GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF INSURANCE, SECURITIES AND BANKING

IN THE MATTER OF	)	
Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.	)	Order No.: 14-MIE-012

MOTION FOR RECONSIDERATION AND
COORDINATED PROCEEDINGS WITH MARYLAND AND VIRGINIA

Group Hospitalization and Medical Services, Inc. ("GHMSI") respectfully seeks reconsideration of the Decision and Order ("Order") dated December 30, 2014. GHMSI also requests that the Commissioner stay the Order, and delay the filing of any remedial plan until 45 days after ruling on GHMSI's motion for reconsideration.

INTRODUCTION AND GROUNDS

The Order is incorrect on both the facts and the law when it concludes that the portion of GHMSI's 2011 surplus that is attributable to the District was "excessive," and seeks to attribute surplus based on a single financial statement filed in a single year. In reaching its conclusions, the Order ignores the Commissioner's duty to coordinate with other jurisdictions, fails to apply the specific analysis required by the Medical Insurance Empowerment Amendment Act ("MIEAA"), contradicts the factual record, and raises new issues that were not fully reviewed or heard before the Order was issued.

The Order seeks to reduce GHMSI's surplus at a time that is particularly dangerous for GHMSI. GHMSI's total surplus level already has declined dramatically due to significant new market risks posed by the Affordable Care Act, and this decline is expected to continue. Between 2010 and the end of 2014, GHMSI's surplus has fallen from 1,098% RBC-ACL to an

estimated 845% RBC-ACL – a fall of more than 250 points in four years. In 2013 and 2014, GHMSI lost surplus in total dollars, as well as a percentage of risk based capital. The Order ignores the conditions that have caused and continue to cause this drop in surplus.

In particular, the Order contains five key errors that the Commissioner should address here:

1. The Commissioner failed to coordinate his decision with Maryland and Virginia, as required by DC Code § 31-3506(e). "Coordination" under the MIEAA requires far more than merely accepting written testimony – it requires Maryland, Virginia and the District to come to agreement regarding the many multi-jurisdictional issues relating to GHMSI's surplus. Because of this failure to coordinate, the Order is now in direct conflict with the 2012 order of the Maryland Insurance Administration ("MIA") regarding GHMSI's surplus, which requires GHMSI to maintain its surplus between 1,000% and 1,300% RBC-ACL. *See* **Exhibit A** hereto. GHMSI cannot comply with both. This inter-jurisdictional conflict violates GHMSI's fundamental rights under the Due Process and Commerce Clauses of the United States Constitution, both of which forbid states from saddling entities like GHMSI with conflicting regulatory commands.

There are potential conflicts with Virginia as well. On January 21, 2015, the Virginia State Corporation Commission issued an order to the Virginia Insurance Commissioner, directing the Commissioner to examine the Order issued in this case and report on whether the impact of GHMSI is harmful to the residents of Virginia. *See* **Exhibit B** hereto.

Maryland and Virginia have strong interests in the regulation of GHMSI's surplus. Under the Commissioner's own analysis, 79% of GHMSI's surplus is attributable to those jurisdictions. Equally important, GHMSI has only one surplus and the entire amount of that

surplus is available to satisfy any debt of GHMSI, no matter where the debt is incurred. A reduction in GHMSI's financial strength affects GHMSI's Maryland and Virginia members, regardless of how surplus is attributed. A reduction in GHMSI's financial strength also affects members in other CareFirst plans. BlueChoice is jointly owned by GHMSI and CareFirst of Maryland, Inc., and 40% of GHMSI's surplus *is* BlueChoice surplus held by BlueChoice to ensure its ability to meet obligations to BlueChoice members.

The Order itself has created these conflicts, and accordingly the issues are new ones that could not have been previously raised. As required by D.C. Code § 31-3506(e), the Commissioner must work with the regulators in Maryland and Virginia to resolve such conflicts. Along with this Motion, GHMSI is filing requests with the Insurance Commissioners of Maryland and Virginia, asking each to participate in a consolidated proceeding to determine GHMSI's proper surplus level and resolve competing attribution claims. The Commissioner should reopen these proceedings and coordinate with these other affected jurisdictions.

