

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF INSURANCE, SECURITIES AND BANKING**

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IN THE MATTER OF	)	
	)	
Surplus Review and Determination	)	Order No.: 14-MIE-19
For Group Hospitalization and Medical	)	
Services, Inc.	)	
	)	
_____	)	

**DECISION AND ORDER**

The Commissioner of the District of Columbia Department of Insurance, Securities and Banking (the “Commissioner”) issues this Decision and Order pursuant to his authority under the Hospital and Medical Services Corporation Regulatory Act of 1996, effective April 9, 1997 (D.C. Law 11-245; D.C. Code §§ 31-3501 *et seq.* (2009)) (the “HMSC Regulatory Act”).

In accordance with the HMSC Regulatory Act, and upon consideration of the record in this proceeding, including timely public comments received by the Department of Insurance, Securities and Banking (the “Department”), the Commissioner orders Group Hospitalization and Medical Services, Inc. (“GHMSI”) to dedicate its excess 2011 surplus attributable to the District of Columbia (the “District”), as adjusted in accordance with this Decision and Order, to community health reinvestment by issuing rebates to current subscribers under subscriber contracts with a situs in the District, as further described in this Decision and Order. The rebates must be paid within 120 days of the date of this Decision and Order. The freeze on premium rate increases imposed by the Decision and Order on Group Hospitalization and Medical Services, Inc. Plan, Order No. 14-MIE-016 (June 14, 2016) (the “June 14, 2016 Order”) shall remain in effect until

GHMSI issues the rebates required by this Decision and Order, at which time the freeze shall be lifted.

## **I. BACKGROUND**

### **A. GHMSI's Obligation to Engage in Community Health Reinvestment**

GHMSI is a nonprofit hospital and medical services corporation created in 1939 by Congressional charter. *See* An Act Providing for the incorporation of certain persons as Group Hospitalization, Inc., Pub. L. No. 395, 53 Stat. 1412 (1939), as amended (the "Charter").<sup>1</sup> The Charter declares GHMSI to be "a charitable and benevolent institution," *id.* at § 8, 53 Stat. at 1414, and further states that GHMSI "shall be not be conducted for profit, but shall be conducted for the benefit of [its] certificate holders." *Id.* at § 3, 53 Stat. at 1413. The Charter establishes the District as GHMSI's legal domicile, *see* District of Columbia Appropriations Act, 1994, Pub. L. No. 103-127, § 138(a), 107 Stat. 1336, 1349 (Oct. 29, 1993), and provides that GHMSI "shall be licensed and regulated by the District of Columbia in accordance with the laws of the District of Columbia." *Id.*, § 138(b).<sup>2</sup> GHMSI is licensed to operate in the District pursuant to the HMSC Regulatory Act.

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<sup>1</sup> GHMSI originally was incorporated as Group Hospitalization, Inc. but later merged with Medical Services, Inc. to form Group Hospitalization and Medical Services, Inc. *See* An Act to amend the Act providing for the incorporation of certain persons as Group Hospitalization, Inc., Pub. L. No. 98-493, § 1, 98 Stat. 2272, 2272 (Oct. 17, 1984).

<sup>2</sup> GHMSI is a wholly-owned subsidiary of CareFirst, Inc., a nonprofit holding company. *See* Health Annual Statement for the Year Ended December 31, 2015 for the Condition and Affairs of the Group Hospitalization and Medical Services, Inc. at 33. Through CareFirst, Inc., GHMSI is affiliated with CareFirst of Maryland, Inc. ("CFMI"). *Id.* Together, GHMSI and CFMI do business in the District, Maryland and Virginia as "CareFirst BlueCross BlueShield." *Id.* Through a jointly-owned intermediate holding company, GHMSI and CFMI share ownership of CareFirst BlueChoice, a health maintenance organization doing business in the District, Maryland and certain counties in Virginia. *Id.*

