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August 1, 2022

Green Mountain Care Board, Data Governance Council
Attention: Kevin Mullin, Chair
144 State Street
Montpelier, VT 05602

Re: Blue Cross Comments to Proposed Revisions to VHCURES Reporting Manual

Dear Chair Mullin,

Thank you for the opportunity to review and comment on the Green Mountain Care Board's proposed revisions to the Reporting Manual for Vermont's All Payer Claims Database, VHCURES. Blue Cross and Blue Shield of Vermont (Blue Cross) appreciates the hard work the Board and staff have undertaken to improve the collection and use of health care data. Under separate cover, we will also provide technical comments relating to the proposed revisions. This letter focuses on privacy concerns.

As you know, since its inception, VHCURES has collected claims data from payers, including commercial payers such as Blue Cross. This claims data is used for a variety of research purposes. Until now, this claims data was deidentified ("hashed") in the VHCURES database. This meant that although it is generally possible to identify an individual's claims data across payers, it was not possible to tie that claims data to a specific person. Now, the GMCB has the authority to collect and maintain individually identifiable claims data, including name, address, birthday and Social Security Number (SSN) (collectively referred to herein as "PHI Data Elements"). The GMCB intends to use individual's SSN as the prime identifier.

We have significant concerns about moving forward with using de-identified data in VHCURES. We understand that state government often does collect personal and identifiable information. However, typically there is a clear public purpose. The Department of Motor Vehicles cannot issue a driver's license if it does not know who you are or where you live. However, in this situation, the GMCB's need for identifiable health claims data is far more nebulous. According to the GMCB, identifiable data will "substantially improve the ability to bring data together across the state, which furthers the state's goal to support an integrated and non-redundant data system and supports richer analyses and research capabilities."

***It is not necessary to increase the risk of a breach at this time.*** Given the rise in cyber threats as seen recently with the University of Vermont Medical Center and the Vermont Department of Labor data breaches, we have considerable concerns about our member's data privacy related to the removal of the hashing requirement for the PHI Data Elements. According to the HIPAA Journal, there were 712 health care data breaches in 2021 alone. Although we understand there are numerous security protocol employed by the VHCURES vendor, the State has a considerable path to reach the goals of data integration, and we should not put Vermonter's protected health information at risk of a breach in the meantime.

***Our members and subscribers expect their PHI Data Elements to be protected by us and disclosed only as de-identified data.*** Our members entrust us with their protected heath information (PHI), and as a HIPAA covered entity, we take stewardship of this role very seriously. When a member provides their social security number, they do so based on the assumption that we

will keep that identifiable information private.[1] Internally at Blue Cross, we go to great lengths to minimize the sharing of this particular information, even with parties who already have SSNs, because of the increased risk associated with their transmission.

***Public trust may be eroded as people realize their once-deidentified PHI Data Elements would be collected, stored, and used in the VHCURES database as identifiable data.*** Although the passage of Act 167 was public, and the resulting proposed revisions to the Manual currently are making their way through the public commenting period, there has been no reporting in the Vermont media about the change. Very few members of the public are aware of the intricacies of the GMCB processes, and the data privacy section of Act 167 was buried deep in a reform bill of considerable complexity. This piece of the law did not garner any public or press attention as it moved through the process. Without a proactive effort to bring this matter to the public's attention, it will remain overlooked until there is a data breach. We are concerned about the negative impact to the public trust in VHCURES broadly, and to our reputation in the case of a data breach.[2]

***Identifiable PHI Data Elements would be at risk when stored and used in the VHCURES database.*** Although the proposed revisions maintain the current practice of prohibiting public *disclosure* of data containing direct personal identifiers, the revisions would change the current practice so that identifiable PHI Data Elements could be *collected, stored, and used* in the VHCURES database. We are concerned that a broad swath of Vermonters' social security numbers and sensitive claims information would be vulnerable to being compromised. With the collection, storage, and use of identifiable SSNs, that data would become both more valuable, and therefore more vulnerable to cyber-attacks. By collecting, storing, and using identifiable PHI Data Elements in the VHCURES database, the Board significantly increases its risk. Several other APCD states do not permit collection of identifiable PHI Data Elements.[3] Although it is possible for social security numbers to be used as identifiers for members and subscribers, that use is not necessary, and in fact, the FTC has advised that SSNs should not be used as identifiers.[4] It has been over a decade since Blue Cross has used SSNs as an identifier.

