The General Laws are hereby amended by inserting after chapter 93H the following
12 chapter:

13 CHAPTER 93I

14 PROVIDER JOINT NEGOTIATIONS

15 Section 1. As used in this chapter, the following words shall have the following
16 meanings:

17 “Attorney General,” the attorney general of the commonwealth and individuals
18 designated by him to act on his behalf in carrying out the purposes of this chapter.

19 “Carrier,” an insurer licensed or otherwise authorized to transact accident or health
20 insurance under chapter 175; a nonprofit hospital service corporation organized under chapter
21 176A; a nonprofit medical service corporation organized under chapter 176B; a health
22 maintenance organization organized under chapter 176G; and an organization entering into a
23 preferred provider arrangement under chapter 176I. A third party administrator shall be
24 considered a carrier when interacting with health care professionals.

25 “Carrier affiliate,” a carrier that is affiliated with another entity by either the insurer or
26 entity having a five percent or greater, direct or indirect, ownership or investment interest in the
27 other through equity, debt or other means.

28 “Covered lives,” the total number of individuals who are entitled to benefits under a
29 health care insurance plan, including, but not limited to, beneficiaries, subscribers and members
30 of the plan.

31 “Health care professional,” a physician or other health care practitioner licensed,
32 accredited or certified to perform specific health services consistent with law, person, acting

33 alone or acting with other persons through a partnership, professional corporation, organization
34 or association.

35 “Health care provider” or “provider,” a health care professional or a facility.

36 “Health care services,” services for the diagnosis, prevention, treatment, cure or relief of
37 a health condition, illness, injury or disease provided by a health care professional and performed
38 within the lawful scope of practice.

39 “HMO,” a health maintenance organization organized under chapter 176G. The term
40 includes any carrier product that requires enrollees to use health care professionals in a
41 designated provider network to obtain covered services except in limited circumstances such as
42 emergencies.

43 “Incentive plan,” any compensation arrangement between a carrier and a health care
44 professional or health care provider group or organization that employs or utilizes services of one
45 or more health care professionals that may directly or indirectly have the effect of reducing or
46 limiting services furnished to insured’s, including but not limited to withholds and risk sharing
47 arrangements.

48 “Joint negotiation,” negotiation with a carrier by two or more health care professionals
49 acting together as part of a formal entity or group or otherwise.

50 “Joint negotiation representative,” a representative selected by a group of health care
51 professionals to be the group’s representative in joint negotiations with a carrier under this act.

52 “Office of Attorney General,” the office of attorney general of the commonwealth.

53 “POS,” a point-of-service plan, a variation of an HMO that provides insureds with the
54 choice of obtaining diagnostic and treatment services from a provider of health care services who
55 is not under contract with or is otherwise a participating provider in a carrier’s network.

56 “PPO,” a preferred provider organization organized under chapter 176I. The term
57 includes any carrier product, other than an HMO or POS product, that provides financial
58 incentives for enrollees to use health care professionals in a designated provider network for
59 covered services.

60 “Provider contract,” an agreement between a health care professional and a carrier which
61 sets forth the terms and conditions under which the provider is to deliver health care services to
62 enrollees of the carrier. The term does not include employment contracts between a carrier and a
63 health care professional.

64 “Provider network,” a grouping of health care providers who contract with a carrier to
65 provide services to insureds covered by any or all of the carrier’s plans, policies, contracts or
66 other arrangements.

67 “Self-funded health benefit plan,” a plan that provides for the assumption of the cost of or
68 spreading the risk of loss resulting from health care services of covered lives by an employer,
69 union or other sponsor, substantially out of the current revenues, assets or any other funds of the
70 employer, union or other sponsor.

71 “Third party administrator,” an entity that provides utilization review, provider network
72 credentialing or other administrative services for a carrier or a self-funded health benefit plan.

73 Section 2. Purpose.

74 (1) Active, robust and fully competitive markets for health care services provide the best
75 opportunity for residents of this commonwealth to receive high-quality health care services at an
76 appropriate cost.

77 (2) A substantial amount of health care services in this commonwealth is purchased for
78 the benefit of patients by carriers engaged in the provision of health care financing services or is
79 otherwise delivered subject to the terms of agreements between carriers and health care
80 professionals.

81 (3) Carriers are able to control the flow of patients to health care professionals through
82 compelling financial incentives for patient's plans to utilize only the services of health care
83 professionals with whom the carriers have contracted.

