**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**DEPARTMENT OF INSURANCE, SECURITIES AND BANKING**

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IN THE MATTER OF

Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.

Order No. 14-MIE-012

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**Brief for D.C. Appleseed Before the DEPARTMENT OF INSURANCE, SECURITIES AND BANKING on Remand from the August 29, 2019 Decision of the District of Columbia Court of Appeals**

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# **INTRODUCTION**

More than eleven years ago – in January 2009 – the D.C. Council passed the Medical Insurance Empowerment Amendment Act (“MIEAA” or “the Act”). The Act requires the Department of Insurance, Securities, and Banking (“DISB”) to hold Group Hospitalization and Medical Services, Inc. (“GHMSI”) accountable to its nonprofit mission and federal charter by ordering GHMSI to spend the maximum feasible amount of its surplus attributable to the District of Columbia to address health needs in the District. MIEAA codified DISB’s recognition of GHMSI’s federal charter obligation to engage in charitable activity for community benefit.[[1]](#footnote-1)

To this date – eleven years after the statute was enacted – *GHMSI has not yet been required to comply with the statute,* and GHMSI *has not yet spent a single dollar from its excessive, ever-increasing surplus on healthcare needs in the District.* The adverse effects on health care in the District due to GHMSI’s failure to adhere to the requirements of its charter have been compounded by the facts that (1) the District currently faces a public health emergency due to COVID-19 in which the healthcare needs of District residents are staggering; (2) the District government’s ability to meet those needs has been greatly reduced by the revenue shortfall the emergency has caused; and (3) GHMSI’s surplus has risen even more, to an all-time high.

On April 21, 2020, CareFirst announced that it had “earmarked an initial investment of $2 million to aid the immediate health, social and economic needs of our communities.” *CareFirst COVID-19 Response and Relief Request For Proposal*, CareFirst (Apr. 24, 2020), https://www.carefirst.com/community/rfp/coronavirus-response-and-relief.page. CareFirst is to be commended for doing so and for recognizing the “unprecedented strain on resources and capacity as a result of COVID-19” and the acute impact of COVID-19 on “disproportionately disadvantaged populations.” *Id.* D.C. Appleseed (“Appleseed”) agrees with CareFirst’s observation that “[t]he COVID-19 pandemic has highlighted the need for enhanced public health and social needs programming to support communities most impacted by the crisis.”[[2]](#footnote-2) *Id.*

During that earmarking process, CareFirst “engaged more than 60 organizations to understand the most critical needs arising from COVID-19.” *Id.* CareFirst indicates that it is, therefore, well positioned to direct funding to address community health needs by supporting “nonprofit 501(c)(3) organizations or public health entities working to provide relief to communities’ health, social, and economic needs that continue to arise during the COVID-19 pandemic.”[[3]](#footnote-3) *Id.* CareFirst is indeed well positioned to direct public funds toward health needs in the District – as the company’s own actuarial expert has indicated, as a result of the pandemic, CareFirst’s excess surplus has likely increased.[[4]](#footnote-4)

In these pressing circumstances, Appleseed respectfully urges the Commissioner to proceed on two simultaneous paths in order to (1) ensure the immediate expenditure of the funds definitively upheld by the Court of Appeals toward addressing needs created by the pandemic, which would now best serve MIEAA’s statutory purpose, while (2) allowing for a prompt resolution of the remaining issues related to additional funds. As set forth in the accompanying motion, Appleseed specifically asks that the Commissioner: (1) immediately order GHMSI to spend down the $51 million of excess surplus attributable to the District as determined by the DISB in December 2014 and affirmed by the D.C. Court of Appeals in August 2019; and (2) promptly address the five issues the Court remanded to the DISB in its August 2019 decision, in coordination with Maryland and Virginia to the extent required by the Court of Appeals.

# **BACKGROUND**

The long history of this case has been set forth in opinions by both the Commissioner and the Court of Appeals, and Appleseed does not repeat all of that history here. Instead, this brief focuses on the two urgent aspects of the current situation: (1) the $51 million in excess surplus that has been upheld by the Court of Appeals, which should be spent immediately on community health needs created by the pandemic, and (2) the five issues remanded by the Court to the DISB that should be promptly resolved. They are not unduly complicated and their resolution would make available at least an additional $250 million to address pressing community health needs.

The case for prompt action by the Commissioner on both the $51 million and on the five issues remanded by the Court is particularly compelling because GHMSI continues to refuse to acknowledge that its surplus is excessive; refuses to comply with the Commissioner’s determinations of statutory limits on that surplus; and has allowed its surplus to rise dramatically so that, at the end of 2019, it was at an all-time high*.* MIEAA requires GHMSI to “engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency.” D.C. Code § 31-3505.01. Moreover, there are critical health needs in the District that the DISB should address by ordering GHMSI to spend down excess surplus. In the current public health emergency, those needs have become even more urgent. And past delays in the DISB proceedings themselves have contributed significantly to the long overdue enforcement of GHMSI’s community health obligations, further supporting immediate action to require disbursement of the amount resolved and to resolve as soon as possible the five remaining issues that will determine the remaining amount to be disbursed.

## GHMSI’s Ever-Growing Excessive Surplus

Despite the D.C. Council’s passage of MIEAA eleven years ago, GHMSI has spent down *none* of its excess surplus to address the community health needs of the District as required by that statute. To the contrary, GHMSI has continuedto *increase* its surplus to an all-time high – well above the “efficient” level that MIEAA requires be maintained, as determined by the Commissioner in his December 2014 decision, and subsequently affirmed by the Court of Appeals.

In that December 2014 decision, the Commissioner calculated that GHMSI had excessive surplus of $268 million based on GHMSI’s own statistical model and concluded that 721% was the maximum risk-based capital (RBC) ratio that GHMSI was permitted. At that time, GHMSI’s RBC ratio was 998%, significantly in excess of that maximum, and its surplus was $963.5 million. Decision and Order at 1, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, No. 14-MIE-26 (Dep’t of Ins., Sec. & Banking, Dec. 30, 2014) [hereinafter 2014 Decision].

Several developments subsequent to the Commissioner’s December 2014 decision highlight GHMSI’s persistent failure to comply with MIEAA. First, as the Court of Appeals acknowledged, DISB’s regulations require GHMSI “to file an annual financial report with DISB detailing ‘the company’s surplus and examin[ing] *whether the company’s surplus is considered excessive under the [MIEAA*].” *D.C. Appleseed Center for Law and Justice, Inc. v. D.C. Department of Insurance, Securities and Banking*, 214 A.3d 978, 984 (D.C. 2019) (quoting D.C. Mun. Regs. tit. 26 § 4601.1 (2017)) (emphasis added). GHMSI’s surplus has risen further following the Commissioner’s 2014 decision: 883% in 2015, 851% in 2016, 1011% in 2017, 923% in 2018, and 1088% in 2019.[[5]](#footnote-5)

GHMSI thus grew its surplus during those years pursuant to calculations that ensured that the surplus was excessive under MIEAA. GHMSI’s agent, Milliman, Inc. continued to use its own – and not MIEAA’s – method for assessing surplus, so GHMSI continued to conclude that its ever-increasing surplus was permissible. For example, Milliman continued to apply its own 98% confidence level in assessing GHMSI’s requisite surplus. But the Commissioner had determined that MIEAA requires a 95% confidence level, which determination the Court of Appeals affirmed. *D.C. Appleseed,* 214 A.3d at 990–92. The 95% confidence level is now final.