In 2009, due to its concern over GHMSI’s commitment to its mission as a charitable and benevolent institution, the Council of the District of Columbia (the “Council”) amended the HMSC Regulatory Act by enacting the Medical Insurance Empowerment Amendment Act of 2008, effective March 25, 2009 (D.C. Law 17-369; 56 DCR 1346) (“MIEAA”). Under MIEAA, GHMSI is required to “engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency.” D.C. Code § 31-3505.01. To ensure GHMSI does not neglect this obligation, MIEAA requires the Commissioner to review GHMSI’s surplus at least once every three years and authorizes the Commissioner to issue a determination regarding whether the surplus is excessive. *See id.* at § 31-3506(e). If the Commissioner determines that GHMSI’s surplus is excessive, he must order it to “submit a plan for dedication of the excess to community health reinvestment in a fair and equitable manner.” *Id.* at § 31-3506(g)(1). MIEAA further provides that if the Commissioner determines GHMSI has “failed to submit a plan [for community health reinvestment] as ordered . . . within a reasonable period . . . the Commissioner shall deny for 12 months all premium rate increases for subscriber policies written in the District sought by the corporation . . . and may issue such orders as are necessary to enforce the purposes of this chapter.” *Id.* § 31-3506(i).

**B. Review of GHMSI’s 2011 Surplus**

Following a multi-year review, pursuant to Decision and Order No. 14-MIE-012 (December 30, 2014) (the “December 30, 2014 Order”), then Acting Commissioner Chester A. McPherson (the “Acting Commissioner”) determined that GHMSI’s surplus as of December 31, 2011 was excessive under MIEAA and ordered GHMSI to submit a

plan for dedication of the excess attributable to the District—approximately \$56.2 million<sup>3</sup>—to community health reinvestment in a fair and equitable manner. *See* December 30, 2014 Order at 66. GHMSI and the D.C. Appleseed Center for Law and Justice, Inc. (“Appleseed”)<sup>4</sup> both filed motions for reconsideration of the December 30, 2014 Order, which were denied.<sup>5</sup>

On March 16, 2015, GHMSI submitted a response to the December 30, 2014 Order, which it styled as a “plan.” *See* Plan of Group Hospitalization and Medical Services, Inc. filed with the Department of Insurance, Securities and Banking Pursuant to December 30, 2014 Order No. 14-MIE-012 (Mar. 16, 2015) (the “Plan”). In the Plan, GHMSI essentially maintained that no tangible plan for reinvestment of the excess 2011 surplus was needed. GHMSI based its position on several grounds. First, GHMSI argued that it had no excess surplus. *See id.* at 3. Second, and alternatively, GHMSI

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<sup>3</sup> The precise amount of excess 2011 surplus attributable to the District is \$56,213,088.72. The figure \$56.2 million is used for ease of reference.

<sup>4</sup> Appleseed is a nonprofit public interest center located in Washington, D.C. and has long been involved as an interested person in these proceedings.

<sup>5</sup> In January 2015, GHMSI and Appleseed filed motions with the Department for reconsideration of the December 30, 2014 Order. *See* D.C. Appleseed’s Motion for Reconsideration (Jan. 9, 2015); GHMSI’s, Motion for Reconsideration and Coordinated Proceedings with Maryland and Virginia (Jan. 22, 2015). The Acting Commissioner denied those motions. *See* Order on Appleseed’s Motion for Reconsideration and GHMSI’s Request for Briefing Schedule on Reconsideration, Order No. 14-MIE-013 (Jan. 15, 2015); Order on GHMSI’s Motion for Reconsideration and Coordinated Proceedings with Maryland and Virginia, and on D.C. Appleseed’s Request for Briefing Schedule, Order No. 14-MIE-014 (Jan. 28, 2015).

Also, on January 29, 2015, GHMSI and Appleseed filed petitions for review of the December 30, 2014 Order with the District of Columbia Court of Appeals (the “Court of Appeals”). GHMSI also petitioned for review of the Order denying its motion for reconsideration. In light of these appeals, GHMSI requested a stay of all further proceedings in this matter – including the filing of a plan – until after the appeals’ resolution. The Acting Commissioner denied GHMSI’s motion for a stay. *See* Order on GHMSI’s Motion to Stay Further Proceedings and Appleseed’s Request for Briefing Schedule, Order No. 14-MIE-015 (Mar. 2, 2015). The Court of Appeals dismissed the petitions filed by GHMSI and Appleseed as having been taken from a non-final and non-appealable order, reasoning that the Acting Commissioner had not yet reviewed GHMSI’s plan, and thus the “administrative process [was] not yet complete, and no specific, enforceable obligations regarding the excess assets ha[d] been imposed on GHMSI.” Order, Appeal Nos. 15-AA-108 and 15-AA-109 (D.C. Ct. App. Apr. 28, 2015).

maintained that in the years since 2011, it had spent more than \$56.2 million on community health reinvestment, in addition to incurring underwriting losses and experiencing a decline in surplus, and therefore had fulfilled its obligations under MIEAA. *See id.* at 4-6. GHMSI further argued, among other things, that the Department had not sufficiently coordinated with Maryland and Virginia before issuing the December 30, 2014 Order. *See id.* at 6-8.

