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July 19, 2017

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

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

Dear Commissioner Taylor:

We are writing concerning the meeting you are convening with Group Hospitalization and Medical Services, Inc. ("GHMSI") and DC Appleseed. As your July 10 Order indicates, the purpose of the meeting is to discuss the terms of a Final Consent Order that would fully resolve both the DISB's long-running GHMSI surplus review, as well as the related litigation pending in the District of Columbia Court of Appeals and the United States District Court for the District of Maryland.

We welcome this meeting and look forward to working with you and GHMSI to develop a Final Consent Order that meets the requirements of the Medical Insurance Empowerment Amendment Act ("MIEAA") and serves the public interest.

Because your Order convening the meeting contemplates that a Final Consent Order will be jointly developed in a short time (by August 2), we would like to suggest in advance of the meeting some key issues that could be usefully discussed at the meeting and addressed in your contemplated Final Consent Order. We hope that providing a preliminary list of key issues now may help facilitate the discussion and better inform you and GHMSI of DC Appleseed's thoughts concerning the possible content of the Final Consent Order.

While not intended to be exhaustive, here are eight issues we suggest for your consideration:

1. The amount of the excess surplus expenditure. GHMSI's earlier proposed consent order contemplated spending $75 million over 10 years, at $7.5 million per year.

We believe that the amount of this offer fails to reflect a rigorous assessment of the possibility that on appeal GHMSI will be required to spend a much higher amount of excess surplus in the District of Columbia. To cite just one possibility, if the portion of the surplus

allocated to the District were determined based on the profitability of premium revenue from District-based GHMSI contracts—which is the methodology the Commissioner's December 30, 2014 Decision actually requires—approximately 60% of the $268 million of excess surplus found by the Commissioner would be allocated to the District, rather than the 21% determined by the Commissioner. This single correction would allocate $161 million to the District, rather than the $51 million contemplated in your August 30, 2016 Order. Furthermore, even the $161 million takes no account of the significant potential that on appeal the Court will determine that the excess surplus before allocation is far greater than the $268 million determined in the Commissioner's December 30, 2014 Decision. We think all these considerations should inform the amount of excess surplus agreed to in a Final Consent Order.

However, we also question the terms of the proposed $75 million. First, the proposal does not indicate how much if any of the $75 million would be reduction of excess surplus, as opposed to meeting GHMSI's separate obligation under MIEAA [D.C. Code § 31-3505.01] to reinvest in community health to the maximum extent feasible every year. Surplus Review and Determination for Grp. Hospitalization and Med. Servs., Order No. 14-MIE-016 8 (D.C. Dep't of Ins., Secs. & Banking June 14, 2016) [hereinafter June 14, 2016 Order]. Second, even if the proffered $75 million were demonstrably in addition to GHMSI's separate obligation under MEIAA, the present value of the $75 million (using the current prime rate of 4.25%) is just $60.1 million. Discounted at the pre-recession prime rate of 7.5%, the present value is $51.5 million. This does not appear to be a material increase over the Commissioner's August 30, 2016 Order requiring GHMSI to refund $51 million to subscribers.

These concerns are laid out in more detail in the sections that follow.

2. Managing the Reinvestment of the Excess Surplus. The Proposed Consent Order provides that all the $7.5 million would be directed to undefined community reinvestment. The Proposed Consent Order provides no standards or procedures for ensuring that the community reinvestment will meet the requirements of MIEAA.

DC Appleseed believes that any Final Consent Order should make clear (a) the types of programs or initiatives that qualify as community reinvestment, including rebates to subscribers; (b) who will make the determinations regarding how and when the excess surplus will be dedicated to those community reinvestments; and (c) the standards that will be followed in making those determinations.

DC Appleseed also continues to believe that the Commissioner should consider a Final Consent Order that provides for at least a portion of the excess surplus to be managed by local private foundations that have broad knowledge of and experience with addressing community health needs. As you know, DC Appleseed has argued that the Commissioner could require creation of a trust for this purpose if that were needed. We continue to believe that he could approve such an approach, particularly if it were agreed to in a Final Consent Order.

3. The Reinvestment Period. GHMSI's Proposed Consent Order provides that, rather than complying with the Commissioner's August 30, 2016 Order to reinvest the entire excess surplus at once on subscriber rebates, the excess surplus would be reinvested over 10 years. We do not think

such a protracted reinvestment period complies with MIEAA—particularly when added to the already long history of this surplus review proceeding. We also think that, while it may be possible to agree on a plan to reinvest the excess surplus over a shorter period than 10 years, future implementation would be simplified if the funds were placed in an escrow account at the outset. Immediate reinvestment of the full amount would not cause GHMSI's surplus to drop below the minimum level that GHMSI itself concurs in the Proposed Consent Order is efficient: 721% of its Authorized Control Level ("ACL").

