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April 28, 2021

VIA ELECTRONIC MAIL (Donna.Jerry@Vermont.gov)

Ms. Donna Jerry
Senior Health Policy Analyst
Green Mountain Care Board
144 State Street
Montpelier, Vermont 05602

Re: UnitedHealthcare of Wisconsin, Inc.: Letter requesting Jurisdictional Determination regarding Certificate of Need process

Dear Ms. Jerry:

Our firm represents UnitedHealthcare of Wisconsin, Inc. (“UHC WI”), a Wisconsin-domiciled health maintenance organization (“HMO”). UHC WI recently was issued a Certificate of Authority by the Vermont Department of Financial Regulation (“DFR”) to operate in the state as a foreign health maintenance organization (“HMO”). The Certificate of Authority is attached to this letter as Exhibit A. The license is limited to Medicare products, and UHC WI will only offer Medicare Advantage/Prescription Drug and Medicare Advantage only (MAPD) plans in Vermont. UHC WI sought and received authority from the DFR to operate in all 14 counties in the state: Addison, Bennington, Caledonia, Chittenden, Essex, Franklin, Grand Isle, Lamoille, Orange, Orleans, Rutland, Washington, Windham and Windsor. UHC will commence offering MAPD coverage to Vermont residents on January 1, 2022.

UHC WI understands that as a prerequisite for commencing business in Vermont, it either must receive a Certificate of Need (“CON”) from the Green Mountain Care Board (“GMCB”) or a written determination from the GMCB that the agency does not have jurisdiction over the matter. Accordingly, this letter notifies the GMCB of UHC WI’s intent to provide MAPD services in Vermont and to request a jurisdictional letter regarding the applicability of the CON process, as described in Vermont statutes and regulations.¹ For reasons explained below, UHC WI believes the MAPD business it proposes is not a “new healthcare project” for which a CON is required under 18 V.S.A. § 9434(a).²

¹ 18 V.S.A. § 9431, et seq.; Vt. Admin. Code § 4-7-4:4.100, et seq.

² Under federal law, insurers and HMOs must obtain a license in the state in which they seek to contract with CMS, and states have ongoing oversight over solvency. All areas relating to ongoing operations other than solvency are governed solely by CMS under federal preemption. See 42 C.F.R. §§ 422.402, 422.404 (Medicare Advantage); 422 C.F.R. § 423.440 (Medicare Prescription Drug Plans). While this letter does not reach the issue of preemption of state law, we note its scope and general applicability to MAPD products for the GMCB’s information.

Background

For several years, UHC WI's affiliate, UnitedHealthcare of New England, Inc. ("UHC NE") has offered MAPD services to Vermont enrollees pursuant to a contract with the Centers for Medicare and Medicaid Services ("CMS"). UHC NE sought and received letters from the GMCB confirming no jurisdiction when UHC NE was first licensed in the state. *See* GMCB letter dated March 24, 2014, which is attached as Exhibit B to this letter. As UHC NE expanded its footprint geographically, UHC NE sought and received additional no jurisdiction letters. *See, for example*, GMCB letter dated February 21, 2018, which is attached as Exhibit C to this letter.

The Government Programs business segment within UnitedHealthcare is working on an initiative to reduce the number of legal entities holding contracts with CMS, thus driving efficiency and optimizing internal resources. As part of this effort, UHC WI has expanded into Vermont and will be assuming a CMS contract from UHC NE, effective January 1, 2022. The manner in which UHC WI will operate in Vermont, however, essentially will be the same as the manner in which UHC NE has operated.

Analysis of Jurisdictional Issues

1. Summary Description of Project: UHC WI's proposed business in Vermont.

As stated above, UHC WI intends to offer MAPD plans to Medicare beneficiaries in all fourteen Vermont counties. It is not a "staff model" HMO that hires doctors and other health care providers as employees or owns hospitals or other facilities. UHC WI instead contracts—either directly, or indirectly through affiliates or other subcontractors—with an independent network of physicians, hospitals and other licensed health care practitioners, and reimburses these providers to provide direct care to its enrollees (in an amount or proportion described in an enrollee's CMS-approved Evidence of Coverage). The MAPD benefits to be offered by UHC WI in Vermont must be approved by CMS as a prerequisite to contracting with CMS. In general, such plans will offer benefits available through original Medicare, plus additional benefits and an annual out-of-pocket maximum to help beneficiaries budget for health care costs. Under the contract that UHC WI plans to assume from UHC NE, the product also includes Part D prescription drug coverage.

2. Applicability of the CON process to UHC WI's proposed business in Vermont. An HMO is a non-hospital "health care facility" as defined in 18 V.S.A. § 9432(8)(B). Accordingly, GMCB would have jurisdiction under section 9434(a) over any "new healthcare projects" that fall within paragraphs (1)-(6) of that subsection. As analyzed further below, UHC WI submits that its proposed business *does not* constitute a "new healthcare project" under any of these six paragraphs.

- 1) **The construction, development, purchase, renovation, or other establishment of a health care facility, or any capital expenditure by or on behalf of a health care facility, for which the capital cost exceeds \$1,500,000.00.**

Conclusion: Not applicable.

Analysis: UHC WI's proposed business in Vermont does not fit within this definition because it does not involve capital costs exceeding \$1,500,000.