### **C. Decision and Order Regarding GHMSI's Plan**

On June 14, 2016, the Commissioner issued a Decision and Order on Group Hospitalization and Medical Services, Inc. Plan, Order No. 14-MIE-016 (June 14, 2016) (the "June 14, 2016 Order"). Under the June 14, 2016 Order, the Commissioner determined that GHMSI had failed to submit a plan as required by the December 30, 2014 Order and ordered as follows:

1. Effective as of the date of the June 14, 2016 Order, all requests for premium rate increases for subscriber policies written by GHMSI in the District were denied for 12 months or until the Commissioner develops and approves a plan for reinvestment of the 2011 excess surplus, whichever occurs first;
2. Pursuant to his authority to issue such orders as are necessary to enforce the purposes of MIEAA, the Commissioner would develop and approve a plan for GHMSI to dedicate the excess 2011 surplus attributable to the District to community health reinvestment in a fair and equitable manner;
3. There would be a 30-day period beginning on the date of the June 14, 2016 Order for the public to comment on the plan to be developed by the Commissioner; and

4. The Commissioner would issue and approve a plan no later than 30 days after the expiration of the public comment period.

June 14, 2016 Order at 19-20.

**D. State and Federal Responses to the December 30, 2014 Order**

The State of Maryland, the Commonwealth of Virginia and the federal government took various actions in response to the December 30, 2014 Order. On February 10, 2015, the Maryland Insurance Commissioner sent a letter to GHMSI's President and Chief Executive Officer stating that the Maryland Insurance Administration ("MIA") would initiate an investigation to determine whether the December 30, 2014 Order would be harmful to the interests of Maryland residents. *See* Motion to Stay Further Proceedings by Group Hospitalization and Medical Services, Inc. (Feb. 10, 2015), Exhibit B (Letter from Al Redmer, Jr., to Chet Burrell at 3 (Feb. 10, 2015)). The letter stated that while the MIA's investigation was ongoing, "GHMSI is prohibited from reducing or distributing its surplus as a result of the [December 30, 2014 Order] and is prohibited from submitting a plan to the D.C. Commissioner for dedication of its excess of 2011 surplus attributable to D.C. until submitted, reviewed, and approved by the MIA." *Id.* On June 10, 2015, following a proceeding to consider the effect of the December 30, 2014 Order on Virginia residents, the Virginia State Corporation Commission ("VA SCC") issued an order stating that GHMSI should not distribute or reduce any portion of its surplus without approval of the VA SCC. *See* Order, Case No. INS-2015-00007, Commonwealth of Virginia, State Corporation Commission (June 10, 2015).

In addition, both Maryland and Virginia enacted legislation in the first months of 2015, the intended effect of which is to prohibit GHMSI from distributing or reducing its surplus in response to an order by the Commissioner to enforce MIEAA without the approval of Maryland and Virginia state insurance regulators. *See* Md. Code, Ins. § 14-124(a)(3), (6); Va. Code § 38.2-4229.2(D). The Maryland legislation was enacted on April 14, 2015. The Virginia legislation was enacted on March 23, 2015.

In December 2015, Congress amended GHMSI's federal charter to provide that GHMSI may not divide, attribute, reduce or distribute its surplus pursuant to any law or order of any jurisdiction without the express agreement of the District, Maryland, and Virginia. *See* Financial Services and General Government Appropriations Act, 2016 § 747, *enacted as part of* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (Dec. 18, 2015). Congress made this requirement applicable with respect to GHMSI's surplus for any year after 2011. *Id.* at § 747(b).

## **II. PUBLIC COMMENT**

The June 14, 2016 Order requested public comment on the plan to be developed by the Commissioner to enforce the December 30, 2014 Order. The Commissioner received and considered numerous thoughtful and helpful comments. Persons submitting comments included members of the Council, GHMSI, Appleseed, GHMSI subscribers and contractholders, two coalitions of local organizations dedicated to improving public health and welfare, nonprofit groups providing community health services in the District, the Maryland Insurance Commissioner, local trade associations, and other interested persons.<sup>6</sup> The discussion below summarizes major aspects of the comments received.