84 (4) Carriers also control the health care services rendered to patients through utilization
85 review programs and other managed care tools and associated coverage and payment policies.

86 (5) The power of carriers in markets of this commonwealth for health care services has
87 become great enough to create a competitive imbalance, reducing levels of competition and
88 threatening the availability of high-quality, cost-effective health care.

89 (6) Carriers often are able to virtually dictate the terms of the contracts that they offer
90 health care professionals and commonly offer provider contracts on a take-it-or-leave-it basis.

91 (7) The power of carriers to unilaterally impose contract terms jeopardizes the ability of
92 physicians and other health care professionals to deliver the superior quality health care services
93 that have been traditionally available in this commonwealth.

94 (8) Physicians and other health care professionals do not have sufficient market power to
95 reject unfair provider contract terms that impede their ability to deliver medically appropriate
96 care without undue delay or hassle.

97 (9) Inequitable reimbursement and other unfair payment terms adversely affect quality
98 patient care and access by reducing the resources that health care professionals can devote to
99 patient care and decreasing the time that physicians are able to spend with their patients.

100 (10) Empowering health care professionals to jointly negotiate with carriers as provided
101 in this act will help restore the competitive balance and improve competition in the markets for
102 health care services in this commonwealth, thereby providing benefits for consumers, health care
103 professionals and less dominant carriers.

104 (11) Allowing health care professionals to jointly negotiate with carriers through a
105 common joint negotiation representative will improve the efficiency and effectiveness of
106 communications between the parties and result in provider contracts that better reflect the mutual
107 areas of agreement.

108 (12) Empowering health care professionals who form accountable care organizations to
109 jointly negotiate with carriers is necessary to facilitate the formation of such organizations and
110 provide access to affordable, quality health care.

111 (13) This chapter is necessary, proper and constitutes an appropriate exercise of the
112 authority of this commonwealth to regulate the business of insurance and the delivery of health
113 care services.

114 (14) It is the intention of the General Court to authorize health care professionals to
115 jointly negotiate with carriers and other purchasers of health care services, and to qualify such
116 joint negotiations and related joint activities for the State-action exemption to the Federal
117 antitrust laws through the articulated State policy and active supervision provided in this act,
118 under section 7 of chapter 93 of the General Laws. Section 3. Health care professionals may
119 jointly negotiate with a carrier and engage in related joint activity, as provided in sections 6 and
120 7, regarding nonfee-related matters which can affect patient care, including, but not limited to
121 any of the following:

122 (1) The definition of medical necessity and other conditions of coverage.

123 (2) Utilization review criteria and procedures.

124 (3) Clinical practice guidelines.

125 (4) Preventive care and other medical management policies.

126 (5) Patient referral standards and procedures, including, but not limited to, those
127 applicable to out-of-network referrals.

128 (6) Drug formularies and standards and procedures for prescribing off-formulary drugs.

129 (7) Quality assurance programs.

130 (8) Respective health care professional and carrier liability for the treatment or lack of
131 treatment of plan enrollees.

132 (9) The methods and timing of payments, including, but not limited to, interest and
133 penalties for late payments.

134 (10) The terms and conditions for amending any agreement between health care
135 professionals and a health insurer, including the amendment of payment methodologies, fee
136 schedules, and payment and claims policies and procedures.

137 (11) The terms and conditions for the reconciliation process under incentive plans,
138 including but not limited to risk sharing and withhold arrangements.

139 (12) The terms and conditions for retroactive termination of covered lives, including but
140 not limited to beneficiaries, subscribers and members of the plan.

141 (13) Other administrative procedures, including, but not limited to, enrollee eligibility
142 verification systems and claim documentation requirements.

143 (14) Credentialing standards and procedures for the selection, retention and termination
144 of participating health care professionals.

145 (15) Mechanisms for resolving disputes between the carrier and health care professionals,
146 including, but not limited to, claims payment, and the appeals process for utilization review and
147 credentialing determination.

148 (16) The carrier plans sold or administered by the insurer in which the health care
149 professionals are required to participate.

150 Section 4. When a carrier has substantial market power over health care professionals, or
151 when the health care professionals are negotiating through an accountable care organization, the
152 professionals may jointly negotiate with carrier and engage in related joint activity, as provided
153 in sections 6 and 7 regarding fees and fee-related matters, including, but not limited to, any of the
154 following:

155 (1) The amount of payment or the methodology for determining the payment for a health
156 care service.