Second, in his 2017 proposed settlement and consent order on GHMSI’s surplus, the Commissioner made clear that he considered the 721% RBC ratio established in the December 2014 decision *to be controlling*. *See* Decision and Order on GHMSI Motion to Approved Proposed Consent Order at 9, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, No. 14-MIE-26 (Dep’t of Ins., Sec. & Banking, Aug. 3, 2017). The Commissioner provided that if GHMSI’s RBC ratio fell below 721%, its obligation to spend down surplus would be suspended. Order and Terms of Consentat 3, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, No. 14-MIE-26 (Dep’t of Ins., Sec. & Banking, Aug. 3, 2017). But GHMSI has since increased its RBC ratio to 1088%.

Third, the Court of Appeals ***rejected*** ***all*** of GHMSI’s arguments challenging the appropriateness of the Commissioner’s 721% RBC ratio. As a result, while resolution of the issues now on remand before the Commissioner could reduce the permissible RBC ratio under MIEAA, that ratio cannot increase. Furthermore, because the Court rejected all of GHMSI’s arguments that could reduce the Commissioner’s determination that the company has an excess surplus of $51 million, it is now clear under the Court’s decision that GHMSI must spend down, at a minimum, that $51 million amount.

But GHMSI has not taken action to spend down the $51 million. Instead, as shown in the chart below, GHMSI has steadily increased its surplus from 2011 through the end of 2019. At year-end 2019, GHMSI’s surplus reached an all-time high of $1.44 billion, and its RBC ratio reached 1088%.

**GHMSI’s total adjusted capital (surplus) and risk-based capital (RBC) ratio, 2011-2019**



In short, to date neither MIEAA, nor the DISB’s rulings, nor the Court of Appeals’ decisions, has caused GHMSI to reduce its surplus to address community health needs of the District. Absent action by the Commissioner, MIEAA will be rendered a dead letter and GHMSI will continue largely to disregard its federal charter, with its nonprofit mission and charitable and benevolent purpose, to the great detriment of the District’s residents.

## The District’s Critical Health Needs

The D.C. Council’s purpose in enacting MIEAA was to require that GHMSI direct its excess surplus to its charitable purpose, i.e., to invest excess surplus in community health needs of the District. The Council determined in 2009 that District residents were facing a “wide variety” of “healthcare issues” and stated that the “primary motivation” for MIEAA was to have GHMSI use excess surplus to address those issues. Council of D.C. Comm. on Pub. Servs. & Consumer Affairs, B. 17-934, at 9 (2008); *D.C. Appleseed Center for Law and Justice, Inc. v. D.C. Department of Insurance, Securities and Banking*, 54 A.3d 1188, 1214 (D.C. 2012).

That purpose remains unfulfilled: GHMSI has steadily *increased*, not decreased,its excess surplus*.* Moreover, since MIEAA’s enactment, the District’s critical health needs have increased. As the Commissioner is aware, the COVID-19 pandemic has created a public health emergency. GHMSI can and should now use its excess surplus to address the health needs caused by this pandemic.

Indeed, as the Commissioner expressly noted in the December 30, 2014 decision, GHMSI’s own statistical model – which the Commissioner adopted to assess GHMSI’s permissible surplus – included a “catastrophic events risk factor” recognizing “the potential effect of events that are infrequent, severe, and unpredictable natural disasters (for example, pandemics . . . .”). 2014 Decision at 43.

GHMSI’s extraordinary, historically high excess surplus ensures that it can do much more than meet its obligations to subscribers during this pandemic. At long last, GHMSI should be brought into compliance with MIEAA and should be required to invest its significant excess surplus to help address the dire health care needs of the District community.

## Past Delays in DISB Proceedings

DISB’s eleven-year delay in fulfilling MIEAA’s mandates is due primarily to its failure to adjudicate GHMSI’s surplus promptly, and then its failure to comply with MIEAA when action was belatedly taken, including as follows:

* Following enactment of MIEAA in January 2009, the Commissioner held a hearing in September 2009 concerning compliance with the statute;
* It was more than a year later, in October 2010, before the Commissioner issued a decision determining that GHMSI held no excess surplus;
* Appleseed promptly appealed that decision, sought expedited review, and argued the appeal in June 2011. DISB did not participate in the argument, but simply asked that the Court summarily affirm the decision.
* In a lengthy September 2012 opinion, the Court reversed the Commissioner on two grounds: failure to apply MIEAA’s requirement that GHMSI commit the maximum feasible amount of its surplus to community health reinvestment, and failure to adequately explain the determination that GHMSI had no excess surplus. The Court also indicated that to comply with MIEAA’s timing requirement for surplus reviews, the Commissioner should act on that remand no later than October 2013.
* DISB did not comply with that three-year deadline (which began to run at the time of the initial surplus review in 2010). Instead, in December 2013, the Commissioner’s expert, Rector & Associates (Rector), issued a report concluding – as it had in the first proceeding – that GHMSI had no excess surplus.
* Appleseed then sought information from the Commissioner explaining Rector’s conclusion. In June 2014, the Commissioner held a hearing on that conclusion and received supporting analysis from GHMSI and its actuarial expert, as well as contrary analysis from Appleseed and its actuarial expert.
* In December 2014, the Commissioner issued a final opinion agreeing with Appleseed that GHMSI held excess surplus ($268 million) and finding that 21% of that excess ($56 million, later reduced to $51 million) should be committed to health reinvestment in the District. Appleseed, however, contended that both GHMSI’s excess surplus and the portion attributable to the District were much larger.
* The Commissioner ordered GHMSI to file a plan by March 2015 to spend down the excess surplus the Commissioner found attributable to the District. When GHMSI did not comply with this order, the Commissioner then took more than a year – until August 2016 – to issue a plan of his own, which required GHMSI to rebate the $51 million to its current subscribers.
* GHMSI then filed a motion for reconsideration of the August 2016 order. The Commissioner denied that motion, but not until February 2018. During that year-and-a-half delay, DISB staff and GHMSI – without Appleseed’s knowledge – agreed on a possible settlement that GHMSI had submitted to the Commissioner. When Appleseed demonstrated that the proposed settlement contained several terms out of compliance with MIEAA, the Commissioner submitted a revised settlement for GHMSI’s review; GHMSI rejected the revised settlement in September 2017. When DISB took no further action, Appleseed asked the D.C. Court of Appeals to issue a mandamus order requiring the Commissioner to end further delay by ruling on GHMSI’s long-pending motion for reconsideration. The Court issued a mandamus order in January 2018 requiring the Commissioner to act in February 2018, which he did – repeating the Commissioner’s earlier requirement that GHMSI rebate $51 million to subscribers as of August 2016.
* Appleseed appealed the Commissioner’s February 2018 order. The appeal was argued in April 2019, and the Court, working under an expedited schedule, issued an opinion just four months later, on August 29, 2019. The Court upheld the determination that GHMSI has a minimum excess surplus of $51 million, and it also identified five issues that remain to be addressed adequately by the Commissioner, which are necessary to determine the full amount of the excess surplus beyond the affirmed $51 million.
* On November 13, 2019, after the DISB failed to take action on the remand from the Court’s August 29 opinion, Appleseed filed a request with DISB, urging the Commissioner to act promptly in response to the Court’s decision and to issue a final order.
* On April 6, 2020, Appleseed and Councilmember Mary Cheh wrote a letter to the current DISB Commissioner, who was appointed on January 21, 2020, urging her to order the spend down by GHMSI of the $51 million and to address the five issues remanded by the Court.
* DISB has not yet taken action in response to the Court’s August 29, 2019 decision, but on February 27, 2020, the new Commissioner issued an order indicating that the case was before her on remand from the Court of Appeals. On April 6, 2020, she indicated that she would be responding to the Councilmember Cheh/Appleseed letter in the coming weeks.[[6]](#footnote-6)