2. The Order fails to evaluate whether the portion of GHMSI's surplus attributable to the District is excessive, and therefore fails to make the analysis required by the MIEAA. Before the Commissioner can require any distribution or reduction of surplus, the Commissioner must specifically find *the portion of the surplus attributable to the District of Columbia* to be excessive. *See* § 31-3506(e)-(g). This analysis must *start* with a determination of the specific surplus and ongoing business attributable to the District of Columbia, and examine the specific surplus needs arising from that portion of the business. The Order does not conduct this analysis, but instead determines only that the *entire* surplus was excessive, based on factors attributable to GHMSI's entire business. The Order's approach does not comply with District law.

3. The Order's method of attributing surplus to the District is arbitrary and fails to comply with the MIEAA. Attribution of surplus requires a determination of which jurisdiction contributed to the surplus over time. This was not done. Instead, the Order relies primarily on premium filings in a single year, and does not attempt to determine which business segments in which jurisdictions generated the profits that built the surplus.

As a result, the Order does not address any of the complexities that must be resolved before determining how GHMSI's surplus was built up over time (literally since the beginning of its operations). For example, the Order does not consider how to address the portion of surplus generated by investment income despite the large portion of surplus so built, nor does it consider how BlueChoice or other sources contributed to surplus, even though those contributions are significant. Because it fails to conduct the required analysis, the Order likely misappropriates surplus dollars generated in Maryland and Virginia for the benefit of District residents. The Order's method of attribution is incorrect both as a matter of law and in its result, thereby injuring the interests of the other jurisdictions.

4. The Order's use of a 95% confidence level with respect to the risk of dropping to 200% RBC-ACL is arbitrary and capricious, because the overwhelming evidence presented throughout the proceedings does not support such a conclusion. The record demonstrates that 98% is the appropriate confidence level, and the Order fails to articulate any reason based on supporting evidence to justify the 95% standard. In fact, the 95% confidence level is inconsistent with the Order's findings as to the severe effect on GHMSI, its members, and the District's insurance market if GHMSI were to drop to 200% RBC-ACL, fall into regulatory supervision, and lose its membership in the Blue Cross and Blue Shield Association.

5. There is no evidence or legal support for the use of a single surplus target point, rather than a surplus range. It is intrinsic that surplus fluctuates month to month and quarter to quarter as well as on an annual basis. To the extent that the Commissioner is concerned that the upper bound of a range should not be treated as a "target," that concern is easily and directly addressed. GHMSI can seek the mid-point of a range, and develop its rates accordingly. The MIA has ordered just such an approach, which can serve as a ready model. It must be recognized that GHMSI cannot cause a specific surplus outcome to occur. Actual results will vary both above and below any target level. If a single target point is used, the only way GHMSI could avoid having "excessive" surplus, and being subject to a future order to reduce surplus, would be to ensure that it maintains too little surplus, falling below the target point every time. That result would be directly contrary to the MIEAA's command that GHMSI should retain the level of surplus needed to remain financially sound.

For these reasons, and those set forth below, the Commissioner should withdraw and reconsider his December 30, 2014 Order and reopen these proceedings. The Commissioner also should stay the filing of any remedial plan until after this motion is decided. The issues raised in this motion are material, and each of them has the potential to significantly alter the Order and the contents of any plan.

ARGUMENT

I. The Commissioner Should Hold Joint Proceedings With Maryland and Virginia To Resolve the Conflicts Raised by the Order and Address the Order's Extraterritorial Effects.

A. The MIEAA Requires the Commissioner to Actively Resolve the Conflict Between the Order and Maryland's 2012 Consent Order.

