DC APPLESEED
Solving DC Problems

1111 Fourteenth Street, NW
Suite 510
Washington, DC 20005

Phone 202.289.8007
Fax 202.289.8009
www.dcappleseed.org

July 15, 2015

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

Re: In the Matter of Surplus Review and Determination of Group Hospitalization and Medical Services, Inc., Order No. 14-MIE-012 (D.C. Dep't of Ins., Secs. & Banking Dec. 30, 2014)

Dear Commissioner Taylor:

We are writing to you concerning the pending GHMSI surplus review and to urge you to act promptly to complete that review and issue a final order in the proceeding.

As you know, DC Appleseed has participated in the DISB's review of GHMSI's surplus for over 10 years:

- In 2005, our participation began with the proceeding before Commissioner Mirel.
- In 2008, this led to the Council's passage of the Medical Insurance Empowerment Amendment Act (MIEAA), which required a surplus review in 2009.
- In 2010, Commissioner Purcell issued a determination under MIEAA.
- In 2012, the D.C. Court of Appeals reversed this determination.
- Subsequently, Commissioner White, succeeded by Commissioner McPherson, undertook a new review.
- In June 2014, Commissioner McPherson conducted hearings, culminating in his December 2014 determination that GHMSI has excess surplus of $268 million and that $56 million of the excess is attributable to the District.
- In that December 2014 order, as required by MIEAA, Commissioner McPherson therefore ordered the company to file a plan to spend that $56 million on community reinvestment in the District.
- On March 16, 2015, GHMSI declined to file the plan, instead contending that it had already spent the $56 million and therefore did not intend to file a plan.

We believe, as demonstrated in our March 25 letter, that this

contention is premised on arguments that the Commissioner already considered and rejected and cannot justify GHMSI's failure to comply with the DISB's Order. As briefly explained in this letter, we also believe that the 10 years of delay in bringing GHMSI into compliance with its nonprofit mission, coupled with GHMSI's refusal to acknowledge the binding effect of the DISB's orders and the company's efforts to undermine those orders, is damaging to the agency's authority, is preventing the agency from meeting its statutory responsibilities, and is contrary to the interests of the residents that the DISB serves. We therefore urge prompt action to address the situation.

We are aware that you only recently assumed the position of Commissioner. We are also aware that you inherited many other pressing issues. Nevertheless, we request that you make the GHMSI surplus proceeding an early, high priority and that you issue a final order in the proceeding as soon as possible. Below we briefly address the three essential reasons for this request: (1) the inordinate delay in resolving the issue; (2) the great importance of finally resolving the issue; and (3) the need to ensure that companies regulated by the DISB (such as GHMSI) comply with and respect the agency's orders.

1. The Significant Delay in this Proceeding

This proceeding began in 2005, when Commissioner Mirel conducted a hearing to determine whether GHMSI was meeting its nonprofit responsibilities under its federal charter. As later noted by the Court of Appeals, Commissioner Mirel found that the company was *not* meeting those responsibilities, but rather that "its ability 'to do more for the community than it is currently doing is beyond doubt" and that "GHMSI should be engaging in charitable activity significantly beyond its current activities.'" *D.C. Appleseed Ctr. for Law & Justice v. D.C. Dep't of Ins., Secs., & Banking*, 54 A.3d 1188, 1194 (D.C. 2013) (quoting 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 19 (May 15, 2005)). The Court also noted that, because GHMSI testified before Commissioner Mirel "that it proposed to reduce its surplus and engage in significant new health care initiatives in the District of Columbia, the Commissioner [had] stopped short" of recommending or ordering any further action by GHMSI, leaving it to the GHMSI Board to take appropriate corrective action. *Id.*

But GHMSI did not reduce its surplus or engage in additional new health care initiatives. Instead, it increased its surplus and reduced its level of charitable activities. Unfortunately, the DISB then took no action to address the situation or to implement Commissioner Mirel's determinations.

As a result, again as noted by the Court of Appeals, the Council became "dissatisfied with the state of affairs" and accordingly enacted MIEAA. *Id.* That statute governs the current proceeding. It requires the DISB to conduct a hearing not less than every three years to determine whether GHMSI's surplus meets the strict requirements laid out in the statute and, if it does not, to order the company to submit a plan for reducing the surplus through increased community reinvestment. Enacted in 2008, MIEAA directed the DISB to take this action within 120 days.

