ENROLLEE NOTICE

HCA Proposal: An ACO must ensure that Enrollees are notified annually in writing that they are attributed to the ACO. All ACO notices written by Vermont ACOs, providers, or insurers must be written in plain language in consultation with the Office of the Health Care Advocate.

HCA Would Be Okay With: An ACO must notify new Enrollees in plain language writing that they are attributed to the ACO, except for Enrollees for whom federal law or regulation requires a different method of notice (e.g., 42 C.F.R. § 425.312, requiring notice to be made available to Medicare shared savings program Enrollees at the point of care by ACO Providers) ~~or require the ACO's Participants to provide notification to their patients at the point of care that the Participant is participating in the ACO~~. For the purpose of this rule, a "new Enrollee" is any Enrollee who was not attributed to the same ACO in the past month.

Recommendation: Amend subsection 5.208(i) as follows:

> An ACO must provide ~~notify~~ new Enrollees with a written, plain language notice that they are attributed to the ACO. This requirement does not apply with respect to Enrollees attributed to an ACO under a Medicare ACO program or to ~~require the ACO's Participants to provide notification to their patients at the point of care that the Participant is participating in the ACO. This requirement does not apply if~~ Enrollees who will be notified by a Payer that they are attributed to the ACO.

Notes: The recommended amendment accommodates existing federal programmatic requirements and potential changes thereto.

- **Medicare Shared Savings**
    - CMS carefully considered the issue of beneficiary notice and decided not to require ACOs in the MSSP to provide written notice to beneficiaries. Instead, CMS required the ACO's Participants to notify beneficiaries at the point of care that their providers are participating in the MSSP, either through signage or by making written notices available upon request.
- **Medicare Next Generation**
    - CMS requires the ACO to provide Next Generation beneficiaries with a written notice that they have been aligned to the ACO in the first year they are aligned. If they continue to be aligned, they do not receive additional notices. CMS provides the notice and ACOs may not change the CMS-provided content.

The value of requiring a notice each year as opposed to a notice only for new enrollees is unclear and the costs would not be small.

The proposed definition of a "new Enrollee" may be relevant to the MSSP. However, attribution in the Medicare and Medicaid Next Generation programs is prospective; beneficiaries are not added during the performance year.

WHISTLEBLOWER PROTECTIONS

HCA Proposal: An ACO may not penalize any individual or organization for reporting any act or practice of the ACO that an individual reasonably believes could jeopardize patient health or welfare or for participating in any proceeding arising from such report.

Recommendation

- Amend section 5.208 by adding a new subsection that provides as follows:

> An ACO may not prohibit any individual or organization from, or penalize any individual or organization for, reporting any act or practice of the ACO that the individual or organization reasonably believes could jeopardize patient health or welfare, or participating in any proceeding arising from such report.

- Amend section 5.208 by deleting subdivision (e)(3), as follows:

> (e) An ACO may not prohibit a Participant from, or penalize a Participant for . . . ~~(3) reporting in good faith to state or federal authorities any act or practice of the ACO that jeopardizes patient health or welfare.~~

Notes: The recommendation builds off of and strengthens the HCA's proposal.

CARE MODELS, MECHANISMS, AND GUIDELINES

HCA Proposal

- Amend section 5.403(a) as follows:

> On or before June 1 of each year . . . The ACO must submit . . . information regarding mechanisms the ACO has established to provide, manage, and coordinate health care services for its patients, including guidelines or best practices adopted, promoted, or implemented by the ACO.

- Any guidelines or care models adopted or implemented by the ACO should be made available to the HCA upon request.

Recommendation: No change.

Notes: The Board can obtain this information during the budget review process under existing language, as can the HCA (18 V.S.A. § 9382(b)(3)(A) gives the HCA a role in the ACO budget review process that is similar to the role it has in the hospital budget review process). If the HCA has concerns that arise between budget cycles, it can bring them to the Board.

ATTORNEY GENERAL REFERRAL

HCA Proposal (to Board): Amend section 5.503 by adding the following:

> If the Board has reason to suspect that an ACO or any individual or entity working with or on behalf of an ACO could be engaging in anticompetitive behavior without the specific behavior creating a countervailing benefit of improving patient care, improving access to health care, increasing efficiency, or reducing costs, the Board must provide notice to the individual or entity of such concerns and give the individual or entity 30 days to respond in writing. If, after the 30 day period, any Board member continues to have any concern that the individual or entity could be engaging in anticompetitive behavior without a countervailing benefit as described above, the Board must refer the matter to the Attorney General for appropriate action on possible antitrust violations. Examples of anticompetitive behavior include but are not limited to the following: improper sharing of competitively sensitive information; preventing payers from directing or incentivizing patients to choose providers outside of the ACO network; tying sales of the ACO's services to a private payer's purchase of other services; preventing or discouraging ACO physicians, hospitals, or other providers from contracting with private payers outside of the ACO; and/or restricting a private payer's ability to make available to its health plan enrollees cost, quality, efficiency, and performance information. This rule in no way limits the rights of individual Board members or Board staff to report suspicions of any legal violations to the Attorney General's Office or other authorities.

Recommendation: Amend section 5.503 by adding the following:

> If the Board has reason to suspect that an ACO, or any individual or entity working with or on behalf of an ACO, is engaging in anticompetitive behavior without the specific behavior creating a countervailing benefit of improving patient care, improving access to health care, increasing efficiency, or reducing costs, the Board will provide written notice to the individual or entity of such concerns and may require the individual or entity to respond to the concerns in writing within a specified time period. After providing the individual or entity notice and an opportunity for a hearing, the Board may refer the matter to the Attorney General for appropriate action.

Notes: A decision to make a referral to the AG would be like other Board actions.

The time limits proposed by the HCA may not be appropriate, depending on the issues involved. The recommended language allows for some flexibility in that it allows the Board to specify a deadline for responding to Board concerns.

The examples in the HCA's proposal were taken from guidance provided by federal antitrust agencies to ACOs in the MSSP. Restating federal guidance does not add to the Board's authority and federal antitrust statements are subject to change and clarification.