# **DISCUSSION**

## The Commissioner Should Immediately Order GHMSI to Spend the $51 Million Affirmed by the Court of Appeals, and Promptly Resolve the Issues Remanded by the Court of Appeals to Determine GHMSI’s Additional Excess Surplus

Given the past delay, and the health crisis created by the coronavirus pandemic, it is urgent that the Commissioner act in two ways, as Appleseed indicated in its April 6 letter.

First, the Commissioner should immediately order the spending of $51 million in excess surplus, as determined by the Commissioner in December 2014. Because the Court of Appeals rejected all of GHMSI’s challenges to that determination, the $51 million determination is GHMSI’s minimum obligation and should be disbursed. The Commissioner should require that these funds prioritize spending on needs arising from the pandemic – potentially including forgiving or reducing premiums for all individual members or, as feasible, those at risk of losing coverage, and supporting frontline healthcare workers in their fight against the pandemic.

Second, the Commissioner should move promptly to resolve the five issues remanded by the Court of Appeals. These issues are relatively narrow. They entail the possibility of an additional $262.44 million or more (for a total of $313.44 million or more, based on interest running through June 2020) to be spent to address community health needs in the District. The Commissioner should resolve them as expeditiously as possible.

The Court of Appeals has directed the Commissioner to address: (1) the effect on GHMSI’s need for surplus of the risk posed by its portfolio investment; (2) the percentage of GHMSI’s excess surplus to be attributed to the District; (3) the request for prejudgment interest from GHMSI on the excess surplus owed to the District as of the end of 2011; (4) reimbursement of Appleseed’s actuarial fees; and (5) determination of an appropriate plan for “community health reinvestment” of GHMSI’s excess surplus.

Taken together, resolution of these issues consistent with MIEAA requires GHMSI to spend $313.44 million from its current $1.44 billion surplus. Spending down this amount will leave GHMSI with a surplus of $1.13 billion and an RBC ratio of 851%.

After addressing below the merits of the five remand issues, Appleseed then sets forth a proposed procedure for resolving the issues, taking into account the need to coordinate with Virginia and Maryland.

### The Effect of Equity Portfolio Risk on GHMSI’s Need For Surplus

#### The Court of Appeals’ Directive on Remand

As the Court stated, in determining GHMSI’s permissible surplus as of December 31, 2011, “the actuaries attempted to predict the range of possible future gains and losses” on GHMSI’s equity investments. *D.C. Appleseed*, 214 A.3d at 992. The purpose of the prediction was to assess the impact of such gains and losses on GHMSI’s projected revenues and thus on the level of surplus it needed to maintain to protect against potential losses to the portfolio, *i.e.*, before the surplus reached an excessive level that required additional surplus to be reinvested for community health. 2014 Decision at 31.

During the administrative proceedings, Appleseed objected that GHMSI’s expert “exaggerat[ed] the effect of potential equity portfolio losses,” thereby significantly overstating GHMSI’s need for surplus to cover such losses. *D.C. Appleseed*, 214 A.3d at 992. Nonetheless, DISB’s expert and the Commissioner “adopted [GHMSI’s] approach . . . without mentioning Appleseed’s objection.” The Court of Appeals has “remand[ed] this issue for the Commissioner to specifically address Appleseed’s objection.” *Id*.

Appleseed’s objection to GHMSI’s prediction is twofold. First, it contains significant errors in calculation, which the District’s Attorney General’s Office (“OAG”) and GHMSI have attempted to walk back or downplay. Second, those significant miscalculations produce a result that is inconsistent with the Commissioner’s own determination that MIEAA requires the use of “middle of the fairway” projections in assessing GHMSI’s surplus.

#### Correcting the Commissioner’s Calculation Error

The reason the Commissioner “exaggerat[ed] the effect of potential equity portfolio losses” was that he measured the risk of those losses not against GHMSI’s equity portfolio but against GHMSI’s projected nonFEP premium revenue of $3.038 billion. A129, A1588. The equity portfolio is only 16% of the size of GHMSI’s nonFEP premium revenue, as Milliman acknowledged. Group Hospitalization and Medical Services, Inc. Post-Hearing Brief, *In re Surplus Review & Determination for Group Hospitalization and Medical Services., Inc.* (Dep’t of Ins., Sec. & Banking, Nov. 7, 2014), Exhibit 12, at 16 (A1589) [hereinafter Milliman Rebuttal]. Thus, multiplying the percentage impact on the equity portfolio by the size of the nonFEP premium revenue—as Milliman did—grossly overstates the impact of that factor by a factor of more than 6 to 1. A1733. As a result, the Milliman model on which the Commissioner relied overstated the need for surplus to cover that risk to the same extent.

GHMSI initially denied that there was any mistake and then later argued that any mistake was insignificant.[[7]](#footnote-7) GHMSI’s counsel argued to the Court of Appeals that the expression of the shortfall as a percentage of nonFEP revenue was no more significant than expressing the amount of a recipe ingredient in cups versus teaspoons.[[8]](#footnote-8) That is colorful language, but as the calculations show, flatly wrong. Measuring in cups or in teaspoons would be consequential indeed if the recipe did not account for the large difference between the two, and it was not accounted for here.

To correct the error, Appleseed’s actuarial expert adopted Milliman’s probability distribution for equities as closely as possible, but adjusted its percentage deviations to account for the 6-to-1 mismatch between the value of equities and the size of nonFEP premium revenue. D.C. Appleseed’s Motion for Reconsideration, *In re Surplus Review & Determination for Group Hospitalization and Medical Services., Inc.* (Dep’t of Ins., Sec. & Banking, Jan. 9, 2015) app. Mark Shaw Statement at 10 [hereinafter Shaw Statement]. Re-running the model to account for downside risk to the projected equity return, which was calculated to be 7% per year, produces a much smaller need for additional surplus and in turn reduces the needed RBC ratio from the Commissioner’s 721% figure to 615% RBC. Shaw Statement at 12. This reduction in surplus need in turn increases GHMSI’s *excess* surplus by a further $102.3 million. Adding this to the excess surplus found by the Commissioner increases the excess surplus from $267.6 million to $369.9 million.

#### The Further Adjustment Needed to Correct for the Understated Projected Return to Equities

In addition to overstating the projected loss to the equities comprising a portion of GHMSI’s holdings, Milliman understated the projected return to the entire investment portfolio. One further adjustment needs to be made to correct this error. Milliman projected that the total return to GHMSI’s investment portfolio for the 2012-2014 period would be 3.75%, and then used its model to estimate the downside risk to this projected return. But the record shows that Milliman understated the projected return to the portfolio – and to that same extent, therefore, overstated the needed surplus.

