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August 10, 2017

The Honorable Stephen C. Taylor, Commissioner
D.C. Department of Insurance, Securities and Banking
810 First Street NE
Suite 701
Washington, D.C. 20002

Re: Review of Group Hospitalization and Medical Services, Inc.'s 2011 Surplus

Dear Commissioner Taylor:

Thank you for your continued efforts to resolve this long-running surplus review proceeding. We write concerning the Amended Proposed Consent Order attached to your August 3, 2017 order. *See* Order No. 14-MIE-26. While, as you know, we believe that under the governing statute the amount of the proposed spend-down of excess surplus in the amended order is too low (\$95 million), and the duration of the spend-down is too long (10 years), we appreciate that you have modified the initial Proposed Consent Order to meet some of our other concerns.

We write now for the limited purpose of urging you to make two changes to your Amended Proposed Consent Order, both of which we think are consistent with the spirit and intent of that Order. The first suggestion concerns whether you should effectively grant a stay of GHMSI's agreement to begin spending down its excess surplus in 2017. The second concerns the process by which you will ensure compliance with the consent order. We hope you will agree to make both our suggested changes.

1. GHMSI's Agreement to Begin Spending its Excess Surplus in 2017 Should Not be Stayed Pending Appeal

The Commissioner's Amended Proposed Consent Order provides that "Beginning in 2017" GHMSI will "provide funds for community health reinvestment in a total amount of at least \$9.5 million per year" and that "All funding obligations for a particular year shall be met by December 31st of that year." Amended Proposed Consent Order, pp. 3, 4. However, the Amended Proposed Order also retains a provision from GHMSI's initial proposed order stating that "all obligations of GHMSI under this Consent Order will be stayed until all appeals or legal challenges are final." *Id.* at 7. If this latter provision is retained, it will amount to the Commissioner granting a stay of GHMSI's agreement to spend \$9.5 million starting this year. In our view, there is no justification for such a stay, under either the Medical Insurance Empowerment Amendment Act of 2008 ("MIEAA"), the governing stay criteria, or the DISB's earlier stay ruling in this proceeding.

We begin with the fact that the District has pressing and unmet community health needs. These needs are documented, among other places, in reports by the D.C. Department of Health and the Urban Institute.¹ Both GHMSI's Charter and MIEAA require that GHMSI participate in the amelioration of those needs, including by the spend-down of GHMSI's excess surplus. Indeed, a key purpose of MIEAA was to ensure that GHMSI would use its excess surplus to address those needs.

Congress originally chartered GHMSI in 1939 as a "charitable and benevolent institution," Pub. L. No. 76-395 § 8, 53 Stat. 1412, 1414 (1939), to provide "health care services and medical insurance," *D.C. Appleseed Ctr. for Law & Justice, Inc. D.C. Dep't of Insurance, Securities & Banking*, 54 A.3d 1188, 1192 (D.C. 2012). In passing MIEAA, the D.C. Council was concerned with, among other things, a series of major health issues in the District. See, e.g., D.C. Council, Report on Bill 17-934, the "Medical Insurance Empowerment Amendment Act of 2008," at 1–2, 8–9 (Oct. 7, 2008). Recognizing GHMSI's important role in ameliorating the District's unmet health needs, the D.C. Council, through MIEAA, sought "to provide a framework to ensure that nonprofit hospital and medical services corporations pursue their public health mission." *D.C. Appleseed*, 54 A.3d at 1201 (quoting Report on Bill 17-934 at 2). In short, the D.C. Council made clear the importance of GHMSI's excess surplus to the District's critical unmet health needs. Any delay in GHMSI's obligations under the proposed Amended Consent Order thus undermines the policies under which GHMSI operates in the District, and which the D.C. Council enacted into law through MIEAA.

In our view, the delay in this proceeding has already been unreasonable. To further delay implementation of GHMSI's obligations under MIEAA simply because an appeal is pending could be justified only if GHMSI could otherwise meet the criteria for a stay pending appeal. But it clearly cannot do so.