157 (2) The conversion factor for a resource-based relative value scale or similar
158 reimbursement methodology for health care services.

159 (3) The amount of any discount on the price of a health care service.

160 (4) The procedure code or other description of the health care service or services covered
161 by a payment.

162 (5) The amount of a bonus related to the provision of health care services or a withhold
163 from the payment due for a health care service.

164 (6) The amount of any other component of the reimbursement methodology for a health
165 care service.

166 Section 5. (a) A carrier has substantial market power over health care professionals when
167 either (1) the carrier's market share in the comprehensive health care financing market or a
168 relevant segment of that market, alone or in combination with the market shares of its carrier
169 affiliates, exceeds either twenty-five percent of the covered lives in the geographic service area
170 of the professionals seeking to jointly negotiate; or (2) the Attorney General determines that the
171 market power of the insurer in the relevant service and geographic markets for the services of the
172 professionals seeking to jointly negotiate significantly exceeds the countervailing market power
173 of the professionals acting individually.

174 (b) The comprehensive health care financing market includes (1) all carrier products
175 which provide comprehensive coverage, alone or in combination with other products sold

176 together as a package, including, but not limited to, indemnity, HMO, PPO and POS products
177 and packages; and (2) self-funded health benefit plans which provide comprehensive coverage.

178 (c) Relevant market segments in the comprehensive health care financing market shall
179 include the following: (1) carrier products and self-funded health benefit plans; (2) within the
180 carrier product category, private health insurance, Medicare HMO, PPO and POS and Medicaid
181 HMO; (3) within the private health insurance category, indemnity, HMO, PPO and POS
182 products; and (4) such other segments as the Attorney General determines are appropriate for
183 purposes of determining whether a carrier has substantial market power.

184 Section 6. The following requirements shall apply to the exercise of joint negotiation
185 rights and related activity under this act:

186 (1) Health care professionals shall select the members of their joint negotiation group by
187 mutual agreement.

188 (2) Health care professionals shall designate a joint negotiation representative as the sole
189 party authorized to negotiate with the carrier on behalf of the health care professionals as a
190 group.

191 (3) Health care professionals may communicate with each other and their joint
192 negotiation representative with respect to the matters to be negotiated with the carrier.

193 (4) Health care professionals may agree upon a proposal to be presented by their joint
194 negotiation representative to the carrier.

195 (5) Health care professionals may agree to be bound by the terms and conditions
196 negotiated by their joint negotiation representative.

197 (6) The health care professionals' joint negotiation representative may provide the health
198 care professionals with the results of negotiations with the carrier and an evaluation of any offer
199 made by the carrier.

200 (7) The health care professionals' joint negotiation representative may reject a contract
201 proposal by a carrier on behalf of the health care professionals as long as the health care
202 professionals remain free to individually contract with the carrier.

203 (8) The health care professionals' joint negotiation representative shall advise the health
204 care professionals of the provisions of this act and shall inform the health care professionals of
205 the potential for legal action against health care professionals who violate the federal antitrust
206 laws.

207 Section 7. (a) Before engaging in any joint negotiation with a carrier, health care
208 professionals not negotiating as part of an accountable care organization shall obtain the
209 Attorney General's approval to proceed with the negotiations. The petition seeking approval
210 shall include the following: (1) the name and business address of the health care professionals'
211 joint negotiation representative; (2) the names and business addresses of the health care
212 professionals petitioning to jointly negotiate; (3) the name and business address of the carrier or
213 insurers with which the petitioning providers seek to jointly negotiate; (4) the proposed subject
214 matter of the negotiations or discussions with the carrier or insurers; (5) the proportionate
215 relationship of the health care professionals to the total population of health care professionals in
216 the relevant geographic service area of the providers by providers by provider type and specialty;
217 (6) in the case of a petition seeking approval of joint negotiations regarding one or more fee or
218 fee-related terms, a statement of the reasons why the carrier has substantial market power over

219 the health care professionals; and (7) such other data, information and documents that the
220 petitioners desire to submit in support of their petition.

221 (b) The petition seeking approval shall include the following: (1) the Attorney General's
222 file reference for the original petition for approval of joint negotiations; (2) the proposed new
223 subject matter; (3) the information required by subsection (a) (6) with respect to the proposed
224 new subject matter; and (4) such other data, information and documents that the health care
225 professionals or carrier desire to submit in support of their petition.