Milliman based its expected return to the investment portfolio by assuming that equities would return an average of 7% annually for the three-year period from 2012 to 2014 and that GHMSI’s remaining assets would return 3.5%, for a blended total rate of 3.75%. Milliman also assumed that equities represented 16% of the portfolio; accordingly, other assets represented 84%. Milliman Rebuttal at 17 (A1589).

But Milliman’s projected return calculation across the whole portfolio is incorrect: Milliman’s own figures demonstrate that the projected return to the investment portfolio was 4.06%, not 3.75%. A portfolio that is composed of 16% equities earning 7%, along with 84% other assets earning 3.5%, is earning an expected return of 4.06% (that is, (0.16 ✕ 7%) + (0.84 ✕ 3.5%) = 4.06%). Shaw Statement at 10. Applied to a portfolio of $1.23 billion at year-end 2011, earning 4.16% rather than 3.75% means that GHMSI would earn $3.8 million per year more than Milliman assumed – resulting in “a total investment return understatement of $11.4 million due only to Milliman’s own arithmetic error.” *Id.*

Thus, permissible surplus at the end of 2011 was a further $11.4 million lower than the Commissioner projected, and GHMSI’s excess surplus was accordingly higher by that same $11.4 million. This $11.4 million error, when added to the more significant error produced by the overstatement of equity risk due to the misuse of the probability distribution in the statistical model, increases GHMSI’s total excess surplus from $369.9 million to $381.3 million.

#### The Foundational Error in the Commissioner’s Approach

The calculation errors described above compound a foundational error in the Milliman analysis on which the Commissioner relied. Put simply, the methodology employed by the Commissioner did not follow his own regulatory standards for assessing the equity portfolio risk and GHMSI’s need for surplus. As a result, the Commissioner’s methodology significantly overstated the downside risk to GHMSI’s projected gains on its investment portfolio, and overstated GHMSI’s need for surplus.

*The legal standard under MIEAA.* In the December 30, 2014 Decision, the Commissioner appropriately determined that MIEAA requires review of GHMSI’s permissible surplus based on “reasonable ‘middle-of-the-fairway’ projections,” not “highly attenuated risks,” 2014 Decision at 21. Further, the Commissioner decided that the projections should be “based on relevant historical experience and reasonable projections for how future experience may deviate from historical experience.” *Id.* at 30. The analysis that the Commissioner relied on to assess the risk to GHMSI’s equity portfolio, however, did not follow these requirements.

*Milliman’s projected rate of return*. At the outset, GHMSI’s expert, Milliman, considered historical returns of Standard and Poor’s (S&P) 500 Index from 1950 to 2011 to project that GHMSI’s equity portfolio would return an average of 7% per year for the three-year period 2012-2014. A1587. If each year’s growth was at this average, GHMSI’s portfolio would have increased by $97,537,508 (annual growth at 7% for three years would produce compounded growth of 22.5%).

As further explained below, Milliman used a probability distribution that concluded, in the face of this historical data, that the most likely return on equities for the 2012-2014 period would be only $6.1 million, or $91.4 million less than the $97 million return Milliman had projected for this time period.

*Milliman’s probability distribution*. Milliman reached this result by employing in its statistical model a probability distribution reflecting “the potential impact of a deviation from the assumed 7.0 % [annual] underlying rate of return on equities, due to fluctuation in market values during the projection period [2012-2014].” A1587. In that probability distribution, the deviation with the largest probability was a 29% shortfall totaling $91.4 million; in other words, the most likely deviation from the $97 million expected gain on the equity portfolio was a shortfall equivalent to -3% “of NonFEP Insured Premium.” A1588. Owing again to the 6-1 mismatch between the size of GHMSI’s equity portfolio and the projected size of its nonFEP premium revenue, Milliman’s statistical model in effect concluded that the most likely equity portfolio gain on an average annual basis would be barely more than 1% – even though, as the Commissioner noted, the average annual gain over the previous 50 years had been 7.3%, and even though Milliman projected that the actual gain would be 7%.

The Commissioner’s expert, Rector & Associates, Inc., agreed with this approach, as did the Commissioner. They adopted Milliman’s probability distribution, finding that “while equity values have increased at an average rate of 7.3% over the last 50 years, there has been significant volatility around this average.” 2014 Decision at 37 (citing Rector Third Scheduling Order at 5-6). Rector found, and the Commissioner agreed, that Milliman’s probability distribution reasonably reflected the “potential for deviation and variation” from the 7% annual return assumed in Milliman’s pro forma projection for equity return during 2012-2014. *Id*.

*Inconsistency with MIEAA*. The Commissioner’s adoption of this probability distribution not only involves a substantial mathematical miscalculation, but it is also inconsistent with the statutory standard articulated by the Commissioner. Under MIEAA, the probability distribution must reflect “middle-of-the-fairway” projections of how “future experience may deviate from historical experience.” As Appleseed showed in its motion for reconsideration of the Commissioner’s December 2014 Decision, the probability distribution used in the Milliman model did not reasonably reflect potential deviations from the 7% equity projection. D.C. Appleseed’s Motion for Reconsideration at 4–8, *In re Surplus Review & Determination for Group Hospitalization and Medical Services., Inc.* (Dep’t of Ins., Sec. & Banking, Jan. 9, 2015). Nowhere did Milliman, Rector, or the Commissioner offer any explanation of how or why the most likely future experience might deviate so drastically from historical experience.

In sum, the probability distribution on which the Commissioner relied assumed that GHMSI would most likely fall short by $91 million from its projected equity return and needed at least that amount of additional surplus to make up for the loss. Nothing in the record or the Commissioner’s stated standards justifies such an assumption. A correct evaluation of the equity portfolio factor alone increases GHMSI’s total excess surplus from $268 million to $381.3 million.

### Percentage of GHMSI’s Excessive Surplus to be Attributed to the District

#### The Court of Appeals’ Directive on Remand

As Appleseed explained before the Court of Appeals, the Commissioner did not follow his own principles when determining that just 21% of GHMSI’s excess surplus was attributable to the District of Columbia.

The Commissioner’s December 2014 Decision announced two principles for attributing excess surplus among the jurisdictions: (1) attribute premium revenue to the jurisdiction that was the situs of the contract giving rise to the revenue; and (2) assess the profitability of that revenue per jurisdiction in order to determine how much each jurisdiction contributed to excess surplus. 2014 Decision 52–53, 55–56.

The Court of Appeals agreed with Appleseed that the Commissioner did not explain adequately how he applied those principles in determining the amount of excess surplus to be attributed to the District as MIEAA requires. The Court held that “the Commissioner in this case has in a number of important aspects not adequately explained the approach the Commissioner took to apportioning surplus.” *D.C. Appleseed*, 214 A.3d at 995.