The MIEAA requires that the Commissioner's review must "be undertaken in coordination with the other jurisdictions in which the corporation conducts business." D.C. Code

§ 31-3506(e).[1] In 2012, the Maryland Insurance Commissioner entered an order that "[t]he approved targeted surplus range for GHMSI effective from the date of this Order shall be 1,000% to 1,300% of its authorized control level risk based capital." **Exhibit A**, Order of Maryland Insurance Commissioner, at 7. GHMSI is required to maintain its surplus towards the midpoint of that range. *Id.* In approving this targeted range, the Maryland Commissioner did not assert that some portion of the surplus was attributable to Maryland or to GHMSI's business in Maryland; rather, the surplus was treated as an indivisible asset available to protect the solvency of the entire company and to ensure payment of all subscribers' claims without regard to jurisdiction. The MIA issued this order after an extensive process, including an independent, expert review. *Id.* at 5-7.

While the Order acknowledges the existence of the Maryland order, it does nothing to resolve the conflict between the two. It is not possible for GHMSI to retain its surplus at the 1,000% to 1,300% RBC-ACL level required by Maryland while also reducing surplus to 721% RBC-ACL. By complying with the order of one jurisdiction, GHMSI necessarily violates the other.

The DISB cannot assume that its order would supersede or override the Maryland order. GHMSI is a unique entity subject to intensive regulation in each of the three jurisdictions in which it operates. While its Congressional Charter provides that GHMSI's legal domicile is the District, GHMSI has far more business in Maryland and Virginia. GHMSI subscribers who have no contact whatsoever with the District of Columbia are affected by the Order to the same degree as subscribers who live there. In fact, the entire CareFirst holding company is affected. A full

[1] Highlighting the importance of the views of the other relevant jurisdictions, District of Columbia law provides that the Commissioner must also "consider the interests and needs of the jurisdictions in the corporation's service area." D.C. Code § 31-3506.01(e).

40% of GHMSI's surplus belongs to BlueChoice and protects insured BlueChoice members, nearly 88% of whom reside in Maryland and Virginia. CFMI owns 50% of BlueChoice and, when BlueChoice surplus is reduced, CFMI's own surplus is reduced even though CFMI sells no insurance in the District at all. One jurisdiction cannot simply "go it alone" and ignore the other.

The MIEAA itself requires the Commissioner to actively avoid such a result. "Coordination" means more than simply accepting, and then disregarding, written testimony. *See 1618 Twenty-First St. Tenants' Ass'n v. Phillips Collection*, 829 A.2d 201, 204 (D.C. 2003) (observing that statutory terms must "be construed according to their ordinary sense and with the meaning commonly attributed to them"). Coordination "envisions more than unilateral action." *MAMSI Life & Health Ins. Co. v. Wu*, 411 Md. 166, 203 n.10 (Md. 2008). It requires parties "to harmonize, work together, or bring into a common action, effort or condition," *Network Commerce, Inc. v. Microsoft Corp.*, 260 F. Supp. 2d 1034, 1041 (D. Wash. 2003), *aff'd* 422 F.3d 1353 (Fed. Cir. 2005)—that is, to "work together properly and well" in order "to cause (two or more things) to not conflict with or contradict each other." *Merriam-Webster Online Dictionary*, *available at* http://www.merriam-webster.com/dictionary/coordinate.

In other words, the MIEAA requires the Commissioner to work directly with Maryland and Virginia to ensure that his decision neither conflicts with nor contradicts the decisions issued by those jurisdictions. That coordination has not taken place.

B. Because of the Lack of Coordination and Resulting Conflicting Orders, the Order is Arbitrary and Capricious, and Violates GHMSI's Constitutional Rights.

Because there was no active coordination in this proceeding, GHMSI is now subject to directly conflicting obligations from its regulators. GHMSI cannot comply with the Order's requirement that surplus be limited to 721% RBC-ACL, while satisfying the Maryland Order's

requirement that surplus be maintained within 1,000% to 1,300% RBC-ACL. As a result of this failure to coordinate, the Order is unreasonable and unenforceable, and therefore arbitrary and capricious under the Administrative Procedure Act. *See Alliance for Cannabis Therapeutics* v. *Drug Enforcement Admin.*, 930 F.2d 936, 940 (D.C. Cir. 1991) (concluding that "[i]mpossible requirements imposed by an agency are perforce unreasonable," and subject to reversal on the grounds that they are arbitrary and capricious).