The language of paragraph (1) reflects that the "establishment of a health care facility" is further modified by "for which capital costs exceeds \$1,500,000." Because of the placement of commas before and after the phrase "or any capital expenditure by or on behalf of a health care facility," such phrase is parenthetical in nature and the language after the parenthetical— "for which capital costs exceeds \$1,500,000"—applies to both the phrase "The construction, development, purchase, renovation, or other establishment of a health care facility" and to "or any capital expenditure on behalf of a health care facility."

We interpret "capital costs" to be very similar to "capital expenditure," which is defined in section 9432(5) as follows:

[A]n expenditure for the plant or equipment which is not properly chargeable as an expense of operation and maintenance and includes acquisition by purchase, donation, leasehold expenditure, or lease which is treated as capital expense in accordance to the accounting standards established for lease expenditures by the Financial Accounting Standards Board, calculated over the length of the lease for plant or equipment, and includes assets having an expected life of at least three years. A capital expenditure includes the cost of studies, surveys, designs, plans, working drawings, specifications and other activities essential to the acquisition, improvement, expansion, or replacement of the plant and equipment.

UHC WI will not incur capital costs exceeding \$1.5 million in providing MAPD services in Vermont. Capital costs, if any, will be very minimal. MAPD operations (claims, enrollment, customer service, etc.) for UHC WI and other UnitedHealth Group-affiliated MAPD plans are centralized in Minnesota to support all such plans across the country. While the UnitedHealthcare companies maintain some functions in New England regional offices (such as management and oversight of the product, sales and network management), they own no real estate in Vermont. If UHC WI needs additional staff to support the product in Vermont (for clinical, sales and/or supervising agents, for instance), these additional staff persons are likely to work remotely, rather than in owned or leased office space.

Accordingly, the MAPD services do not meet the definition of a "new healthcare project" under paragraph (1).

- 2) **A change from one licensing period to the next in the number of licensed beds of a health care facility through addition or conversion, or through relocation from one physical facility or site to another.**

Conclusion: Not applicable.

Analysis: UHC WI will not have licensed beds, as it will not provide direct inpatient health care services. It will have access to the same provider contracts as UHC NE, and pursuant to such contracts, will have provide access for its members to independent hospitals and other facilities. Those facilities will have such licensed beds, but these facilities are regulated separately by the GMCB.

- 3) **The offering of any home health service, or the transfer or conveyance of more than a 50 percent ownership interest in a health care facility other than a hospital.**

Conclusion: Not applicable.

Analysis: UHC WI is not a home health agency, nor does its licensure in Vermont to provide HMO services involve a change in ownership.

- 4) **The purchase, lease, or other comparable arrangement of a single piece of diagnostic and therapeutic equipment for which the cost, or in the case of a donation the value, is in excess of \$1,000,000.00. For purposes of this subdivision, the purchase or lease of one or more articles of diagnostic or therapeutic equipment which are necessarily interdependent in the performance of their ordinary functions or which would constitute any health care facility included under subdivision 9432(8)(B) of this title, as determined by the board, shall be considered together in calculating the amount of an expenditure. The board's determination of functional interdependence of items of equipment under this subdivision shall have the effect of a final decision and is subject to appeal under section 9381 of this title.**

Conclusion: Not applicable.

Analysis: UHC WI's licensure in Vermont to provide HMO services does not involve the purchase of medical equipment. As noted above, UHC does not directly provide health care services to Medicare beneficiaries.

- 5) **The offering of a health care service or technology having an annual operating expense which exceeds \$500,000.00 for either of the next two budgeted fiscal years, if the service or technology was not offered or employed, either on a fixed or a mobile basis, by the health care facility within the previous three fiscal years.**

Conclusion: Not applicable.

Analysis: The phrase "health care service" is not defined in the statutes or regulations applicable to the GMCB's CON process, but the phrase appears to be equivalent to "health services," a term defined in 18 V.S.A. § 9432(10) as

Ms. Donna Jerry
April 28, 2021
Page 5

“activities and functions of a health care facility that are directly related to care, treatment or diagnosis of patients.” As described above in the summary of UHC WI’s proposed services in Vermont, the HMO is not a staff model HMO and does not directly provide health services through employed physicians or owned hospitals and other facilities. It contracts with independent providers and facilities and reimburses them for providing care to Medicare beneficiaries who have enrolled with the HMO. While UHC WI will monitor and manage care, and will seek to promote high quality of care by its network of providers (as required under its contract with CMS), the HMO is not a direct provider of such care. Indeed, its entry into the state will not add to or diminish the number of providers of direct health services in Vermont. Accordingly, the MAPD services do not meet the definition of a “new healthcare project” under paragraph (5).

6) The construction, development, purchase, lease, or other establishment of an ambulatory surgical center.

Conclusion: Not applicable.

Analysis: UHC WI will not directly, own, lease or otherwise establish such a facility.

We appreciate the GMCB’s review of these matters. *Because of the need to complete this jurisdictional determination before UHC WI starts to provide coverage, we respectfully request a determination as soon as possible and no later than June 1, 2021.* Should you have questions or need additional information, please let us know. Thank you.

Sincerely,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.



By

Charles B. Cliett, Jr.

CBC:mr
Enclosures