

**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

DC APPLESEED'S REQUEST FOR EXPEDITED REMAND PROCEEDINGS

DC Appleseed Center for Law and Justice, Inc. ("Appleseed") respectfully requests that the Commissioner of the Department of Insurance, Securities, and Banking ("DISB") institute expedited proceedings concerning Group Hospitalization and Medical Services, Inc.'s ("GHMSI") obligations under the Medical Insurance Empowerment Amendment Act ("MIEAA") on remand from the D.C. Court of Appeals. Prompt action is necessary to fulfill the public interests memorialized in MIEAA and bring to a close the DISB's statutorily-mandated review of GHMSI's year-end 2011 surplus.

As detailed below, both the Court of Appeals' decision and MIEAA inform the scope and nature of the proceedings on remand. Among other things, MIEAA compels the Commissioner to expedite the procedure by which the Commissioner shall undertake his inquiry, and Appleseed urges the Commissioner to initiate the requisite proceedings expeditiously.

I. The Court of Appeals' Decision and MIEAA Dictate Expedited Proceedings on the Court's Remand.

After ten years of administrative proceedings and litigation, the D.C. Court of Appeals' August 29, 2019 decision affirmed in part, and vacated in part the Commissioner's determination of GHMSI's excess surplus as of year-end 2011.

Having vacated aspects of the Commissioner's existing surplus determination, the Court remanded the matter to the Commissioner for further proceedings with respect to: (1) coordination with GHMSI's insurance regulators in Virginia and Maryland, (2) the Commissioner's potentially erroneous calculation of the effect of GHMSI's projected equity-portfolio gains and losses on GHMSI's permissible surplus, (3) attribution of GHMSI's excess surplus to the District of Columbia, (4) Appleseed's requests for reimbursement of actuarial fees and for prejudgment interest, and (5) the appropriate form for reinvesting GHMSI's excess surplus in community health in the District. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec. & Banking*, 214 A.3d 978, 985–89, 992–96 (D.C. 2019). *See also Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 136 (D.D.C. 2018) (“[W]here an administrative agency has been ordered to reconsider or explain an earlier decision on remand . . . , the agency has an affirmative duty to respond to the specific issues remanded” (quotation omitted)). *Cf. Dilley v. Alexander*, 627 F.2d 407, 412 n.7 (D.C. Cir. 1980) (agency, on remand, “is without power to do anything which is contrary to either the letter of spirit of the mandate construed in the light of the opinion of the court deciding the case”) (quotation and alteration omitted)).

While an agency thus “retains some discretion to determine how” to conduct its remand proceedings, *Oceana*, 321 F. Supp. at 136 (quotation omitted), the agency's remand procedures remain subject to statutory requirements and the Court's mandate. *See generally Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 547 (1978) (explaining that

adequacy of agency’s procedure “turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes”); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 653–54 (1990) (applying the same standard to informal agency adjudications). Here, MIEAA directs that the Commissioner should (1) minimize delay in the proceedings, and (2) coordinate with the insurance regulators of Virginia and Maryland in response to the Court’s remand order.

A. MIEAA Requires the Commissioner to Proceed Expeditiously.

MIEAA requires the Commissioner to, at least once every three years, review GHMSI’s excess surplus and dedicate to community health reinvestment the excess surplus attributable to the District. *See* D.C. Code § 31-3506(e)–(g). Due to the prolonged administrative and judicial proceedings, the review of GHMSI’s excess surplus as of 2011—which began originally as a review of GHMSI’s year-end 2008 surplus—has continued into 2019. Fulfillment of MIEAA’s mandate through dedication of GHMSI’s excess surplus to community health reinvestment is long overdue. Indeed, the Court of Appeals expedited its review of the Commissioner’s initial decisions concerning both GHMSI’s year-end 2008 and year-end 2011 surpluses.

In light of MIEAA’s statutory deadline and public health purposes, the Commissioner should issue an expedited schedule for remand proceedings. As we speak, District citizens are being deprived of reinvestment in public health mandated by MIEAA. Prolonging the proceeding on remand would preserve the status quo and continue that unlawful deprivation. In such circumstances, remand proceedings should be completed “as expeditiously as possible.” *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 239 (D.D.C. 2011) (encouraging expedition where preserving status quo on remand would keep legal flaws in effect).