Moreover, this conflict infringes GHMSI's rights under the United States Constitution. An "inconsistency that makes it literally impossible to adhere to one state's requirements without breaching another's" violates the Due Process Clause. *Lake Carriers' Ass'n* v. *EPA*, 652 F.3d 1, 8 (D.C. Cir. 2011); *accord United States* v. *Dexter*, 165 F.3d 1120, 1125 (7th Cir. 1999). As Justice Black put it, "the very enactment of two statutes side by side, one encouraging" a particular action "and another making it a crime" to engage in that action, "would be contrary to the very idea of government by law. It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow, and would thus violate one of the first principles of due process." *N. Carolina* v. *Pearce*, 395 U.S. 711, 738-39 (1969) (Black, J., concurring in part and dissenting in part).

Such a conflict also violates the Commerce Clause, which "invalidate[s] statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations." *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987); *accord Healy* v. *Beer Institute*, 491 U.S. 324, 336-337 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 585 (1986).[2] The Order is particularly subject to Commerce Clause scrutiny because

[2] While some state regulation of insurance is protected by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, that protection does not apply here. McCarran-Ferguson authorizes states to regulate certain aspects of the insurance market and thus cuts back on regulated entities' ability to challenge insurance regulation under the dormant Commerce Clause. However, the statute's authorization is a limited one: It

of its extraterritorial effects upon subscribers who have no contact with the District. "A statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336. The "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.*; *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 645 (6th Cir. 2010) ("[A] state regulation that controls extraterritorial conduct is per se invalid."); *Pharm. Research & Mfrs. of Am. v. District of Columbia*, 406 F. Supp. 2d 56, 71 (D.D.C. 2005) (holding provision of D.C. Code as applied to certain sales unconstitutional because it had a *per se* invalid extraterritorial reach in violation of the Commerce Clause).

The Order necessarily regulates conduct in Maryland and Virginia. As discussed in Section I, GHMSI has only one surplus that is available for satisfaction of all GHMSI obligations, and a forced reduction of surplus affects all GHMSI and BlueChoice subscribers. For this reason, and because of the lack of coordination and the direct conflict that has resulted, the Order is arbitrary and capricious under District law and constitutionally defective.

C. The Commissioner Should Hold Joint Proceedings with Maryland and Virginia to Resolve the Conflicting Orders.

GHMSI's surplus level and the attribution of GHMSI's surplus raise issues that can only be resolved through agreement between the affected jurisdictions. It is for that reason that the MIEAA expressly requires the Commissioner to coordinate his review. D.C. Code § 31-3506(e). Along with this Motion, GHMSI is filing requests with the Insurance Commissioners of

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forecloses dormant Commerce Clause challenges when the state law regulates risk-spreading or insurance company practices integral to the insurer-insured policy relationship. *See Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982); *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979). The MIEAA, and the Commissioner's Order under the MIEAA, fall into neither category.

Maryland and Virginia, asking each to participate in a coordinated proceeding to determine GHMSI's proper surplus level and resolve competing attribution claims. The Commissioner should withdraw the Order until that proceeding is complete and the conflicts have been resolved.

II. The Commissioner Failed to Conduct an Analysis of Whether the Surplus "Attributable to the District" was Excessive.

The Order should be reconsidered because it does not apply the analysis required by MIEAA. The MIEAA instructs the Commissioner to "review the *portion of the surplus* of the corporation that is *attributable to the District*" and determine whether that portion is excessive. D.C. Code § 31-3506(e) (emphasis added). Only after making that specific determination can the agency "order the corporation to submit a plan for dedication of the excess to community health reinvestment in a fair and equitable manner." *Id.* § 31-3506(g)(1). The Order makes no such finding, but instead finds that the "appropriate level" for GHMSI's *entire* surplus is 721% RBC-ACL, and that GHMSI's surplus is excessive because the *entire* surplus as of December 31, 2011 stood at 998% RBC-ACL. Order at 49-50. This is not the analysis required by MIEAA.