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<sup>6</sup> All public comments are hereby incorporated as part of the record in this proceeding and can be found at <http://disb.dc.gov/node/771622>.

### **A. GHMSI's Comments**

GHMSI's comments revisit many of the same arguments it has made before in this proceeding. *See* GHMSI Comments in Response to DISB's Order of June 14, 2016 ("GHMSI Comments"). The Department has addressed these arguments in its previous decisions and orders in this proceeding.

New issues raised by GHMSI include the following: GHMSI argues that the amendment to its Charter enacted by Congress in 2015 prohibits the Commissioner from ordering reinvestment of the excess 2011 surplus without the agreement of Maryland and Virginia. *See id* at 2-5. In addition, GHMSI asserts that since 2011, it has made premium rate filings that resulted in a reduction to its surplus of \$42.44 million, which should be credited as community health reinvestment. *See id.* at 10-13.<sup>7</sup> Finally, GHMSI argues that the Commissioner lacks authority under MIEAA to develop and approve a plan for reinvestment of GHMSI's excess surplus on his own initiative. *See id.* at 14.

### **B. Comments from Members of the Council**

The Commissioner received comments from Councilmember At-Large Elissa Silverman and Ward 3 Councilmember Mary M. Cheh. *See* Letter from Councilmember At-Large Elissa Silverman to Commissioner Taylor (July 14, 2016); ("Silverman Letter"); Letter from Councilmember Mary M. Cheh to Commissioner Taylor (July 14, 2016) ("Cheh Letter"). Councilmembers Silverman and Cheh both urge the Commissioner to maintain the rate freeze on GHMSI for a full 12 months as a penalty for failing to comply with the December 30, 2014 Order. *See* Silverman Letter at 1-2; Cheh

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<sup>7</sup> As it has before, GHMSI also argues that its community giving, contributions to the Healthy DC fund, and losses attributable to the District's open enrollment program should be credited as expenditures of excess surplus for community health reinvestment. *See* GHMSI Comments at 13-14.



Letter at 1. The Councilmembers state that MIEAA requires this result. *See* Silverman Letter at 2; Cheh Letter at 1. In addition, both Councilmembers support the recommendation made by two coalitions of nonprofit organizations to establish a fund for reinvestment of the excess surplus. *See* Silverman Letter at 1; Cheh Letter at 1. The coalitions' recommendations are summarized below. Finally, both Councilmembers urge the Commissioner to require reinvestment of the excess surplus in ways most likely to improve public health in the District. *See* Silverman Letter at 2; Cheh Letter at 2.

### **C. Appleseed's Comments**

Appleseed urges the Commissioner to adopt a plan similar to that suggested by the coalitions, as summarized below. Specifically, Appleseed proposes requiring GHMSI to place the excess surplus in a trust fund managed by an independent and experienced third party acting in the public interest. *See* D.C. Appleseed's Comments on the Commissioner's Plan for Holding GHMSI Accountable to the Requirements of the Medical Insurance Empowerment Amendment Act at 3-5 (July 14, 2016) ("Appleseed Comments"). Appleseed further suggests that the Commissioner require the fund manager to invest the excess surplus in community health initiatives over a five-year period. *See id.* at 5. Appleseed recommends that spending by the fund be guided by independent assessments of the District's community health needs, such as those provided in a report from the Urban Institute examining the District's health care needs and the types of community investments that could be made with the excess surplus (the "Urban Institute Report")<sup>8</sup> and a report issued by the District of Columbia Department of

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<sup>8</sup> Urban Institute, *Health Needs in the Washington Metropolitan Area* (June 2016), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000833-Health-Needs-in-the-Washington-Metropolitan-Area-Potential-Intiaitives-for-Investment-by-CareFirst.pdf>.

Health in April, which provides baseline information on District community health indicators (the “DOH Report”).<sup>9</sup> *See id.*

Appleseed bases its recommendation to establish a community reinvestment fund on two grounds. First, Appleseed states that although MIEAA defines “community health reinvestment” broadly, the legislative history of MIEAA suggests that the Council was particularly interested in promoting community healthcare-related programs, which is what a community reinvestment fund would be designed to achieve. *See id.* at 1-2. Second, Appleseed argues that a reinvestment fund is a better option than requiring GHMSI to pay rebates because rebates would likely not be “fair and equitable,” as required by MIEAA. *See id.* at 8. Appleseed offers several reasons for this view, most of which center on the view that the rebate received by each subscriber should be directly proportional to the subscriber’s contribution to the excess 2011 surplus, and it would be difficult to ensure that this goal is achieved. *See id.* at 8-9. Appleseed also argues that the payment of rebates would not advance MIEAA’s purpose of promoting and safeguarding the public health. *See id.* at 9-10.