***Self-funded employers will be less likely to participate in VHCURES.*** To date, we have encouraged our self-funded ASO groups to voluntarily submit their data to VHCURES, as the State cannot mandate they do so based on the U.S. Supreme Court *Gobeille* decision. The existing requirement that PHI be de-identified through hashing has helped minimize data privacy concerns, and many of our ASO groups have opted to submit their data. With the removal of that protection for the PHI Data Elements, we would expect them to reconsider providing their employees' data given the identifiability and risk to their PHI Data Elements.

***Individuals have no right to opt out of supplying identifiable and sensitive claims data to the government.*** The collection and maintenance of identifiable claims data that is being proposed would be implemented with no additional changes to the law relating to the sensitivity of the data.

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[1] Note that commercial payers such as Blue Cross do not require social security number to sign up for insurance and such data is incomplete.
[2] As you know, payers are subject to fines for not submitting such data. 18 V.S.A. § 9410.
[3] Florida Claims Data Submission Guide, November 2017 (available at https://ahca.myflorida.com/SCHS/docs/ClaimsDataSubmissionGuideFinal041918.pdf); Maryland Data Submission Manual; 957 Mass. Reg. 8.03 (Data Reporting Requirements); Minnesota Administrative Rules 4653.0200 (Data Collected); Tennessee Rules of the Department of Commerce and Insurance Division of Insurance, 0780-01-k79-.03 Health Care Claims Data Set Filing Description.
[4] Federal Trade Commission, *Protecting Personal Information: A Guide for Business*, 2016 (available at https://www.ftc.gov/business-guidance/resources/protecting-personal-information-guide-business).

Although self-funded groups can refuse to supply their employees' claims data, individual Vermonters have not been afforded any such protection. Claims data can and often does contain extremely sensitive medical information that individuals may not want to share with the Green Mountain Care Board. Yet, they have been given no opportunity to opt out of the new process.

***There are no protections for Vermonters in the event of a breach.*** Commercial payers such as Blue Cross are subject to a variety of legal and regulatory consumer protections relating to PHI. Additionally, in the event of a breach, Blue Cross can be sued in court and subject to regulatory oversight. No such protections exist in the event of a GMCB data breach. Blue Cross maintains cyber-insurance specifically in the event of a data breach for which it is held liable. Members will have no such recourse in the event of a GMCB breach.

***Statutory legal protections are vague and subject to abuse.*** The VHCURES data can be used "to the extent allowed by HIPAA" 18 V.S.A. § 9410(h)(3)(B). However, HIPAA does not apply to the GMCB. This is of particular concern. HIPAA applies to "covered entities" which are generally insurers, providers, and health care clearing houses. As such, once the GMCB takes possession of the data, it ceases to be protected by HIPAA. It is concerning that an analysis of HIPPA proposed use has not been considered. Furthermore, it's unclear what protections relate to data relating to mental health and substance disorder treatment. Payers and providers are subject to enhanced regulatory obligations to protect this information pursuant to 42 C.F.R. Part 2. It does not appear that the GMCB is subject to these protections, and no additional protections have been implemented to provide additional protection for this or other sensitive data.

We strongly support the State's overall goals of simplifying the health care system and using data to improve quality and patient experience. However, at this time, we feel it is premature to move forward with collecting and maintaining identifiable claims data. Instead, the Board should keep the hashing requirement in effect for the PHI Data Elements while at the same time revising the timeline for the Reporting Manual revision process to allow time to more fully address the outstanding issues associated with collecting and tracking Vermonters' health care claims data and social security numbers.

Sincerely,

Rebecca C. Heintz
Rebecca C. Heintz (Aug 2, 2022 10:05 EDT)

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