MIEAA's requirement that the Commissioner must analyze the surplus caused only by one jurisdiction is necessarily different from the review of a company's overall surplus. A company's overall surplus is not limited by jurisdiction, but is affected by the conditions in every market in which the company operates. To perform the analysis that MIEAA requires, the Commissioner cannot focus on GHMSI as a whole, but must look at both the surplus *level* and the surplus *need* that is specific to the District. Different markets have different medical cost trends and medical claims ratios, benefit mandates, and rates of premium growth, among other things. The Commissioner cannot determine whether the surplus attributable to the District is

excessive until it is compared to the specific surplus *requirements* for business in the District. This review is very different from an assessment of GHMSI's overall surplus needs.

GHMSI did not object to the Commissioner's initial review of GHMSI's total surplus, because it is not, in fact, excessive, and because the surplus needs of the District alone will necessarily be *higher* than the surplus needs of GHMSI as a whole. As GHMSI warned during the first review under MIEAA, "[i]f one were . . . to divine a way to calculate an RBC for a subset of GHMSI's total service area, the RBC 'attributable to D.C.' by necessity would be higher—perhaps dramatically higher—than the optimal RBC range Milliman has calculated for GHMSI as a whole." GHMSI Pre-Hearing Br. for 2008 Surplus Review, Attachment E at 27 n.27.

This higher RBC requirement is true for several reasons. First, the business conducted by GHMSI in the District is much smaller than GHMSI's entire book of business, and therefore inherently more volatile. A higher RBC level is required to address such volatility: "The ratio of reserves an insurer needs to ensure financial soundness generally rises in inverse proportion to the company's size; the smaller the subscriber base over which to spread risk, the greater the reserves needed to guard against an unexpected medical or financial catastrophe." *Id.* Pennsylvania reached the same conclusion when it determined that its smaller non-profit health plans had higher RBC requirements than larger plans.[3] Second, surplus requirements turn on risk, and GHMSI faces risks in the District that are different than it faces in Maryland and

[3] Opinion and Order dated February 9, 2005, filed in *In Re: Applications of Capital BlueCross, Highmark, Inc., Hospital Service Ass'n of Northeastern Pa. and Independence Blue Cross for Approval of Reserves and Surplus,* Misc. Docket No. MS05-02-006 (Pa. Dept. of Ins.), *available at* http://www.portal.state.pa.us/portal/server.pt/community/industry_activity/9276/blues_reserve_and_surplus_determination/623159

Virginia, such as a smaller market, a different health benefit exchange, and the lack of any off-exchange sales.

Unless and until the DISB makes the finding required by statute, it lacks the statutory authority to order a remedial plan. Under the MIEAA, the Commissioner "shall order the corporation to submit a plan for dedication of the excess to community health reinvestment" only ***if*** the Commissioner has found that "the surplus of the corporation that is attributable to the District is excessive." D.C. Code § 31-3506(f), (g)(1) (emphasis added). "An administrative agency is a creature of statute and may not act in excess of its statutory authority," and "[t]he purported exercise of jurisdiction beyond that conferred upon the agency by the legislature is ultra vires and a nullity." *District of Columbia Office of Tax & Revenue* v. *Shuman*, 82 A.3d 58, 67 (D.C. 2013) (citations omitted). The Commissioner has power to order a remedial plan if and only if he finds that the portion of the surplus attributable to the District is excessive. The Order does not make that finding – it finds only that the entire surplus is excessive.

Without a specific analysis of the surplus needs attributable to the District relative to the actual size of the surplus attributable to the District, it is also factually impossible to implement any remedial plan. Even if 721% RBC-ACL were determined to be the correct surplus target applicable to GHMSI's entire surplus, it is impossible to know how much surplus would need to be reduced or distributed to achieve that target without a calculation of the specific RBC level for the District business, a calculation the Order does not make. If GHMSI's overall surplus were reduced by $56 million, as ordered by the DISB, GHMSI's *entire* surplus would not drop to 721% RBC-ACL, because the District's share is only a fraction of the whole. Does this mean that yet more surplus would need to be bled off until an overall surplus level of 721% RBC-ACL is achieved? We think not – the $268 million difference between GHMSI's overall 2011 surplus

and a 721% target is larger than the $202 million in surplus attributed to the District in the Order. Yet, if a District specific surplus were calculated, and $56 million taken from this far smaller number, GHMSI's District specific surplus could be far lower than 721% RBC-ACL. The Commissioner could not reasonably seek further distributions or reductions based on GHMSI's entire surplus, when the DC-only surplus already has been reduced. This is why the MIEAA says what it does – that the Commissioner must specifically analyze the actual surplus level against the surplus requirements attributable to the District, not GHMSI's surplus as a whole.