4. Implementation of MIEAA's Ongoing Reinvestment Requirement. The Commissioner's June 14, 2016 Decision rejecting GHMSI's proposed reinvestment plan acknowledges GHMSI's separate obligation under MIEAA to expend the maximum feasible amount each year for community health reinvestment, and states why it differs from the obligation to reinvest excess surplus. However, GHMSI's Proposed Consent Order provides no mechanism to ensure that the $7.5 million payments are in fact expenditures that extend beyond the company's separate obligation. A Final Consent Order should articulate standards and measures for ensuring that GHMSI meets both obligations, and that it does not meet its obligation to reinvest excess surplus by foregoing its ongoing obligation to spend the maximum feasible amount each year on community health reinvestment.

5. Recovery of DC Appleseed's Actuarial Fees. We recognize that the general rule is that participants in litigation are responsible for their costs unless otherwise provided by statute, and that MIEAA does not expressly provide for a participant to recover fees. However, this is a case where the D.C. Court of Appeals has recognized the necessity of DC Appleseed's participation to enforcing the statute and that statute contemplates the corporation paying for independent expertise used by the Commissioner in reaching a determination. Under these circumstances, we think the Commissioner can and should consider allowing DC Appleseed to recover actuarial fees as part of a Final Consent Order.

As the Court laid out in some detail, when DC Appleseed appealed the 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, DC 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, DC 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.

DC Appleseed's advocacy to promote public health through the implementation of MIEAA continued after the remand from the Court's September 2012 decision. 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." June 14, 2016 Order at 8. As the Commissioner also said, he permitted extensive involvement by DC Appleseed in the remand proceedings "in light of Appleseed's longstanding involvement with and special interest in the MIEAA." *Id.* at 7 n.2.

DC Appleseed was able to sustain this 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 a health economist, Deborah Chollet at Mathematica Policy Research. However, it became clear early in the DISB proceedings that retaining our own 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 & Associates.

As you know, our 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. As you also know, 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 the company has $268 million of excess surplus.

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 you have said, "MIEAA was enacted 'to ensure that nonprofit hospital and medical service corporations pursue their public health mission.'" Surplus Review & Determination for Grp. Hospitalization & Med. Servs., Inc., Order No. 14-MIE-19 14 (D.C. Dep't of Ins., Secs. & Banking Aug. 30, 2016).

Although the Commissioner did not formally engage our expert, the DISB's interpretation of MIEAA has recognized that actuarial expertise independent of the company may aid the Commissioner, and where it does, the Commissioner should have the discretion to impose the costs of that expertise on the company. This should be particularly so where, as here, that actuarial expertise has advanced the purposes of the statute.

Finally, we believe it is good public policy for a small nonprofit that has expended its very limited dollars to wage a long-term battle to serve the public be allowed to recover at least part of its costs for that battle. Recovering the significant amount of its reserves that DC Appleseed had to spend to pursue this long effort will provide DC Appleseed the needed resources to pursue other significant efforts that serve community health needs. For example, one of DC Appleseed's longstanding initiatives is addressing the continuing HIV/AIDS epidemic in the District—an initiative in which we are partnering with the Mayor. In addition, one of our more recent undertakings—and one that will benefit both the public and potentially GHMSI itself—is working with District officials and community partners to address and respond to the impact of changes to the ACA contemplated by the Congress and the federal government.

6. Oversight and Monitoring of the Final Consent Order. Thought should be given to the process for ensuring implementation of the Final Consent Order, and to including the terms of that process in the Order itself. We think the DISB should have a role in systematically reviewing and certifying GHMSI's compliance with the Order and with MIEAA.

7. Preserving the Integrity of the Final Consent Order. Finally, the Final Consent Order should provide that those agreeing to the Order will act to protect it. This means, we think, that those agreeing to the Order must also agree not to take actions to undermine the Order through any other undertakings, including efforts to override or undercut the Order through legislative, regulatory, or judicial action. In addition, GHMSI should agree in the Final Consent Order that the District (through the DISB) has the authority to make final determinations concerning the approval of reinvesting excess GHMSI surplus allocable to the District, notwithstanding any contrary determinations by Maryland or Virginia officials.

8. Crafting a Balanced, Persuasive Final Consent Order. The proposed order should include a brief explanation for all stakeholders of the reasons the order is a fair and reasonable compromise of this dispute. This should include enough background for public officials, community stakeholders, subscribers, and the public at large to understand why the resolution is consistent with the statute and in the public interest.

* * *

As stated at the outset, we welcome the Commissioner's invitation to participate in the development of a Final Consent Order. We believe there is a path toward final resolution for all stakeholders. Although we remain willing to litigate the issues if necessary, we are willing to compromise to avoid further litigation and delay that undercuts the public interest. We share your apparent view that a consent order supported by all stakeholders is the best way to resolve this matter and advance community health in the District of Columbia.

Sincerely,

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DC Appleseed Center

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