The Court identified three ways in which the Commissioner’s explanation for his decision to attribute just 21% of GHMSI’s excess surplus to the District was inadequate: (1) the Commissioner limited his analysis of the jurisdictions’ relative contributions to surplus based solely “on a snapshot of 2011 rather than an effort to analyze GHMSI’s surplus history and to determine the District’s contributions to that surplus over time”; (2) the Commissioner “addressed only to a very limited degree alleged differences among the District, Virginia, and Maryland with respect to the riskiness and profitability of GHMSI’s activities”; and (3) the Commissioner “took as dispositive” GHMSI’s attribution by jurisdiction of FEP premium revenue, even though that treatment “has varied over time” (shifting from situs to residence) and even though relying on GHMSI’s treatment “led the Commissioner to treat FEP policies differently from nonFEP policies without providing a sufficient rationale for such differential treatment.” *Id.* The Court therefore “remand[ed] for further consideration of these issues.” *Id.*

#### The Three Errors Underlying the Commission’s Flawed Application of its Attribution Principles

The Court identified essentially the same problems with the Commissioner’s decision that Appleseed raised both in its reconsideration motion before the Commissioner and in its briefs before the Court of Appeals.

First, Appleseed demonstrated that basing the attribution determination solely on contributions to surplus in 2011, as the Commissioner did, would not fairly measure how much of the excess surplus as of the end of 2011 was attributable to each of the three jurisdictions. Rather, given that GHMSI’s maximum permissible surplus was 721% RBC, it was necessary to assess contributions to surplus beginning with the year when GHMSI’s surplus was last below 721% RBC in order to measure the source of the excess that led the surplus to rise to its impermissible level at the end of 2011 – i.e., to 998% RBC from 721% RBC. As Appleseed stated, “the last time that GHMSI’s year-end surplus was below a 721% RBC ratio was at 12/31/2002. It follows then that all of the excess surplus above 721% RBC was generated in the 9-year period from 2003 to 2011.” Shaw Statement at 4.

Second, while the Commissioner properly adjusted gross FEP and nonFEP revenue separately to account for the higher profitability of nonFEP revenue, he failed to adjust for differences in the profitability of nonFEP revenue among the three jurisdictions. Because the District’s nonFEP revenue was significantly more profitable than that in the other jurisdictions, this failure led to a significant understatement of excess surplus attributable to the District. Indeed, GHMSI’s financial statements make clear that while only about 30% of GHMSI nonFEP gross revenue was earned in the District during 2003-2011, more than 65% of GHMSI’s nonFEP *profit* derived from the District during that period. *Id*., Shaw Statement at 3. *See also* A1727-28. Failure to adjust for the difference in profitability resulted in an incorrect answer to the Commissioner’s own overriding attribution question: “where did the money come from?” 2014 Decision at 53 (quoting *Benedik v. Commissioner,* 429 F.2d 41, 43 (2d Cir. 1970)). Surplus comes from profits, but the Commissioner failed to account for how much profit came from the District.

Finally, Appleseed explained that during nearly the whole of the period 2003-2011, GHMSI reported FEP revenue consistent with the Commissioner’s principle that revenues be attributed among the jurisdictions based on the situs of the contract leading to the revenue. However, in 2010 and 2011, for the first time and without explanation, GHMSI began attributing FEP revenue based on the residence of subscribers. This caused GHMSI to attribute a portion of FEP revenue to Maryland that had previously been attributed to the situs of the FEP contract, the District of Columbia. And to that same extent, this change caused an understatement of premium revenue attributable to the District. Notwithstanding that this change contradicted the Commissioner’s explicit rejection of residence as the appropriate method for attributing premium revenue, 2014 Decision at 52–53, the Commissioner approved it on the ground that GHMSI “should be bound” by how it reported the revenue. *Id.* at 54 n.30. Appleseed argued that this view had it backward: GHMSI’s regulatory filings must comply with MIEAA; MIEAA is not subordinate to GHMSI’s choices in its regulatory filings, particularly when those choices reverse its longstanding prior practice. The Court of Appeals determined that the Commissioner’s acceptance of GHMSI’s regulatory filing is not a “sufficient rationale” for this inconsistent treatment of situs versus residence as between FEP and nonFEP. *D.C. Appleseed*, 214 A.3d at 995. Rather, GHMSI should be bound by the Commissioner’s assessment of MIEAA, i.e., that situs of the contract controls.

#### Correcting the Commissioner’s Attribution to Account for the Three Identified Errors

To correct for the prior Commissioner’s three attribution errors, the Commissioner should now: (1) take into account contributions to excess surplus from the years 2003 through 2011, not just from 2011; (2) measure profitability of nonFEP revenue during those years by jurisdiction to determine how much nonFEP revenues in each jurisdiction actually contributed to GHMSI’s surplus; and (3) attribute FEP revenue during those years among jurisdictions according to the situs of the contract. As Appleseed showed, these three changes – all consistent with the Commissioner’s announced principles and with the Court of Appeals’ analysis – result in an appropriate attribution of excess surplus to the District at the end of 2011 of 58.3%. A1732.[[9]](#footnote-9)

As previously explained, correcting the Commissioner’s errors on GHMSI’s equity portfolio increases GHMSI’s excess surplus at the end of 2011 to $381.3 million. Multiplying this total GHMSI excess surplus by the 58.3% attributable to the District means that the amount owed for community reinvestment for public health in the District (before interest) is $222.3 million.

When appropriate interest is added to this amount, *see infra* Section 3, the total amount is $313.44 million (based on interest running through June 2020).

### Prejudgment Interest on Excess Surplus That GHMSI Owed to the District as of End of 2011

#### The Court of Appeals’ Directive to Address the Request for Prejudgment Interest

In a July 19, 2017 letter to the Commissioner, Appleseed requested that the Commissioner order that interest be paid by GHMSI beginning at the end of 2011 on the amount of excess surplus finally determined to be owed at that date. Appleseed explained that, among other things, “there has been considerable delay in protecting the public’s interest in GHMSI’s excess surplus,” “GHMSI should not profit from this delay,” “interest earned on the excess surplus belongs to the public, not the company,” and the Commissioner has authority to award interest based on his broad discretion under MIEAA to “issue such orders as are necessary to enforce the purposes of the statute.” Letter from Walter Smith, Exec. Dir., D.C. Appleseed Ctr. for Law & Justice, to Hon. Stephen Taylor, Comm’r, Dep’t of Ins., Sec. & Banking (July 19, 2017) (citing D.C. Code Section 31-3506(i)).

The Court of Appeals noted that the Commissioner did not address this request. Nor had GHMSI or DISB disputed that the request was made or that the Commissioner had failed to address it. *D.C. Appleseed*, 214 A.3d at 995–96. The Court therefore directed the Commissioner to address the request on remand. *Id.*

#### Prejudgment Interest Is Appropriate

As Appleseed explained in its appellate brief, relevant local precedent supports imposing prejudgment interest. The Court of Appeals made clear in *Riggs Nat’l Bank v. District of Columbia*, that where, as here, money was owed at an earlier date but not paid, denying interest “would deny full compensation to [those entitled to the payment] while allowing the recalcitrant party to take advantage of his own wrong and become the richer for it.” 581 A.2d 1229, 1252 (D.C. 1990). Similarly, *D.C. Pub. Sch. v. D.C. Dep’t of Emp’t Servs*, 123 A.3d 947, 952 (D.C. 2015), upheld an agency determination to award prejudgment interest notwithstanding the lack of explicit statutory authority to do so.

In addition, Councilmember Cheh, the author of MIEAA, stated before the Court that “[a]s a matter of sound public policy, the Court should add interest to the award, as argued by [Appleseed].” Amicus Curiae Brief of D.C. Councilmember Mary M. Cheh at 8.