III. The Order Fails to Determine How The Surplus Was Caused Over Time, and Fails To Coordinate the Attribution Analysis With Maryland and Virginia.

The Order's attribution of surplus is incorrect as a matter of law. As the Order acknowledges, the attribution of surplus requires a determination of how that surplus was caused. The word "attributable" means "due to, caused by, or generated by." Order at 53 (quoting *Electrolux Holdings, Inc.* v. *United States*, 491 F.3d 1327, 1330-31 (Fed. Cir. 2007)). "In other words, [t]he question to be answered is where did the [surplus] come from?" *Id.* (quoting *Benedek* v. *Commissioner*, 429 F.3d 41, 43 (2d Cir. 1970)) (quotation marks omitted). The Order does not attempt to answer this question, however. It apportions GHMSI's 2011 *business*, and fails to apportion the GHMSI's *surplus*. The Order relies almost exclusively on the 2011 premium filings; it ignores the fact that only *profits* (in the sense of excess income over costs) contribute to surplus, not raw premium charges; and it ignores the fact that surplus is built up over time and its source is not reflected in any one year financial statement.

As a result, the Order does not address any of the complexities that must be resolved in order to attribute surplus in the manner that MIEAA requires. Such an analysis must determine how GHMSI's surplus was built since the beginning of its operations. To do so, the analysis must address limitations in available records; the large portion of surplus generated by

investment income; how BlueChoice or other sources contributed to surplus; and many other considerations. That analysis has not been done and, as a result. the Order likely misappropriates surplus dollars generated in Maryland and Virginia for the benefit of District residents.

The attribution analysis required by MIEAA can only take place in coordination with Maryland and Virginia. Both Maryland and Virginia have expressed their interest in and concern with this proceeding, and with attribution in particular. The Maryland Commissioner expressed, in her written submission, a strong concern with the effort to attribute surplus under MIEAA, and her view that GHMSI's surplus could not be divided in the manner proposed in the Order.[4] Virginia explained in its submission that Virginia law requires the Virginia State Corporation Commission to consider the effect of the Order on Virginians, while attributing surplus based on residency of members.[5] Virginia has already begun the examination required under its statute, and has requested initial documents from GHMSI.

Neither Maryland nor Virginia is likely to accept the attribution of surplus chosen in the Order. There is no established financial methodology for attributing a carrier's surplus, since no such analysis has ever been required to be performed. The MIEAA thus requires the Commissioner to do something that is financially novel and untried – but it does so in a way that protects GHMSI from competing demands by requiring the Commissioner to *coordinate* his decision with Maryland and Virginia. D.C. Code § 31-3506(e). Without such coordination, the Commissioner would be asserting control over surplus likely to be claimed by another State. The Commissioner can only resolve this conflict by engaging in the coordination that MIEAA requires.

[4] *See* Statement of Commissioner Therese Goldsmith (June 18, 2014).

[5] *See* Statement of the Virginia State Corporation Commission's Bureau of Insurance (Sep. 29, 2014).

IV. The Order's Use of the 95% Confidence Level is Arbitrary and Capricious.

The Order's use of a 95% confidence level with respect to the 200% RBC-ACL benchmark is not supported, and the decision is arbitrary and capricious as a result. *Dickson* v. *Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995)[6]; *see also D.C. Appleseed Ctr. for Law & Justice, Inc.* v. *D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1216 (D.C. 2012). In fact, the Order provides no specific explanation as to why 95% is appropriate, or 98% is inappropriate, despite the APA's requirement that there must be a "rational connection between the facts found and the choice made." *Dickson*, 68 F.3d at 1407.

