D.C. Appleseed's Comments on GHMSI's Proposed Consent Order For Resolving Proceedings Under The Medical Insurance Empowerment Amendment Act

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In response to the Commissioner's April 19 Order, D.C. Appleseed, which has participated in this surplus review since its inception, offers four comments for the Commissioner's consideration. Those four comments, further explained below, are:

1. The proposal by Group Hospitalization and Medical Services Inc. ("GHMSI") to settle this proceeding by paying $7.5 million per year for each of the next 10 years is inconsistent with the requirements of the Medical Insurance Empowerment Amendment Act ("MIEAA"), departs from the Commissioner's own interpretation of that statute, and is contrary to the public interest. D.C. Appleseed will argue in the Court of Appeals that under MIEAA, GHMSI's excess surplus attributable to the District is approximately $300 million. The Commissioner should not prejudge or attempt to cut off D.C. Appleseed's ability to win those arguments by approving a settlement that requires the company to pay $75 million over the next 10 years. Discounted to its present value, this payment stream is worth just $60 million.

2. Even if the proposed settlement were fair, which it is not, the Proposed Consent Order makes no provision for ensuring that GHMSI would pay $7.5 million per year from previously accumulated excess surplus, rather than the company simply meeting its separate obligation to spend the maximum feasible amount on community reinvestment each year from incoming revenue. The proposed order also fails to justify a 10-year payout period.

3. It was unfair, inappropriate, and contrary to the public interest for GHMSI to negotiate a proposed settlement of this case with staff from the Department of Insurance, Securities, and Banking (the "DISB") and the Office of the Attorney General (the "OAG"), but excluding D.C. Appleseed. As the Court of Appeals has made clear, this is a contested, adversarial proceeding in which D.C. Appleseed is entitled to participate, and in fact has long participated, seeking to protect the public interest. Given the nature of, and D.C. Appleseed's role in, the proceedings, negotiating a settlement without D.C. Appleseed was not only inappropriate, but will not advance the Proposed Consent Order's stated goal of promptly ending these proceedings: either the Commissioner will reject the proposed settlement, or he will approve it over our objection, and we will then appeal that approval to the Court of Appeals. Neither path advances the goal of ending the proceedings promptly in the public interest, which we support.

4. Finally, however, we strongly support the impulse that has led to the Proposed Consent Order, and agree completely with what we take to be GHMSI's purpose in proposing the order—bringing about a final settlement of these longstanding and long-delayed proceedings. We therefore urge the Commissioner to hold the Proposed Consent Order in abeyance, and direct GHMSI, DISB staff, the OAG, and D.C. Appleseed to engage in settlement negotiations and report to the Commissioner by a date certain either with an agreed final order, or with an indication that an agreed settlement cannot be reached. In the

latter event, the Commissioner should enter a final order leaving to the Court of Appeals the ultimate determination of these proceedings.

We are willing to work with the DISB and GHMSI to achieve a resolution that fulfills the statutory requirements of, and serves the public interest protected by, MIEAA.

A. Background

GHMSI was chartered by Congress as a "charitable and benevolent institution" that "shall not be conducted for profit, but shall be conducted for the benefit of [its] certificate holders." *D.C. Appleseed Ctr. for Law & Justice, Inc. v. Dist. of Columbia Dep't of Ins., Securities & Banking*, 54 A.3d 1188, 1192 (D.C. 2012) (quoting Pub. L. No. 76-395, §§ 3, 8, 53 Stat. 1412, 1413, 1414 (1939)). To ensure that GHMSI fulfills its federal charter obligation to invest in community health, MIEAA "authorize[s] the [DISB] Commissioner to determine whether a medical services corporation's surplus is 'excessive' and to order that any excess surplus be reinvested in the community," *id*. at 1194, and authorizes the DISB to undertake a surplus review for this purpose.

To put the surplus review discussed below in context, it is important to take two things into account. The first is GHMSI's mission to be a nonprofit organization that acts as a charitable and benevolent institution. The second is that the amount in dispute in this proceeding is "excess surplus." It is not the reserves set aside to pay claims accrued but not yet filed. *See* D.C. Code § 31-3509(a); *see also id.*, § 31-3501(11) ("surplus" is over and above reserves). And it is not the surplus that MIEAA allows to ensure financial soundness and efficiency. That surplus, and GHMSI's reserves, serve as a cushion to protect GHMSI and its certificate holders against a range of risks. Excess surplus is money above and beyond reserves and permitted surplus.