DISB did not respond to these contentions. GHMSI argued that “in absence of unequivocal prohibition of interest on statutory obligation,” the Court should look to the statutory “purpose in imposing the obligation.” GHMSI Intervenor Brief at 28 (citing *Rodgers v. United States*, 332 U.S. 371, 373–74 (1947)). Appleseed agrees. Three principles support imposing prejudgment interest here: (1) there is no prohibition against interest in MIEAA; (2) the Commissioner has broad authority to issue orders effectuating MIEAA’s purpose,[[10]](#footnote-10) which was to promptly commit GHMSI’s excess surplus to community health reinvestment; and (3) the interest that the company has earned on its excess surplus during the past eight years’ delay in implementation (2012-2019) should be used to serve community health needs of the District, not retained by GHMSI.

#### Calculating Prejudgment Interest

The interest on GHMSI’s excess surplus is properly determined with reference to its actual total returns earned on that excess during 2012-2019, including its return on equities (dividends plus net appreciation in the value) and interest on bonds. Computing the amount earned on the excess surplus during those years is consistent with the Court’s determination in *Riggs Bank* that the party improperly withholding an amount of money from those to whom it was owed should not retain the interest earned on that amount, but should transfer that earned interest to those improperly denied the money.

Based upon GHMSI’s publicly available annual statements detailing the company’s investment income and capital gains during 2012-2019 (including its 50% share of Blue Choice), GHMSI earned an average annual rate of return of 4.06% on its excess surplus during those years, for a cumulative gain of 41%. When that gain is added to the $222.3 million of excess surplus due the District at the end of 2011 based on the amount attributed to it, the total due the District is $313.44 million. This is the amount GHMSI should commit to community health reinvestment in the District.

### Reimbursement of Appleseed’s Actuarial Fees

#### The Court of Appeals’ Directive to Address the Request for Actuarial Fees

As with prejudgment interest, Appleseed requested recovery of its actuarial fees before the Commissioner. Again, the Commissioner did not address the issue; nor did DISB or GHMSI dispute that the request for recovery of fees was made or that the Commissioner did not address it. Accordingly, the Court of Appeals directed the Commissioner to address the issue on remand. *D.C. Appleseed*, 214 A.3d at 995­–96.

#### The Commissioner Should Grant Appleseed’s Request for Its Out-of-Pocket Actuarial Fees as a Payment Separate from Spend-Down Of Excess Surplus for Community Health Benefit

In its July 19, 2017 Letter to the Commissioner, Appleseed recognized that participants in litigation generally are responsible for their costs unless otherwise provided by statute, and that MIEAA does not expressly provide for a participant to recover fees. But MIEAA does authorize the Commissioner to award fees in appropriate circumstances, and the circumstances in this drawn-out administrative proceeding and parallel litigation justify recovery of Appleseed’s actuarial fees, which have benefited both the Commissioner’s review of GHMSI’s surplus and the public interest. Reimbursement of actuarial fees would be in addition to GHMSI’s spend-down of its excess surplus.

In this case, the Court of Appeals recognized the value and contribution of Appleseed’s role in enforcing MIEAA,[[11]](#footnote-11) and in multiple instances, the Commissioner has recognized the importance of Appleseed’s advocacy to implement MIEAA.[[12]](#footnote-12) In addition to this recognition of Appleseed’s peculiarly important third-party contribution, MIEAA contemplates GHMSI paying for independent expertise used by the Commissioner in reaching a determination.[[13]](#footnote-13)

Appleseed was able to sustain its longstanding involvement in developing and implementing MIEAA due in part to the significant pro bono contributions from two law firms—Covington & Burling and Harkins Cunningham—and from health economist Deborah Chollet at Mathematica Policy Research. However, it became clear early in the DISB proceedings that retaining an independent actuarial expert was critical to address the complexities of the statistical model central to the arguments of both GHMSI’s expert, Milliman, and the Commissioner’s expert, Rector.

Appleseed’s independent actuarial expert disagreed with many elements in Milliman’s and Rector’s use of the model, including their use of the confidence level and the premium growth estimates. And it was the Commissioner’s disagreement with Milliman and Rector on those two elements that caused him to conclude, contrary to GHMSI’s position, that GHMSI has $268 million of excess surplus. Although the Commissioner did not formally engage Appleseed’s expert, MIEAA expressly acknowledges that actuarial expertise independent of GHMSI may aid the Commissioner, and where it does, the Commissioner should have the discretion to impose the costs of that expertise on GHMSI.

The Commissioner should exercise that discretion here. The expertise of Appleseed’s independent actuarial expert has directly aided the Commissioner in resolving this case, and it will continue to do so in these remand proceedings. Indeed, key information needed to resolve both the equity portfolio and attribution issues now before the Commissioner comes solely from Appleseed’s expert. Although Milliman and Rector both determined that those issues were properly addressed, the Court of Appeals rejected those determinations.

It is important to the implementation of MIEAA to make it possible for a small nonprofit to pursue this matter before the Commission and in the Court in service to the public. Allowing recovery of at least part of its Appleseed’s out-of-pocket costs (which are not covered by pro bono) for that long-term effort is key to that role.

In addition to Appleseed’s prior showing that reimbursement of our actuarial fees is justified, the author of the statute, Councilmember Cheh, confirmed the importance of such compensation in her amicus brief to the Court of Appeals:

[I]t is important that GHMSI be required to compensate DC Appleseed for its out-of-pocket actuarial fees – something that the DISB Commissioner failed to address. DC Appleseed is a small nonprofit that works to improve the lives of District residents. Its work is invaluable to the D.C. Council working toward this common goal. In this David versus Goliath matter, DC Appleseed’s resources are far outmatched by GHMSI, and it has incurred out-of-pocket actuarial fees [of $432,000] which, for DC Appleseed, represent a significant amount of its relatively small budget.[[14]](#footnote-14)

We must encourage our public organizations to do this kind of work. Here, this means that apart from the exact dollar outcome of the GHMSI excess surplus issue, DC Appleseed should be reimbursed for the fees paid to the actuarial experts, who have provided vitally important input at every stage of years of the DISB proceedings. DISB had the discretion to award these fees but failed even to consider them, which was clear error on DISB’s part.

Cheh Amicus Brief at 8.

Viewed as a whole, the Commissioner should award reimbursement of the requested out-of-pocket fees. The requested amount is small relative to the large amount of excess surplus at issue. Because it is an amount separate from and in addition to GHMSI’s excess surplus, it will not diminish the amount reinvested in community health in the District, and it will help Appleseed to continue to monitor GHMSI’s activities in this proceeding as the company spends down its excess surplus.

### Determination of an Appropriate Plan for Community Health Reinvestment of GHMSI’s Excess Surplus

With respect to the ultimate use of GHMSI’s excess surplus, the Court of Appeals noted that the parties “extensively debated the Commissioner’s decision to order a rebate rather than some other type of community-health reinvestment.” *D.C. Appleseed*, 214 A.3d at 996. Because the Court was otherwise remanding the case for further proceedings, it left this debate for the Commissioner to address. *Id.*

MIEAA distinguishes between expenditures of excess surplus “that promote and safeguard the public health” and expenditures “that benefit current or future subscribers.” *See* D.C. Code §31-3501(1A). Both are within the definition of “community health reinvestment,” but each is distinct from the other. The real-life differences between the two are, of course, significant.