There is no support for any confidence level below 98%. Rector & Associates, the Commissioner's own expert consultant, testified that the 98% confidence level should be used, and the record is replete with similar expert conclusions. *See* Exhibit 12 to Pre-Hearing Br. (Milliman 2011 Report) at 13; Rector Report at 15; RSM McGladrey, Inc., *Maryland Insurance Administration Examination and Auditing: Surplus Evaluation Consulting Services Report: CareFirst of Maryland, Inc. and Group Hospitalization and Medical Services, Inc.*, May 29, 2012 ("McGladrey Report") at 21; Invotex, Group, *Report on: Surplus Evaluation Consulting Services*, Oct. 30, 2009 ("Invotex Report") at 53. Even DC Appleseed's own actuary endorsed the 98 percent confidence level. *See, e.g.*, *Letter from Mark Shaw to Walter Smith*, Jan. 18, 2013 at 4. The MIA, with which the DISB is obligated to coordinate in this proceeding, likewise endorsed 98 percent. *See* Exhibit 15 to Pre-Hearing Br. (MIA 2012 Consent Order).

The Order cites only a single data point for its 95 percent figure: the fact that Lewin used a 95% confidence level in a surplus analysis using its own proprietary model. Lewin, however,

[6] The D.C. Court of Appeals has said it is proper to "look to case law interpreting the federal APA" because "the DCAPA requirements as to notice and comment are closely analogous to the requirements of the Federal Administrative Procedure Act." *Andrews* v. *D.C. Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 769 n.11 (D.C. 2010) (citation omitted).

did not testify, did not provide any explanation regarding how its confidence level was incorporated into its model, used much more conservative assumptions within its model, and proposed a surplus target of 1,000% to 1,550% RBC-ACL, far above the levels proposed by Milliman or Rector. Lewin's use of 95% confidence in a different model with very conservative assumptions cannot support adoption of the 95% confidence level here, where far narrower assumptions have been drawn. *See The Washington Times*, 724 A.2d at 1216 (rejecting administrative conclusion that does not "flow rationally from" the record facts); *Phillips* v. *Astrue*, 413 F. App'x 878, 886 (7th Cir. 2010) (unpublished) (administrative judge's findings not supported by substantial evidence when he relied on the one "outlier" opinion in the record to deny a claimant benefits).

The 95% standard is inconsistent with the Order's own assessment of the risks GHMSI faces. The Order concludes that falling to 200% RBC-ACL would be catastrophic for GHMSI, that it would cause "extreme distress" in the D.C. market, that GHMSI would lose its Blue Cross membership, and that it would be nearly impossible for GHMSI to recover surplus once lost. Order at 24-26. And yet the Order adopts a confidence level that, by definition, gives GHMSI a 5% chance of falling to or below 200% RBC-ACL during the period of analysis. As this confidence level is applied on an ongoing basis, from year to year, GHMSI's surplus would be expected drop to or below 200% RBC-ACL *every two decades*. An Order that knowingly inflicts "extreme distress" on the regulated market once a generation is unreasonable on its face.

The Order also fails to articulate any basis for the selection of one confidence level over another. The Order provides no explanation why a 1 in 20 risk of failure is acceptable, or why 95% was a more appropriate level than 98% – the only confidence level supported by evidence. The Court of Appeals has already cautioned that it would not affirm "a truncated and conclusory

explanation, especially where, as here, the technical nature of the actuarial reports requires a far more detailed discussion of a decision in which even a small variance can implicate millions of dollars." *D.C. Appleseed*, 54 A.3d at 1219 (emphasis added). Other than its cursory assertion that GHMSI's expert may not have considered the MIEAA's requirements in selecting its proposed confidence level, *id.* at 27,[7] the Order is silent on all these key questions.

The DISB's silence is particularly troubling in light of the fact that the confidence level is a critical—perhaps the *most* critical—component of the larger surplus determination. The DISB's move from a 98% to a 95% confidence level single-handedly lowered GHMSI's surplus requirement by 159% RBC-ACL, more than *$153 million* in dollar terms.[8] Such a dramatic result cannot be accomplished by silence and *ipse dixit*.