Appleseed urges the Commissioner not to credit GHMSI for any reductions in surplus it has made since 2011 as community health reinvestment. Appleseed maintains that any such reductions must be intentional to qualify as community health reinvestment. *See id.* at 10. According to Appleseed, there are several reasons why GHMSI cannot show the requisite intent. *See id.* First, Appleseed states that GHMSI has consistently maintained it has no excess surplus and therefore cannot now argue that it intentionally

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<sup>9</sup> D.C. Department of Health, *DC Health People 2020 Framework* (April 2016), available at <http://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/FINAL%20DC%20HP2020%20Framework%20Report%205-23-16.pdf>.

sought to reduce its surplus for purposes of community health reinvestment. *See id.* at 10-11. Second, Appleseed asserts that, until now, GHMSI has never indicated that it intended to reduce its surplus for the purpose of engaging in community health reinvestment. *See id.* at 11. In addition, Appleseed states that, although it found three rate filings by GHMSI effective after 2011 in which GHMSI intentionally sought to reduce its surplus, none of these filings identifies community health reinvestment as the purpose of the reduction and none is distinguishable from rate changes made for competitive reasons. *See id.*

Finally, Appleseed argues that because the Commissioner has determined GHMSI failed to submit a timely plan for community health reinvestment, he is required by MIEAA to deny rate increases by GHMSI for a full 12 months and has no discretion to lift the freeze on rates until the 12-month period has ended. *See id.* at 12-14.

#### **D. Comments from GHMSI Contractholders and Subscribers**

The Commissioner received comments from a number of GHMSI contractholders and subscribers. These comments generally urge the Commissioner to devote the excess surplus to the payment of rebates or rate reductions.

#### **E. Comments from Coalitions**

The Commissioner received comments from two coalitions of local organizations whose missions include improving the health and welfare of District residents.<sup>10</sup> The

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<sup>10</sup> The comments of the first coalition were submitted on the letterhead of the Community Foundation for the National Capital Region, which was joined as a signatory by the following organizations: The Morris & Gwendolyn Cafritz Foundation; The Moriah Fund; Eugene and Agnes Meyer Foundation; The Washington Area Women's Foundation; and The Consumer Health Foundation. The comments of the second coalition were signed the following organizations: Bread for the City; Children's Law Center; DC Fiscal Policy Institute; Families USA; Family and Medical Counseling Service, Inc.; Family Voices of the District of Columbia, Inc.; Greater Washington Society for Clinical Social Work; Legal Aid Society of the District of Columbia; Miriam's Kitchen; National MS Society, Greater DC-Maryland Chapter; ONE DC; University Legal Services; and Washington Interfaith Network.

comments from both coalitions are very similar. Each coalition recommends dedicating the \$56.2 million in excess surplus to a fund from which grants would be made over no more than a five-year period to support community health initiatives in the District. *See* Letter from the Community Foundation for the National Capital Region to Commissioner Taylor at 2 (July 14, 2016) (“Community Foundation Letter”); Letter from Bread for the City, *et al.*, to Commissioner Taylor at 1 (July 14, 2016) (“Bread for the City Letter”). Although their recommendations differ in some details, both coalitions envision that the fund would be administered by one or more private foundations with oversight by the Commissioner. *See* Community Foundation Letter at 4-8; Bread for the City Letter at 1. Both coalitions also suggest that priorities for grant-making could be guided by the Urban Institute Report. *See* Community Foundation Letter at 2; Bread for the City Letter at 2. In addition, one coalition identifies the DOH Report as a guidepost that could be used to track the effectiveness of the fund over the course of its operations. *See* Community Foundation Letter at 2.

#### **F. Comments from Community Health and Welfare Service Providers**

The Commissioner received comments from a number of District-based organizations that provide community health and welfare services in the District.<sup>11</sup> These comments generally provide recommendations regarding specific programs that should receive funds for community health reinvestment.