Appleseed explained to the Court of Appeals that the Commissioner’s rebate order failed to give sufficient consideration to the possibility of requiring that at least part of GHMSI’s excess surplus be directed to addressing community health needs in the District, rather than exclusively as rebates to current subscribers (Opening Brief at 40-44). In the present posture of the case – including GHMSI’s decade-long delay in spending down its excess surplus – rebating all or most of the excess to subscribers is simply not reasonable.

Several strong reasons support this view. First, the D.C. Council’s principal purpose in passing the Act was to use GHMSI’s excess surplus to address the “wide variety” of “healthcare issues” that cause District residents to “fight[] an uphill battle in elevating the quality and expectancy of their lives.” Committee on Public Serv. & Consumer Affairs, Report on Bill 17-934, MIEAA, at 9 (Oct. 17, 2008). The Commissioner adopted as his remedial standard that the remedy must “best serve []” this purpose of the Act (along with its “fair and equitable” requirement). A4139. Across-the-board rebates to individual current subscribers do not effectively serve this purpose, let alone (to quote the Commissioner’s standard) “best-serve” it.

Second, more than eight years after the surplus year at issue (2011), rebates to individual current subscribers would be unreasonable as a practical matter. MIEAA envisioned annual filings and prompt determinations of whether GHMSI surplus was excessive, so that, when the remedial choice was rebates to subscribers rather than to “support and promote the public health,” such rebates would be promptly returned to the subscribers that had funded the excess surplus. That is now impossible. Refunding rebates to current subscribers would inevitably provide windfalls to some subscribers that did not fund any of the excess surplus, and deny refunds to many that funded the excess but are no longer subscribers. Thus, rebates would be both impermissibly under-inclusive and impermissibly over-inclusive. They would constitute an economic transfer from past subscribers to current subscribers, and they would flout the statutory standard that the spend-down of excess surplus be “fair and equitable.” D.C. Code § 31-356(g).[[15]](#footnote-15)

In short, rebates to subscribers do not further the principal purpose of the Act, would contravene expectations with respect to the timetable for completing a surplus review, and would violate the “fair and equitable” standard. Rebates of 2011 excess surplus cannot possibly “best-serve” the purposes of the Act when the Act expressly provides an alternative remedy that squarely furthers the purposes of the Act and that does not entail the arbitrary, inequitable outcomes that would result from individual current subscriber rebates.

In its recent report entitled “CareFirst’s Investment in Public Health,” GHMSI focused on three priorities for public health investment in the District: improving maternal and child health; empowering the region’s safety net clinics and promoting the patient-centered medical home concept; and behavioral health. Appleseed supports these initiatives and would welcome a spend-down plan that considered them. At the same time, however, the spend-down plan approved by the Commissioner should also take into account the community health needs posed by the current coronavirus pandemic.

## Other Issues for a DISB Final Order

In addition to ordering immediate payment of the $51 million portion of excess surplus affirmed by the Court of Appeals, and resolving the five remand issues, the Commissioner should address several other matters in a final order. Appleseed addressed those issues is its earlier comments objecting to GHMSI’s proposed consent order. D.C. Appleseed’s Comments on GHMSI’s Proposed Consent Order for Resolving Proceedings Under the Medical Insurance Empowerment Amendment Act, *In re Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.*, No. 14-MIE-26 (Dep’t of Ins., Sec. & Banking, May 9, 2017).

Appleseed explained that any Final Order requiring community health reinvestment of GHMSI’s excess surplus should make clear: (1) the types of programs or initiatives that qualify as community health reinvestment; (2) who will make the determinations regarding how and when the excess surplus will be dedicated to those community health reinvestments; (3) the standards that will be followed in making those determinations; (4) the standards and measures for ensuring that GHMSI meets its obligations under MIEAA both to reinvest excess surplus and also to expend the maximum feasible amount each year for community health reinvestment; (5) a mechanism that ensures the company meets those obligations and (6) that DISB will have a role in systematically reviewing and certifying GHMSI’s compliance with the Order and with MIEAA.

These are important provisions that should be addressed in the Commissioner’s final order.

## Further Proceedings by the Commissioner

The above discussion presents Appleseed’s views concerning how the five remand issues should be resolved, and how a final spend-down order should be structured. Appleseed understands, of course, that GHMSI and representatives of Virginia or Maryland may have different perspectives. As noted in the Motion accompanying this brief, for the Commissioner to hear from these stakeholders and to appropriately coordinate with them, and, to implement the decision of the Court of Appeals, Appleseed proposes that the Commission enter an order directing the following steps:

* The Commissioner should immediately order GHMSI to spend down the $51 million of excess surplus.
* The Commissioner should permit GHMSI to respond to Appleseed’s Motion and accompanying brief no later than 20 days after the filing of this Motion and brief.
* The Commissioner should permit the Virginia and Maryland state insurance regulators and any other interested party to submit a pre-hearing public statement to DISB no later than 14 days after filing of this Motion and brief or GHMSI’s response, whichever is later. Any pre-hearing public statement should be limited to 20 pages.
* If GHMSI and/or Virginia and Maryland insurance regulators submit a response to Appleseed’s Motion and brief, the Commissioner should permit Appleseed to file a reply, no later than 14 days after the filing of the response.
* At the close of the parties’ opportunity to respond to this Motion and the accompanying brief and Appleseed’s opportunity to submit a reply, the Commissioner, in consultation with Virginia and Maryland state insurance regulators on the public record, should issue a notice for a joint public hearing (by teleconference, if need be) regarding the issues that remain to be addressed on remand in light of the Court of Appeals’ decision and the existing factual record. The Commissioner should schedule the joint public hearing to be no more than 14 days after the close of the parties’ opportunity to respond to this Motion and Appleseed’s opportunity to submit a reply.
* The Commissioner should 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 submissions.
* Appleseed, GHMSI, the Virginia and Maryland state insurance regulators, and any other interested party should be afforded the opportunity to submit a responsive public statement no later than 14 days after the joint hearing. Any post-hearing public 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 should be limited to 30 pages.
* The Commissioner should issue a final decision on remand within 30 days after receiving any post-hearing statements.

This schedule is proposed as a means to provide a timely and orderly remand proceeding that comports with MIEAA and the Court of Appeals’ decision.

# **CONCLUSION**

For the reasons stated, and pursuant to the Commissioner’s interpretation of MIEAA, we urge the Commissioner to enter an order that requires GHMSI to spend $51 million immediately from its excess surplus for community health reinvestment, and then order that GHMSI spend down, from its current surplus of $1.44 billion, the remaining $262.44 million of the $313.44 million in excess surplus attributable to the District to address community health needs in the District of Columbia. GHMSI should also be required, separately from its spend-down of excess surplus, to reimburse Appleseed for its out-of-pocket actuarial fees, given the significant contribution that Appleseed has made to these proceedings through that actuarial expert.