After the D.C. Court of Appeals reversed and remanded the DISB's initial 2008 surplus review, *see id*. at 1220, the DISB began the present review of GHMSI's 2011 surplus in October 2012. After a hearing and briefing, the DISB's then-Acting Commissioner issued an Order on December 30, 2014 finding GHMSI's $964 million surplus to be excessive by approximately $268 million. The DISB then found $56 million of the excess surplus attributable to the District of Columbia. As required by MIEAA, the Acting Commissioner ordered GHMSI to develop a plan for community reinvestment of this excess surplus and submit it by March 16, 2015.

On June 14, 2016, the DISB found that GHMSI had not complied with the DISB's order to file a plan. As required by MIEAA, the DISB restricted GHMSI's rate increases. The DISB then solicited public comment on a proposed plan and, on August 30, 2016, issued a Final Order directing the DISB to rebate the full amount of the excess surplus attributable to the District—revised to $51 million—to current GHMSI subscribers by December 28, 2016. This deadline for distribution of the DISB's excess surplus has now been extended three times, currently until June 27, 2017.

D.C. Appleseed petitioned the D.C. Court of Appeals for review of the August 30, 2016 Final Order on September 6, 2016. GHMSI thereafter filed a motion for reconsideration of the Final Order with the DISB, and also petitioned the D.C. Court of Appeals for review of the Final Order.

GHMSI also previously sued the DISB Commissioner in the federal district court *in Maryland* one month before the DISB issued the August 30, 2016 Final Order. *CareFirst, Inc., et al. v. Taylor*, No. 16-cv-2656, Dkt. No. 1 (D. Md. July 22, 2016). Relying on the congressional charter amendment precluding division of GHMSI's surplus "after 2011," Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. E, Tit. VII, § 747(a), 129 Stat. 2486 (2015), GHMSI attacked MIEAA as well as the Commissioner's orders pursuant to the statute. GHMSI sought a declaration that the MIEAA is preempted as well as a declaration that the DISB's orders regarding GHMSI's surplus violate various constitutional rights. *See CareFirst*, No. 16-cv-2656, Dkt. No. 1 at 27–28. On January 9, 2017, the district court denied GHMSI's motion for summary judgment that the charter amendment precludes distribution of GHMSI's 2011 surplus under MIEAA, and denied the DISB's requests to transfer the case to the District of Columbia. *See* Order, Dkt. No. 52 at 5–12.

On April 17, 2017, with the petitions for review in the D.C. Court of Appeals, GHMSI's motion for reconsideration, and GHMSI's non-charter claims before the Maryland federal district court still pending, GHMSI filed with the DISB Commissioner a motion to approve the Proposed Consent Order. *See* Motion at 1. Among other things, the Proposed Consent Order would:

1. Require GHMSI to provide, over ten years, $7.5 million per year for community health reinvestment through grants reviewed and issued by GHMSI. *See* Proposed Order, ¶ 12(a)(i).

2. Allow GHMSI to forego its yearly reinvestment obligation in any year following a year in which GHMSI's year-end surplus falls below 721% RBC. *See* Proposed Order, ¶ 12(a)(ii).

3. Allow GHMSI to treat any new community health reinvestment obligations imposed by the District on GHMSI as reinvestments satisfying the obligations of the Proposed Consent Order. *See* Proposed Order, ¶ 12(b).

4. Vacate the DISB's August 30, 2016 Final Order and June 2016 Order, and resolve all administrative proceedings on GHMSI's 2011 surplus. *See* Proposed Order, ¶¶ 12(e)–(g), (j).

5. Obligate GHMSI to dismiss its legal challenges to MIEAA and the August 30, 2016 Final Order.

On April 19, 2017, the DISB Commissioner posted the Proposed Consent Order for public comment. *See* DISB Order No. 14-MIE-022, *In the Matter of: Surplus Review and Determination Regarding Group Hospitalization and Medical Services, Inc.* (April 19, 2017). Because the Proposed Consent Order's proposed payment for community health reinvestment is inconsistent with MIEAA and the public interest, the DISB Commissioner should not approve it. Instead, for the reasons discussed below, the Commissioner should hold the proposed order in abeyance and direct GHMSI, DISB staff, the OAG, and D.C. Appleseed to enter settlement negotiations and together propose a final order for the Commissioner's review and approval.

B. The Proposal to Settle this Case for a Present Value of Just $60 Million is Contrary to the Public Interest and Inconsistent with MIEAA.