Whitman-Walker Health makes the more general suggestion that the Commissioner either order GHMSI to reinvest the excess surplus using GHMSI’s

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<sup>11</sup> The following health and welfare service providers submitted comments: Walker Whitman Health; District of Columbia Primary Care Association; Miriam’s Kitchen; Capital Area Food Bank; ONE DC; Amerihealth Caritas DC; Food & Friends; DC Campaign to Prevent Teen Pregnancy.

existing grant-making procedures or require GHMSI to contribute the excess to a fund dedicated to providing financial support to individuals and families insured by GHMSI. *See* Letter from Donald Blanchon, Chief Executive Officer, Whitman-Walker Health to Commissioner Taylor at 2 (July 14, 2016).

### **G. Comments from Trade Associations**

The Commissioner received comments from three District trade associations representing the insurance industry and the business community at large.<sup>12</sup> Each expressed concern over the effect a distribution or reduction of excess surplus might have on GHMSI's financial position.

### **H. Comments from Maryland Insurance Commissioner**

The Commissioner also received comments from Maryland Insurance Commissioner Al Redmer, Jr. Commissioner Redmer states that, under the 2015 amendment to GHMSI's federal Charter, any order by the Commissioner that will cause GHMSI's present or future surplus to be distributed or reduced requires the agreement of the District, Maryland and Virginia. *See* Statement of Al Redmer, Jr., Maryland Insurance Commissioner at 1-2 (July 11, 2016) ("Redmer Comment"). Commissioner Redmer further states that any such order would conflict with a consent order issued in 2012 by former Maryland Insurance Commissioner Therese M. Goldsmith as well as with Commissioner Redmer's own assessment of the appropriate target level for GHMSI's surplus and the 2015 amendment to Maryland law requiring the consent of the Maryland Insurance Commissioner before GHMSI may distribute or reduce its surplus in

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<sup>12</sup> District of Columbia Association of Health Plans; DC Chamber of Commerce; District of Columbia Insurance Federation.

response to a law or order from another jurisdiction. *See id.* at 2-3. Commissioner Redmer also asserts that coordination among the District, Maryland and Virginia should precede any such order. *See id.* at 3-4.

### **III. DISCUSSION**

The discussion below addresses the major comments received in response to the June 14, 2016 Order, especially as they relate to the Commissioner's authority under MIEAA and the actions necessary to enforce MIEAA's purposes.

#### **A. Commissioner's Authority Under MIEAA**

The Commissioner construes MIEAA to authorize him to enforce the December 30, 2014 Order by directing GHMSI to issue rebates and by lifting the freeze on rate increases imposed by the June 14, 2016 Order at such time as GHMSI complies with the directive to issue rebates.

##### **1. Authority to Lift Rate Freeze**

Appleseed and Councilmembers Cheh and Silverman urge the Commissioner not to lift the freeze on rate increases imposed by the June 14, 2016 Order under any circumstances. They assert that MIEAA requires the freeze to remain in place for 12 months as a punitive measure.

MIEAA provides that if the Commissioner determines that a hospital or medical service corporation has failed to submit a plan for community health reinvestment within a reasonable period following an order to do so, "the Commissioner shall deny for 12 months all premium rate increases for subscriber policies written in the District sought by

the corporation . . . and may issue such orders as are necessary to enforce the purposes of this chapter.” D.C. Code § 31-3506(i) (emphasis added). The Commissioner interprets the authority under this provision to issue such orders as are necessary to enforce the purposes of MIEAA to permit him to lift the freeze on GHMSI’s rates if he reasonably determines that doing so is necessary to enforce the purposes of MIEAA.<sup>13</sup>

MIEAA was enacted “to ensure that nonprofit hospital and medical service corporations pursue their public health mission.” *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep’t of Ins., Sec. & Banking*, 54 A.3d 1188, 1201 (D.C. 2012) (quoting D.C. Council, Report on Bill 17-934, the “Medical Insurance Empowerment and Amendment Act of 2008” at 2 (Oct. 17, 2008)). In specific, the Council’s twin objectives were “(1) obligating GHMSI to reinvest in community health ‘to the maximum feasible extent,’ (2) without undermining GHMSI’s ‘financial soundness and efficiency.’” *D.C. Appleseed*, 54 A.3d at 1214. These objectives are explicitly stated in Section 2(c) of MIEAA, which is codified at D.C. Code § 31-3505.01. In addition, if the Commissioner determines that GHMSI’s surplus is excessive, MIEAA requires dedication of the excess attributable to the District to community health reinvestment. *See* D.C. Code § 31-3506(g)(1).