Respectfully submitted,

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|  | *Counsel for Appleseed* |

**CERTIFICATE OF SERVICE**

I certify that on this 14th day of May, 2020, 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 Hertzer 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 |



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Marialuisa Gallozzi

1. Lawrence H. Mirel, Report of the District of Columbia Department of Insurance, Securities, and Banking In the Matter of: Inquiry into the Charitable Obligations of GHMSI/CareFirst in the District of Columbia (May 15, 2005). One purpose of the Act was to make clear that GHMSI's obligation to engage in community benefit spending extends beyond its basic operations. The then-Attorney General of the District, Robert J. Spagnoletti reported to the City Administrator that GHMSI has a “legal obligation to *devote its entire operation* to serving, directly or indirectly, the charitable, public health purposes” created by its federal charter. Letter from Robert J. Spagnoletti, Attorney General, to Robert Bobb, City Administrator, at 1 (Aug. 4, 2005) (emphasis added). [↑](#footnote-ref-1)
2. The latest data, as of this filing, show that the COVID-19 pandemic has claimed the lives of 323 District residents. *Coronavirus Data*, Gov’t of D.C., https://coronavirus.dc.gov (last updated May 9, 2020). [↑](#footnote-ref-2)
3. This process raises two important questions that Appleseed urges DISB and CareFirst to consider. First, CareFirst has not stated *when* it will disburse the funds to those organizations – as CareFirst points out, the funds are desperately needed now. CareFirst has proposed a “request for proposal” (RFP) process that could be excessively burdensome and too prolonged to meet the organizations’ immediate need for resources. Although the RFP process could help ensure that the funds are directed to the greatest need, Appleseed urges CareFirst to expedite it. Second, and more importantly, as demonstrated below, $2 million is a small fraction of the sum that MIEAA obligates CareFirst to commit to community health needs. Appropriate calculations indicate that CareFirst is obligated to additionally devote more than $300 million of excess GHMSI surplus to address the pandemic and other health needs in the District, including the $51 million already affirmed by the D.C. Court of Appeals. [↑](#footnote-ref-3)
4. *See* Hayley Rogers, Charlie Mills & Matthew J. Kramer, Milliman, Inc., Estimating the impact of COVID-19 on healthcare costs in 2020 (Apr. 2020), https://milliman-cdn.azureedge.net/-/media/milliman/pdfs/articles/estimating-the-financial-impact-covid19.ashx; *see also* Amol S. Navathe and Ezekiel J. Emanuel, *How Health Insurers Can Be Heroes. Really.*, N.Y. Times (May 6, 2020), https://www.nytimes.com/2020/05/06/opinion/coronavirus-insurance.html. [↑](#footnote-ref-4)
5. The annual CareFirst reports from 2015 through 2018 of GHMSI’s surplus are available at: https://disb.dc.gov/node/315992. [↑](#footnote-ref-5)
6. Email from Karima Woods, Comm’r., Dep’t of Ins., Sec. and Banking, to Walter Smith, Exec. Dir., D.C. Appleseed Ctr. for Law & Justice (Apr. 6, 2020). [↑](#footnote-ref-6)
7. OAG likewise defended the error on behalf of DISB by arguing to the Court that the negative 3% deviation relied on by Milliman as the most likely downside risk to GHMSI’s nonFEP premium revenue was applied as a percentage of the projected 7%, meaning the most likely expected return was only .21% less than 7% (3% times 7% is .21%), leaving an expected return of 6.79% (7% minus .21%). But as further discussed below, that is flatly contradicted by the language of the probability distribution itself, which expressly states that the percentages in the probability distribution represent three-year “Surplus Change *as % of nonFEP Insured Premium*.” Milliman Rebuttal at 16 (A1588) (emphasis added). All of GHMSI’s probability distributions – including the equity portfolio factor – expressed surplus impacts in the same way, i.e., as a percentage of nonFEP revenue. *Id.* As a matter of math, 3% of nonFEP revenue is $91.4 million, not the much smaller $4.3 million that results from the OAG reading. [↑](#footnote-ref-7)
8. Brief for Intervenor Group Hospitalization and Medical Services, Inc., *D.C. Appleseed Center for Law and Justice, Inc. v. D.C. Department of Insurance, Securities and Banking*, 214 A.3d 978 (D.C. 2019) (No. 18-AA-178), http://www.dcappleseed.com/wp-content/uploads/2018/11/2018-10-31-GHMSI-Intervenor-Brief.pdf. [↑](#footnote-ref-8)
9. This attribution would have been higher (63.5%) had the excess surplus calculation been limited to GHMSI’s profit. However, given that the Commissioner determined that the attribution should include GHMSI’s interest in BlueChoice, 2014 Decision at 54 n.28, that interest is included in this calculation, resulting in a lower attribution (58.3%). A1732. [↑](#footnote-ref-9)
10. D.C. Code Section 31-3506(i). [↑](#footnote-ref-10)
11. As the Court of Appeals laid out in some detail in its first opinion, when Appleseed appealed DISB’s erroneous October 2010 determination that GHMSI has no excess surplus, that appeal came “at the end of Appleseed’s protracted pursuit of greater investment by GHMSI in accessible health care for D.C. residents.” D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep’t of Ins., Secs., & Banking, 54 A.3d 1188, 1210 (D.C. 2012). As the Court said, Appleseed has not “merely [sought] to enforce the requirements of the MIEAA, but has been a catalyst for and helped to create those requirements.” *Id.* As the Court also said, Appleseed has engaged in “dogged and concrete work . . . over a number of years to establish and enforce the legal structure created by the MIEAA so as to enhance the availability of affordable health care and promote public health in the District of Columbia." *Id.* at 1208. [↑](#footnote-ref-11)
12. As the Commissioner said in his December 2014 decision finding $268 million in excess surplus, “[t]he Commissioner acknowledges and appreciates Appleseed’s efforts in enhancing the record and contributing its analyses of GHMSI’s surplus.” 2014 Decision at 7 n.2. The Commissioner also explained that the permitted extensive involvement by Appleseed in the remand proceedings “in light of Appleseed’s longstanding involvement with and special interest in the MIEAA.” *Id.* at 7 n.2. [↑](#footnote-ref-12)
13. MIEAA provides that “[w]hen determining what surplus is attributable to the District and whether surplus is excessive, the Commissioner may retain . . . independent actuaries . . . the cost of which shall be borne by the corporation.” D.C. Code § 31-3506(h) (emphasis added). DISB regulations further clarify that “the Commissioner shall make a final determination regarding the corporation’s surplus . . . with the assistance of experts, if necessary,” and that “[t]he cost of any experts used by the Commissioner shall be borne by the corporation.” D.C. Mun. Regs. tit. 26A, § 4602.5 (emphasis added). MIEAA also allows the commissioner to “issue such orders as are necessary to enforce the purposes of” the act. D.C. Code § 31-3506(i). As the Commissioner has recognized, “MIEAA was enacted ‘to ensure that nonprofit hospital and medical service corporations pursue their public health mission.’” Decision and Order at 15, *In re* Surplus Review & Determination for Grp. Hospitalization & Med. Servs., Inc., No. 14-MIE-19 (D.C. Dep’t of Ins., Sec. & Banking, Aug. 30, 2016). [↑](#footnote-ref-13)
14. If the Commissioner approves reimbursing Appleseed for its out-of-pocket actuarial fees, Appleseed will submit invoices documenting these fees. [↑](#footnote-ref-14)
15. Further, it was not only the Council’s intention to use GHMSI’s excess surplus to address pressing community health needs, but to address the needs of *District residents*. Because the vast majority of GHMSI subscribers are not District residents, this means that returning the whole of the excess surplus exclusively as rebates to individual current GHMSI subscribers will not serve the Council’s purpose. [↑](#footnote-ref-15)