The Proposed Consent Order does not explain the basis for GHMSI's proposal that this case can fairly be settled for a ten-year series of payments totaling $75 million, the present value of which is $60 million.[1] That proposal disregards the possibility that the D.C. Court of Appeals may conclude that GHMSI owes District residents far more than $60 million, perhaps as much as $300 million. From GHMSI's viewpoint, it is understandable that the company might want to settle the case for the certainty of a $60 million payment, since that amount is only slightly higher than the $51 million payment imposed by the DISB's orders to reinvest.

However, from *the public's* standpoint, settling for $60 million is not a good outcome if there is a reasonable possibility the D.C. Court of Appeals will decide that GHMSI is obligated to pay a substantially greater amount for community health reinvestment. D.C. Appleseed will make (at least) four separate arguments on appeal that the DISB's December 2014 Decision is inconsistent with MIEAA and must be reversed. If the Court accepts any one of these four arguments, GHMSI will be required to spend an amount much higher than the proposed $60 million present value; and if the Court accepts all four arguments, GHMSI will be required to spend more than $300 million for community reinvestment. The Proposed Consent Order does not account for this risk to GHMSI and upside potential for the public. A fair settlement of this matter lies somewhere between the proposed $60 million and the potential $300 million and should be the subject of negotiations among GHMSI, the DISB and D.C. Appleseed.

We understand that, in its December 2014 Decision and in its denial of our motion for reconsideration, the DISB has indicated that it disagrees with D.C. Appleseed's four arguments. But for purposes of deciding whether the proposed $60 million present value is a fair settlement, the Commissioner need *not* decide whether he disagrees with our arguments. Rather, for the purposes of settlement, the Commissioner must take into account (1) whether there is a reasonable chance we might win one or more of those arguments on appeal, (2) if so, what the dollar benefit to District residents would be, and (3) how to factor that possible benefit into the selection of a reasonable settlement amount. In our view, the $60 million proposed settlement figure does not take this possible benefit into account.

Given the strength of the arguments we intend to make on appeal, we believe that settling for $60 million is directly contrary to the public interest.

First, we will show that the Commissioner's December 2014 determination that only 21% of GHMSI's excess surplus is attributable to profits from District-based contracts violates his own stated principles for making that determination. We also will show that a more appropriate allocation to the District is at least 60%, a figure that is consistent with the determination made by the former Commissioner in her 2010 determination. Aug. 6, 2010 Order at 11 ("[A]pproximately 69% of GHMSI's premiums for this ten-year timeframe were attributable to policies or contracts issued in the District."). Significantly, correcting just this one error would mean that the amount owed to District residents is $161 million (60% x the $268 million excess GHMSI surplus found

[1] Using 5% to discount to present value.

by the Commissioner) — a figure that is $100 million higher than the amount of the proposed settlement.

Second, we will argue on appeal that the 95% "confidence level" used by the Commissioner to calculate GHMSI's excess surplus was too high. In this case, the confidence level measures the likelihood that GHMSI has sufficient assets to remain above the critical threshold of 200% risk-based capital. In applying the 95% confidence level, the Commissioner erred in (1) failing to follow the Court of Appeals' instruction to explain the basis for such a high confidence level, and (2) departing from his own standard that that level should measure only "reasonable risks and contingencies," not "highly attenuated" ones. Dec. 30, 2014 Order at 21. Using a slightly lower confidence level — 90% — has a dramatic effect on GHMSI's permissible surplus level. Indeed, using the model that the Commissioner relied on and assuming a 60% District allocation, a 90% confidence level would increase the amount of excess surplus to be spent down in the District to $245 million — an amount four times the $60 million present value proposed in the consent order.

Finally, in our other two arguments we will show that, as to two of the key factors the Commissioner relied on to estimate GHMSI's excess surplus, he again did not follow his own interpretation of MIEAA. Those two factors concerned possible downside risk to GHMSI's projected returns to its equity portfolio, and possible variations to its projected premium growth. For both factors, the Commissioner stated that the statistical model must reflect "reasonable 'middle of-the-fairway' assumptions" and that those assumptions must be "based on relevant historical experience and reasonable projections for how future experience may deviate from historical experience." Dec. 30, 2014 Decision at 30-33. We will show on appeal that, as to the equity portfolio and premium growth, the assumptions in the model bore no relationship to relevant historical experience and the Commissioner offered no explanation for departing from that experience.[2] Using assumptions that are consistent with historical experience raises the amount of GHMSI's excess surplus still further. After accounting for the allocation and confidence level errors noted above, the error regarding the equity portfolio risk raises the excess surplus owed to the District to $299 million, and the premium growth error raises it to $312 million.