For several reasons, the Commissioner believes a continued freeze on rate increases after GHMSI complies with this Decision and Order would be contrary to the purposes of MIEAA. First, so long as GHMSI complies with the Commissioner’s order to issue rebates, it will have engaged in community reinvestment to the maximum

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<sup>13</sup> The Department’s regulations provide that if GHMSI fails to submit a plan as ordered, “the Commissioner shall deny all premium rate increases for subscriber policies written in the District until the company complies with the order or the Commissioner may issue any other order as necessary to enforce the purposes of the Act.” D.C. Mun. Regs. tit. 26-A, § 4603.3. The Commissioner also construes this provision to permit him to lift the freeze on GHMSI’s rates if he reasonably deems it necessary to enforce the purposes of MIEAA.

feasible extent, as determined by the December 30, 2014 Order—*i.e.*, GHMSI will have reinvested all of the excess 2011 surplus attributable to the District. Thus, a continued freeze on rate increases will not be necessary or consistent with the purposes of MIEAA. Second, a freeze on rates following the distribution of the excess 2011 surplus attributable to the District would likely cause a further reduction in GHMSI’s surplus to the extent that GHMSI seeks rate increases during the freeze period to maintain rates that are adequate to meet claims costs and expenses. Any such reduction would reduce the surplus attributable to the District in excess of the amount determined in the December 30, 2014 Order.

Finally, the Commissioner is concerned that a continued freeze on rates could have an adverse effect on GHMSI’s financial efficiency, which also would be contrary to MIEAA’s purposes. The record in this proceeding documents the disruption to the health insurance marketplace resulting from, and uncertainty surrounding, the reforms mandated by the Affordable Care Act (“ACA”) and District law implementing the ACA. *See, e.g.*, December 30, 2014 Order at 32-49 (citing Rector & Associates, Inc., *Report to the D.C. Department of Insurance, Securities and Banking – Group Hospitalization and Medical Services, Inc.* (Dec. 9, 2013)). This disruption includes uncertainty regarding the expense of insuring, and appropriate premium rates for, new entrants to the health insurance pool, who may be less healthy than existing participants and in need of more costly services. *See id.* The Commissioner is mindful of the fact that a lengthy freeze on rates could require GHMSI to increase rates in the future by a larger amount than would otherwise be the case. In this case, larger-than-expected rate increases could be detrimental to GHMSI’s contractholders and subscribers, especially individuals and small businesses,



who may not have the resources to manage unplanned-for increases in the cost of health insurance. Accordingly, the Commissioner concludes that lifting the rate freeze after GHMSI's compliance with this Decision and Order is necessary to ensure that GHMSI engages in community health reinvestment, but only to the extent consistent with the purposes of MIEAA.

## **2. Authority to Order Implementation of a Plan**

GHMSI disputes the Commissioner's authority to develop and approve a plan for dedication of its excess 2011 surplus to community health reinvestment. According to GHMSI, MIEAA provides only two remedies following a determination that its surplus is excessive: (1) that GHMSI submit, and the Department approve, a plan for reinvestment of the excess attributable to the District or (2) that the Commissioner deny premium rate increases for 12 months if GHMSI fails to submit a satisfactory plan when required by MIEAA. *See* GHMSI Comments at 14. GHMSI therefore argues that the Commissioner has no authority under MIEAA to approve and issue a plan for the reinvestment of the excess surplus on his own initiative as stated in the June 14, 2016 Order. *See id.* at 15.

GHMSI's argument ignores the Commissioner's statutory authority to "issue such orders as are necessary to enforce the purposes of [MIEAA]." D.C. Code § 31-3506(i). This broad grant of authority allows the Commissioner to issue such orders as he reasonably determines are necessary to enforce MIEAA's purposes. *See Wisconsin-Newark Neighborhood Coal. v. D.C. Zoning Comm'n*, 33 A.3d 382, 388 (D.C. 2011) ("[W]e will accord deference to an agency's interpretation of the statute which it is responsible for administering if it is reasonable and not plainly wrong or inconsistent with its legislative purpose.") (internal quotation omitted); *Smith v. D.C. Dep't of Emp't*

*Servs.*, 548 A.2d 95, 97 (D.C. 1988) (“Where an administrative agency is delegated broad authority to administer a statutory scheme . . . we defer to a reasonable construction of the statute made by the agency.”) (citations omitted).