But once again the DISB did not act promptly. Instead of complying with the statute's initial 120-dayday directive, Commissioner Purcell did not act until October 2010. Even then, regrettably, her action failed to hold GHMSI accountable to the standards adopted by the Council in MIEAA.

In September 2012, the Court of Appeals reversed the DISB's determination and remanded for another surplus review—one complying with MIEAA's standards. Although the Court did not set a deadline for completion of the new review, the Court indicated that because the statute required a review no less often than once every three years, and because Commissioner Purcell's review was issued on October 29, 2010, the new review would be timely if issued three years from that date, in other words, by October 29, 2013. *Id.* at 1220.

The DISB did not meet the time frame specified by the Court. Then-Commissioner White delayed initiation of the remand proceedings and, as a result, Commissioner McPherson did not release his determination until December 30, 2014.

In summary, it has been 10 years since Commissioner Mirel first determined that GHMSI should engage in greater community reinvestment; it is nearly seven years since MIEAA became law; it is nearly three years since the Court of Appeals remanded for a new surplus review. It is more than 6 months since Commissioner McPherson determined that GHMSI's surplus is excessive by $268 million and that the company should file a plan to reinvest the $56 million of this excess in the District; and it is four months since the company's March 16 filing took the position that it did not need to comply with the DISB's order to file a plan. By any measure, the DISB's delay in holding GHMSI accountable to its mission and its statutory obligations is unreasonable.

2. The Critical Importance of the Issue

The longstanding failure to hold GHMSI accountable to its mission and to MIEAA involves an issue that the Council determined was of great importance to the District and its residents.

The Council enacted MIEAA "to provide a framework to ensure that [GHMSI] pursue[s] its public health mission." *Id.* at 1214 (quoting D.C Council, Report on Bill 17-934, the "Medical Insurance Empowerment Amendment Act of 2008," at 2 (Oct. 17, 2008) [hereinafter Council Report]). The Council found urgency around the establishment of this framework *in 2008,* because, as the Council said in its Report, "The health needs of the community are acute and extensive," and "District residents are fighting an uphill battle in elevating the quality and expectancy of their lives." Council Report at 9, 14.

Requiring GHMSI to promptly commit $56 million of its excess surplus is necessary to effectuate the Council's determination that addressing those needs should be a high priority.

3. The Need to Protect the DISB's Authority

In addition to the need to end the unreasonable delay that has already occurred in these proceedings and the need to implement the critically important requirements of MIEAA, there is a third reason DISB should now expeditiously issue a final order—the need to protect the authority and integrity of the DISB's orders.

Actions taken by GHMSI since Commissioner McPherson's December 30 decision pose a serious threat to the efficacy of those orders and the DISB's jurisdictional authority. Not only has

GHMSI with impunity filed a March 16 document with the DISB declining to offer a plan reinvesting $56 million of its excess surplus as ordered by the DISB, the company has successfully urged the Maryland and Virginia Insurance Commissioners to issue orders precluding GHMSI from complying with Commissioner McPherson's Decision.[1] In addition, GHMSI has urged Congress to overturn the DISB's orders, on the erroneous ground that the DISB did not sufficiently coordinate its actions with Maryland and Virginia.[2]

Most recently, on June 19, GHMSI filed another document disregarding the DISB's orders and regulations. By law, in this annual filing, GHMSI was required to "examine whether the company's surplus is considered excessive under" MIEAA. D.C. Mun. Regs. tit. 26A, § 4601.01. Despite the Commissioner already determining that GHMSI's surplus was excessive under MIEAA, in its June 19 filing, GHMSI attempted to justify its current surplus by continuing to rely on the very analysis the Commissioner *had specifically rejected as violating MIEAA*.