To be clear, the Commissioner need not resolve these arguments in this forum, and D.C. Appleseed does not contend (in this forum) that these arguments compel the conclusion that the only possible settlement amount is $300 million. Our point is simply that these substantial arguments that D.C. Appleseed will make in its appeal must be fairly taken into account in assessing the public value of a reasonable settlement, and that the proposed $60 million present value fails to do so.

Nor is that failure wise as a matter of law. The last time that D.C. Appleseed took this case to the Court of Appeals, GHMSI, OAG, and the DISB all took the position that GHMSI had zero excess surplus under MIEAA. Yet the Court unanimously reversed the DISB's determination and on remand, the DISB found that there was $268 million in excess surplus. Now that the DISB has

[2] For example, the DISB accepted a 53-percent probability of a an equity return of no more than 1% over three years, compared with GHMSI's expected annual 7% equity return (a 21% gain over three years without compounding), which in turn reflected the long-term average of S&P returns.

agreed that there is significant excess surplus, the only issue is how much excess surplus exists and what proportion of that belongs to the District. In our view, settling this issue for $60 million does not accord with MIEAA and shortchanges District residents.

C. The Proposed Consent Order Fails to Require GHMSI to Show that the Payments Reduce its Excess Surplus And Fails to Justify the Proposed 10-year Payout Period

To comply with MIEAA, the Proposed Consent Order payments must come from the excess surplus identified by the Commissioner. Instead, the Proposed Consent Order merely requires payments, but does not require or provide a mechanism for GHMSI or the DISB to show that GHMSI's payments actually reduce its excess surplus.

GHMSI's charter requires it to continuously reinvest in community health, and MIEAA explicitly imposes a continuous obligation, separate from the obligation to reinvest excess surplus, to engage in community health reinvestment to the maximum feasible extent. D.C. Code § 31-3505.01. MIEAA's additional requirement that GHMSI reinvest excess surplus is a means to enforce GHMSI's community health reinvestment obligation under its charter and MIEAA, but it does not absolve GHMSI of its ongoing community health reinvestment obligation. GHMSI has taken the position that it already invests in community health. *See* GHMSI Plan, dated Mar. 16, 2015, at 6, 16.[3] But the Commissioner's June 14, 2016 Decision makes clear that these investments are separate from its obligation to reinvest its excess surplus. The Proposed Consent Order provides no way to determine that the company will meet that separate obligation. Past practice demonstrates that such a mechanism is necessary.

In December 2014, the DISB Commissioner ordered GHMSI to develop a plan to spend for community health benefit $56 million in excess surplus attributable to the District of Columbia. GHMSI failed to do so, asserting in its March 2014 filing that it had already spent $56 million on community health, and claiming those prior expenditures satisfied its obligation to spend an additional $56 million as required by the Commissioner's order. The Commissioner disagreed. There is nothing in the Proposed Consent Order that would prevent GHMSI (which has sole control over the proposed spending under the Proposed Consent Order) from accounting for the payments required by the Proposed Consent Order in the same way, thus rendering the apparent increase in community health reinvestment illusory. At a minimum, any consent order must be structured so that GHMSI is required to show that the required community health reinvestment comes from excess surplus and that GHMSI's other, ordinary-course community benefit expenditures are not being reduced.

[3] That filing also forecast GHMSI's strategy to eliminate its community health reinvestment obligations to the District through collateral attacks on MIEAA itself outside the District of Columbia surplus review process and appeals. GHMSI's March 15 filing proposed an amendment to its charter requiring all three jurisdictions to find its surplus excessive before GHMSI would be required to reinvest the surplus. GHMSI Plan, dated Mar. 16, 2015, at 8. That amendment was subsequently enacted but does not apply to the 2011 surplus review. In addition, GHMSI filed a law suit in Maryland to declare the statute unconstitutional. That law suit is still pending. *See CareFirst*, No. 16-cv-2656 (D. Md.).

The Proposed Consent Order also contemplates that GHMSI will take ten years to satisfy the community reinvestment obligation arising out of the excess surplus for the year 2011. Thus, under the proposed order, GHMSI will not complete the required expenditure of excess surplus in the District of Columbia until 2027 — 16 years after the accumulation of the excess surplus in question. The Proposed Consent Order does not attempt to justify this protracted compliance period. This extensive delay, coupled with many others in this proceeding, is an affront to the Council's purpose in enacting MIEAA and has no place in a consent order intended to effectuate the purposes of MIEAA. It should be rejected.