While determination of the appropriate confidence level "ultimately is entrusted to the Commissioner's reasonable discretion," Order at 28, the Commissioner does not have *carte blanche* to adopt a standard for which there was no record support. Discretion must be informed and guided by competent evidence. *See Dunkwu* v. *Neville*, 575 A.2d 293, 294 (D.C. 1990). The Order ignores the competent evidence in the record and fails to explain why it is justified in doing so.

V. Use of a Single Target Point is Inconsistent with MIEAA's Requirement That GHMSI Should Retain Surplus Needed to Remain Financially Sound.

The Order's use of a single target point to determine whether surplus is excessive, rather than a reasonable range, is inconsistent with MIEAA's stated purpose of ensuring that GHMSI

[7] The Order's assertion that Milliman or Rector did not modify their confidence level on account of the MIEAA, Order at 27, does not support the selection of 95%, or any other level. In fact, it misunderstands the point of the Milliman and Rector analysis. Both Milliman and Rector assessed the level of surplus required for GHMSI to remain *financially sound*, a prime concern of the MIEAA. In arbitrarily selecting a confidence level below that recommended by his own expert, the Commissioner undermines the very purposes of MIEAA and poses a grave threat to the long-term viability of GHMSI.

[8] *Rector Review of Milliman Response to Order With Supplemental Information Requests* (Oct. 24, 2014).

retains surplus needed to remain financially sound. *See* Order at 46. The Commissioner's expressed concern that the upper bound of a range should not become the "target" is easily addressed in the same manner as in the Maryland Order. Through its rate filings and other planning, GHMSI can seek to achieve the mid-point of the range on an ongoing basis. However, GHMSI cannot achieve a specific surplus target with precision, and imposing a single target in this review will necessarily force GHMSI to retain surplus below the target level, thereby retaining less surplus than needed for financial soundness.

Surplus fluctuates from day to day based on factors outside of GHMSI's control, such as claim costs and investment returns. GHMSI cannot know exactly how much surplus it holds at any one time, until well after the fact (such as upon completion of its annual filings, months after the close of the year). Rector correctly observed in its report that the selection of a single RBC-ACL target number "implies a degree of precision that does not, in fact, exist." Rector Report at 12. As Rector explained:

> Given the numerous variables and judgments that are necessary to select the assumptions underlying the calculations, this implied level of precision is misleading. . . . Further, even if the target level could be determined precisely, it would be impractical for the DISB to require GHMSI to increase community health reinvestment expenditures, or to reduce expenditures in order to build surplus, merely because of relatively modest fluctuations in surplus that happen normally from year to year.

Rector Report at 12-13.

By definition, the selection of a single point, rather than a range, will require GHMSI to act inconsistently with the MIEAA. The Order defines a single point as the *sole* surplus level that is neither too high (thereby requiring community reinvestment) nor too low (underneath the level of surplus required for financial soundness). *See* Order at 46. But GHMSI cannot possibly maintain its surplus at this precise target, and therefore can only avoid holding too much surplus

by holding too little. GHMSI must aim for an RBC-ACL figure *under* the target selected by DISB to ensure that its constantly changing RBC-ACL will not exceed the legal maximum. The Commissioner's selection of a single target point necessarily forces GHMSI to maintain surplus below the level that is necessary to maintain the financial soundness of the company.

Such a result is contrary to the MIEAA, under which community health reinvestment is appropriate only when "consistent with financial soundness and efficiency." D.C. Code § 31-3505.01; *see also Comcast Corp.* v. *F.C.C.*, 579 F.3d 1, 10 (D.C. Cir. 2009) (holding that agency rules should be overturned where they "fail[] adequately to take account of" facts relevant to the market in which the regulated entities do business). The Commissioner's concern should be managed prospectively – utilizing appropriate surplus targets in rate filings and other planning. The purposes of the MIEAA are only met, however, if a reasonable range of surplus is used in this retrospective review.

CONCLUSION

For all of the reasons stated above, the Commissioner should grant GHMSI's motion for reconsideration and begin a coordinated proceeding with Maryland and Virginia.

Respectfully submitted,

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