We realize that GHMSI disagrees with the DISB's determinations. But unless and until those determinations are overturned on appeal, GHMSI is bound to follow them. Yet it is not doing so. Meanwhile, as the recent order from the Court of Appeals made clear, there can be no appeal in these proceedings until the DISB issues its final determination ordering the implementation of a specific plan that it has found "fair and equitable." D.C. Appleseed Ctr. for Law & Justice v. D.C. Dep't of Ins., Secs., & Banking, No. 15-AA-108 (D.C. Apr. 28, 2015). It is essential that the DISB act promptly to issue that order—so that any challenge GHMSI has to the DISB's orders can be adjudicated and the binding effect of the DISB's orders affirmed.

In the absence of a prompt review by the Court of Appeals, it appears that GHMSI intends to continue playing the three jurisdictions off against each other in order to avoid reinvesting any of its excess surplus. Commissioner McPherson made clear in his March 2, 2015, Order denying

---

[1] *See* Md. Code Ann., Ins. § 14-124(a)(6); Va. Code § 38.2-4229.2(D); Ex Parte: In the Matter of an Examination of Group Hospitalization and Medical Services Inc., Reply to Comments, Case No. INS-2015-00007 (Va. State Corp. Comm'n June 5, 2015); Ex Parte: In the Matter of an Examination of Group Hospitalization and Medical Services Inc., Comments of Group Hospitalization and Medical Services, Inc. on the Report of the Virginia Bureau of Insurance, Case No. INS-2015-00007 (Va. State Corp. Comm'n May 13, 2015); Letter from Al Redmer, Jr., Ins. Comm'r, Md. Ins. Admin., to Mr. Chet Burrell, President and Chief Exec. Officer, CareFirst BlueCross BlueShield (Feb. 20, 2015); Letter from Chet Burrell, President & Chief Exec. Officer, CareFirst BlueCross BlueShield, to the Hon. Jacqueline K. Cunningham, Comm'r of Ins., Commonwealth of Va. (Jan. 22, 2015); Letter from Chet Burrell, President & Chief Exec. Officer, CareFirst BlueCross BlueShield, to the Hon. Alfred W. Redmer, Jr., Commissioner, Md. Ins. Admin (Jan. 22, 2015).

[2] *See* In the Matter of Surplus Review and Determination of Group Hospitalization and Medical Services, Inc., Decision and Order, Order No. 14-MIE-012 62–65 (D.C. Dep't of Ins., Secs. & Banking Dec. 30, 2014) ("The Commissioner carefully reviewed and considered all of the materials submitted by the Maryland and Virginia Commissioners and has taken their submissions into account in reaching his conclusions in this review. In making his determination, he has sought to balance the interests and needs of Maryland and Virginia, as articulated by the regulators in those states, with the interests and needs of the District and the requirements of this Act.").

GHMSI's motion to stay these proceedings that the possibility of any conflicting determinations among the jurisdictions had been addressed and precluded by Congress when it provided in GHMSI's charter that the company is to be "licensed and regulated by the District of Columbia on accordance with the laws and regulations of the Distinct of Columbia." In the Matter of Surplus Review and Determination for Group Hospitalization and Medical Services, Inc., Order on GHMSI's Motion to Stay Further Proceedings and Appleseed's Request for Briefing Schedule, Order No. 14-MIE-015 5 (D.C. Dep't of Ins., Secs. & Banking Mar. 2, 2015)(quoting Pub. L. No. 103-127, § 138(b), 107 Stat. 1336, 1349 (1993)). Indeed, Congress's purpose in giving the District oversight authority was to avoid the very playing of the jurisdictions off against each other that GHMSI is now engaged in. *See* S. Rep. No. 104-92, at 54 (1995) ("GHMSI has adeptly played Maryland, Virginia, and D.C. Insurance regulators against one another").

* * *

For all these reasons, we respectfully urge the Commissioner to issue a final order in these proceedings promptly, so that GHMSI can at long last be held accountable to its mission and District residents can benefit from the excess surplus that the company has, with their premium dollars, impermissibly built.

Sincerely,

Walter Smith, Executive Director
DC Appleseed Center

Richard B. Herzog
Harkins Cunningham LLP

Deborah Chollet, Ph.D.

Marialuisa S. Gallozzi
Covington & Burling LLP

cc: Mr. Philip Barlow, Associate Commissioner for Insurance
D.C. Department of Insurance, Securities and Banking

Mr. Adam Levi, Assistant General Counsel
D.C. Department of Insurance, Securities and Banking