D. Excluding D.C. Appleseed from the Negotiations Leading to the Proposed Consent Order Was Unfair, Inappropriate, and Contrary to the Public Interest.

Five years ago, the D.C. Court of Appeals said that D.C. Appleseed "has undertaken" "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." *D.C. Appleseed*, 54 A.3d at 1208.

MIEAA itself was "sparked by [D.C.] Appleseed's 2004 investigation of and report on GHMSI's practices[.]" *Id.* Indeed, D.C. Appleseed "helped craft and promoted [MIEAA] before the Council of the District of Columbia, and" pursued its "proper implementation . . . in an administrative proceeding before the Department[.]" *Id.* And D.C. Appleseed has since appeared as an intervenor before the D.C. Court of Appeals in this matter, *see generally D.C. Appleseed*, and advocated for the public interest throughout the DISB's review of GHMSI's 2011 surplus, *see, e.g.,* Letter from D.C. Appleseed to DISB Commissioner, dated July 27, 2016. In sum, D.C. Appleseed is a "long-time participant in DISB proceedings involving GHMSI," *D.C. Appleseed*, 54 A.3d at 1208 n.27, pushing all parties to comply with MIEAA and to pursue the public interest.

Notwithstanding that D.C. Appleseed has been a key participant throughout the surplus review proceedings and a party to the prior and currently pending appeals, neither the DISB staff nor GHMSI solicited D.C. Appleseed's input before filing the proposed consent order. D.C. Appleseed has since contacted the DISB and GHMSI with a request that they involve D.C. Appleseed in further negotiation of the consent order. For three reasons, the Commissioner should not approve a "consent order" regarding settlement of an appeal that was negotiated without the participation or consent of the key entity representing the public interest.

First, both as a matter of fairness and to ensure full representation of the public interest, a settlement of these proceedings should involve D.C. Appleseed. As the D.C. Court of Appeals laid out at some length, D.C. Appleseed's role in these proceedings has been long and sustained, and our organization brings knowledge and expertise to the table that no other public interest advocate can offer.

Second, this is a contested, adversarial proceeding. Settlement of such a proceeding through negotiation between DISB staff and GHMSI – but without D.C. Appleseed's involvement – is not in the public interest and is of questionable propriety.

And third, in any case it is not clear what can be achieved through a proposed "consent order" that is not consented to by a key player in these proceedings. Either the Commissioner will disapprove the proposal, or he will approve it over D.C. Appleseed's objection and we will appeal it to the D.C. Court of Appeals. In the latter case, by its own terms, the proposed consent order will be stayed pending the appeal. Proposed Consent Order, ¶ 12(n)(iii). So in either case the Proposed Consent Order will not achieve its purpose of ending these proceedings.

E. The Commissioner Should Hold the Proposed Consent Order in Abeyance, and Direct GHMSI, DISB Staff, and OAG to Re-Open Settlement Negations that Include D.C. Appleseed.

The Proposed Consent Order is inadequate not only because D.C. Appleseed, a key player in this saga, has been excluded from the negotiations leading to the proposal but also because the proposal fails to account for the statutory arguments we describe above. Accordingly, the Commissioner should hold it in abeyance and direct GHMSI, the DISB, and D.C. Appleseed to discuss the terms of a proposed consent order that will fully resolve this matter. The Commissioner should require the parties to report by a date certain whether a final agreement is likely to be reached, and, if not, the Commissioner should enter a final order that may be reviewed by the D.C. Court of Appeals.

F. Conclusion.

D.C. Appleseed commends GHMSI and the DISB's inclination to settle this matter so that District residents can finally receive the public health reinvestment that they have been owed since at least 2011, carrying out the D.C. Council's purpose in enacting MIEAA nearly ten years ago.

For the reasons stated above, D.C. Appleseed opposes the Proposed Consent Order in its current form but is hopeful that further litigation concerning either the Commissioner's June 2016 Order or the Proposed Consent Order will not be necessary. As our comments indicate, we see opportunities to craft a consent order that all stakeholders could support. Such a consent order would benefit all stakeholders — including GHMSI — by concluding this long-running surplus review proceeding and associated litigation, increasing and appropriately targeting the spending of community health reinvestment dollars, and freeing all parties to focus their attention on other health care issues going forward. We look forward to working with the DISB and GHMSI and other stakeholders to achieve these purposes.