As the Acting Commissioner pointed out when he denied GHMSI's earlier stay of proceedings pending appeal, to justify a stay GHMSI would have to show (1) it is likely to succeed on the merits in its appeal, (2) it will be irreparably injured if the stay is denied, (3) no opposing parties would be harmed by a stay, and (4) the public interest favors a stay. March 2, 2015 Order, pp. 2-3 (citing *Salvaterra v. Ramirez*, 105 A.2d 1003, 1005 (D.C. 2014)). The Acting Commissioner held in his earlier decision that *none* of these four factors justified a stay; that is even truer now than it was when the earlier stay was denied.

First, and most important, if GHMSI accepts the Amended Proposed Consent Order, it will by definition not be seeking to overturn the requirement to spend \$9.5 million starting in 2017; rather, both GHMSI and the Commissioner will be arguing in *favor* of the company spending that amount pursuant to the Amended Order. It is therefore illogical to stay that requirement given that both GHMSI and the DISB expect to prevail on appeal and are seeking to uphold the requirement that the company spend the \$9.5 million this year.

It is true, of course, that DC Appleseed will be seeking on appeal a greater obligation than the \$9.5 million; but that fact cannot justify delaying the spending of *at least* the \$9.5 million. Nor can GHMSI claim any irreparable injury from such a payment, given that it has agreed to the payment.

It is also true that Virginia has intervened in the D.C. Court of Appeals proceeding, but Virginia can be expected to argue only that there are jurisdictional conflicts between Virginia and the District; yet as the Acting Commissioner already determined, those "purported jurisdictional

¹ See D.C. Dep't of Health, DC Healthy People 2020 Framework (April 2016); Lisa Dubay et al, Urban Inst., Health Needs in the Washington Metropolitan Area: Potential Initiatives for Investment by CareFirst (June 2016).

conflicts do not support a stay.” March 2, 2015 Order, p. 5. Rather, as he determined, the spend down plan applies only with regards to *the District’s* share of the excess surplus and, in any case, if there are conflicts between the jurisdictions, GHMSI’s charter “provides the Commissioner with primary authority and oversight over GHMSI.” *Id.*

Finally, as the Acting Commissioner previously determined, a stay here is not supported by the other applicable stay factors; as he said, a stay would here would harm District residents who would benefit from the surplus spend-down, and the “District has a strong public interest” in expeditious implementation of the spend down plan. March 2, 2015 Order, pp. 4-5.

In summary, there is no justification to further delay implementation of a spend down plan, particularly given the past delay, the fact that GHMSI has agreed to the plan, and the need to address pressing health needs in the District. We therefore urge the Commissioner to remove the stay provision from his Amended Proposed Consent Order.

2. The Commissioner Should Amend the Proposed Order to Ensure Compliance with the Spend Down Plan

The Amended Proposed Consent Order modifies the original Proposed Consent Order by “[r]equir[ing] that the community health reinvestment by GHMSI under the Order be paid from GHMSI’s previously accumulated surplus,” and “[c]larif[y]ing that the community health reinvestments by GHMSI under the Order are in addition to GHMSI’s continuing obligation under MIEAA to engage in community health reinvestment.”

DC Appleseed welcomes these changes. But we are concerned that the Amended Proposed Consent Order fails to specify how these obligations will be enforced. Rather, the Order says only that GHMSI’s “commitments” to meet these requirements are sufficient to “satisfy [its] obligations” under the statute. Amended Proposed Consent Order, p. 5. We believe that more is required to ensure that GHMSI in fact spends down the required excess surplus and meets its separate, continuing obligation to engage in community health reinvestment.

Accordingly, DC Appleseed urges the Commissioner to revise the Proposed Amended Consent Order to provide that (a) the Commissioner shall have oversight authority and responsibility to address these two issues for the duration of the consent order, and (b) GHMSI shall certify annually that it satisfied these two requirements, and demonstrate how it did so.

We appreciate you considering these two suggested modifications to your proposed consent order. We also appreciate your ongoing efforts to resolve these proceedings. Please let us know if you have any questions or if we can assist in any way.

Sincerely,



Walter Smith, Executive Director
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cc: The Honorable Muriel Bowser
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