Expedition is especially appropriate in this proceeding because the parties have already had full and fair opportunities to make their respective arguments and develop the requisite factual record on GHMSI's year-end 2011 surplus. That existing factual record will be the basis of the remand proceedings and the Commissioner's determination on remand. Because the parties have already developed a fulsome administrative record and detailed arguments regarding the statutory consequences of that record over nearly a decade of proceedings, MIEAA's provisions for review of GHMSI's surplus again dictates that the Commissioner should minimize further delay.

B. The Court of Appeals' Decision Outlines the "Coordination" that MIEAA Requires Among GHMSI's Insurance Regulators on Remand.

The Court of Appeals explained that MIEAA's coordination requirement may include, but is not limited to, the Commissioner, on the public record, (1) inviting the insurance regulators of Virginia and Maryland to participate in a joint proceeding assessing GHMSI's surplus, (2) soliciting their on-record input, (3) considering the interest in uniform regulation of GHMSI, and (4) explaining the Commissioner's decisions that conflict with the input of Virginia and Maryland. *D.C. Appleseed*, 214 A.3d at 989.

Although "mere consultation" is insufficient to satisfy MIEAA's coordination requirement, MIEAA does not require unanimous agreement among the different regulators, *see id.* at 988–89, and neither Maryland nor Virginia may compel the outcome of a District agency procedure created by a District statute. Under GHMSI's congressional charter and the MIEAA, the Commissioner retains ultimate decisionmaking authority over GHMSI's year-end 2011 surplus.

II. Proposed Expedited Remand Proceeding Schedule.

In light of these directives from MIEAA and the Court, Appleseed proposes the following remand proceeding schedule:

- The Commissioner, in consultation with Virginia and Maryland state insurance regulators on the public record, shall issue a notice setting the date for a joint public hearing regarding the issues to be addressed on remand in light of the Court of Appeals' decision and the existing factual record.
- Appleseed, GHMSI, the respective Virginia and Maryland state insurance regulators, and any other interested party may submit a public statement to DISB 14 days prior to the joint hearing. Any pre-hearing statement shall be limited to 20 pages.
- The Commissioner shall jointly preside over the public hearing with the relevant Virginia and Maryland state insurance regulators, during which any interested party may make a public statement and respond to regulator questions, and address the positions expressed in any pre-hearing submission.
- Appleseed, GHMSI, the respective Virginia and Maryland state insurance regulators, and any other interested party may submit a responsive public statement 14 days after the joint hearing. Any post-hearing statement may include the party's proposed findings and conclusions regarding the remand issues and their effect on GHMSI's permissible year-end 2011 surplus, and shall be limited to 45 pages.
- The Commissioner shall issue a final decision on remand within 60 days after receiving any post-hearing statements.

The proposed schedule will ensure a timely and orderly remand proceeding that comports with MIEAA and the Court of Appeals' decision.

III. Conclusion

For the foregoing reasons, Appleeed respectfully requests that the Commissioner implement an expedited proceeding on remand from the Court of Appeals.

Respectfully submitted,



Marialuisa Gallozzi
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001

*Counsel for DC Appleeed Center for Law
and Justice, Inc.*

CERTIFICATE OF SERVICE

I certify that on this 18th day of November, 2019, I caused one copy of the foregoing to be sent by electronic mail to the following:

Adam Levi, Assistant General Counsel
D.C. Department of Insurance and
Securities Regulation
810 First Street, NE, Suite 701
Washington, D.C. 20002
Phone: 202-442-7759
adam.levi@dc.gov

Loren AliKhan
James McKay
Office of the Solicitor General
Office of the Attorney General for the
District of Columbia
441 4th Street, N.W., Suite 630
Washington, D.C. 20001
loren.alikhan@dc.gov
james.mckay@dc.gov

Lisa Hertzler Schertler
SCHERTLER & ONORATO, LLP
1101 Pennsylvania Ave., N.W.
Suite 1150
Washington, D.C. 20004
lschertler@schertlerlaw.com

Michelle S. Kallen
Office of the Attorney General of Virginia
202 North Ninth Street
Richmond, VA 23219
mkallen@oag.state.va.us

I also caused one copy of the foregoing to be sent by U.S. mail to the following:

Virginia Bureau of Insurance
P.O. Box 1157
Richmond, Virginia 23218-1157

Maryland Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

Maryland Insurance Administration
200 St. Paul Place, Suite 2700
Baltimore, MD 21202



Marialuisa Gallozzi