226 (c) No provider contract terms, other than those involving accountable care
227 organizations, negotiated under this act shall be effective until the terms are approved by the
228 Attorney General. The petition seeking approval shall be jointly submitted by the health care
229 professionals and the carrier who are parties to the contract. The petition shall include: (1) the
230 Attorney General's file reference for the original petition for approval of joint negotiations; (2)
231 the negotiated provider contract terms; and (3) such other data, information and documents that
232 the health care professionals or carrier desire to submit in support of their petition.

233 Section 8. (a) The Office of Attorney General shall either approve or disapprove a
234 petition under section(s) 7(a), (b) or (c) within 30 days after such petition is filed. If any petition
235 is disapproved, the Attorney General shall furnish a written explanation of any deficiencies with
236 such petition along with a statement of specific remedial measures as to how such deficiencies
237 may be corrected.

238 (b) (1) The Office of Attorney General shall approve a petition under section 7(a) and
239 (b) if (i) the pro-competitive and other benefits of the joint negotiations outweigh its anti-
240 competitive effects, and (ii) in the case of a petition seeking approval to jointly negotiate one or

241 more fee or fee-related terms, the carrier has substantial market power over the health care
242 professionals.

243 (2) The pro-competitive and other benefits of joint negotiations or negotiated
244 provider contract terms may include, but shall not be limited to (i) restoration of the competitive
245 balance in the market for health care services, (ii) protections for access to quality patient care,
246 and (iii) improved communications between health care professionals and carriers.

247 (c) For the purpose of enabling the Attorney General to make the findings and
248 determinations required by this section, the Attorney General may require the submission of such
249 supplemental information as it may deem necessary or proper to enable him to reach a
250 determination.

251 Section 9. In the case of a petition under section 7(a) or (b), the Attorney General shall
252 notify the health insurer of the petition and provide the insurer with the opportunity to submit
253 written comments within a specified time frame that does not extend beyond the date on which
254 the Attorney General is required to act on the petition.

255 Section 10. Within 180 days from the mailing of a notice of disapproval of a petition
256 under section 8, the petitioners may commence a claim in superior court seeking approval of
257 such petition. The matter shall be tried by the court without a jury. The court shall enter its
258 findings as a judgment of the court and the judgment shall have the same effect and be
259 enforceable as any other judgment of the court in civil cases, subject to the provisions of this
260 chapter. Appeals may be taken to the supreme judicial court under the same conditions and
261 under the same practice as appeals are taken from judgments in civil cases rendered by the
262 superior court.

263 Section 11. Any petition submitted under section 7 herein and any supplemental
264 submission made under section 8 herein shall be considered confidential, not a public record
265 under the section 7 of chapter 4, and not subject to public disclosure under section 10 of chapter
266 66.

267 Section 12. The Attorney General may, in effectuating the purposes of this chapter,
268 engage experts or consultants to assist with the review of the petition. All copies of reports
269 prepared by experts and consultants shall be made available to the petitioners. All costs incurred
270 under this chapter shall be the responsibility of the petitioners in an amount to be determined by
271 the Attorney General. No petition for approval of joint negotiations, petition for approval of
272 modification of joint negotiations, or petition for approval of provider contracts shall be
273 considered complete, unless an agreement has been executed with the Attorney General for the
274 payment of costs incurred pursuant to this chapter.

275 Section 13. Nothing contained in this act shall be construed (1) to prohibit or restrict
276 activity by health care professionals that is sanctioned under the federal or state laws; (2) to
277 prohibit or require governmental approval of or otherwise restrict activity by health care
278 professionals that is not prohibited under the federal antitrust laws; (3) to require approval of
279 provider contracts terms to the extent that the terms are exempt from state regulation under
280 section 514 of the Employee Retirement Income Security Act of 1974 (Public Law 93-406, 88
281 Stat. 829); or, (4) to expand a health care professional's scope of practice or to require a carrier
282 to contract with any type or specialty of health care professionals.

283 Section 14. If any provision of this chapter or the application thereof to any person or
284 circumstances is held invalid, such invalidity shall not affect other provisions or applications of

285 the chapter, which can be given effect without the invalid provision or application, and to this
286 end the provisions of this chapter are declared to be severable.

287 SECTION 3. This act shall take effect on October 1, 2011.