To accept GHMSI’s formulation of MIEAA’s remedies would render the public policies embodied in MIEAA unenforceable and simply ignores the authority conferred upon the Commissioner to issue such orders as are necessary to enforce the purposes of the law. As discussed above, the central purpose of MIEAA is to require GHMSI to engage in community health reinvestment to the maximum extent feasible consistent with financial soundness and efficiency. The development and approval of a plan for reinvestment of excess surplus, and not just a rate freeze, clearly is necessary to enforce this purpose. Without such a plan, GHMSI would be free to ignore its full obligations under MIEAA as determined by the December 30, 2014 Order. Accordingly, the Commissioner concludes that he has discretion to develop, approve and order GHMSI to implement a plan for community health reinvestment.<sup>14</sup>

### **B. GHMSI’s 2015 Charter Amendment**

On December 18, 2015, Congress passed and the President signed into law the Financial Services and General Government Appropriations Act, 2016 (the “Appropriations Act”), which was enacted as part of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242. Section 747 of the Appropriations Act states:

Sec. 747. (a) The Act entitled “An Act providing for the incorporation of certain persons as Group Hospitalization and Medical Services, Inc.”, approved August 11, 1939 (53 Stat. 1412), is amended—

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<sup>14</sup> Moreover, it is immaterial whether the Commissioner’s orders under this Decision and Order are characterized as a “plan” or otherwise. Regardless of how they are characterized, they are orders necessary to enforce the purposes of MIEAA and therefore squarely within the Commissioner’s authority.

- (1) by redesignating section 11 as section 12; and
- (2) inserting after section 10 the following:

Sec. 11. The surplus of the corporation is for the benefit and protection of all of its certificate holders and shall be available for the satisfaction of all obligations of the corporation regardless of the jurisdiction in which such surplus originated or such obligations arise. The corporation shall not divide, attribute, distribute, or reduce its surplus pursuant to any statute, regulation, or order of any jurisdiction without the express agreement of the District of Columbia, Maryland, and Virginia—

- (1) that the entire surplus of the corporation is excessive; and
- (2) to any plan for reduction or distribution of surplus.

(b) The amendments made by subsection (a) shall apply with respect to the surplus of Group Hospitalization and Medical Services, Inc. for any year after 2011.

Appropriations Act, § 747; 129 Stat. 2242, 2468 (Dec. 18, 2015) (emphasis added).

GHMSI contends that under Section 747, the Commissioner must obtain the approval of Maryland and Virginia before he may order GHMSI to distribute or reduce its excess 2011 surplus or impose a freeze on rates for policies issued in the District. *See* Letter from Chet Burrell, President and C.E.O., CareFirst, to Commissioner Taylor at 5 (July 14, 2016); GHMSI Comments at 2. According to GHMSI, because any order to dedicate the excess 2011 surplus to community health reinvestment necessarily would affect GHMSI's present or future surplus, the Commissioner may not take such action without the agreement of Maryland and Virginia. *See id.* at 3. Thus, GHMSI concludes that in amending the Charter, Congress chose not to interfere with the Commissioner's review of GHMSI's 2011 surplus but intended to require that any decision by the Commissioner requiring a reduction in GHMSI's present or future surplus would require the agreement of Maryland and Virginia. *Id.* at 4.

GHMSI's argument regarding the effect of the Charter amendment ignores the plain language of the Appropriations Act and contravenes established principles of statutory construction. The Charter amendment under Section 747(a) provides that

GHMSI “shall not divide, attribute, distribute, or reduce its surplus pursuant to any statute, regulation, or order of any jurisdiction without the express agreement of the District of Columbia, Maryland, and Virginia—(1) that the entire surplus of the corporation is excessive; and (2) to any plan for reduction or distribution of surplus.” Section 747(b) provides that this requirement “shall apply with respect to the surplus of [GHMSI] for any year after 2011.” It is very clear from this language that the required agreement among jurisdictions regarding whether surplus is excessive and as to any plan for reduction or distribution of surplus applies only to surplus for any year after 2011. In other words, by the plain language of the statute, GHMSI may divide, attribute, distribute or reduce its surplus as to any year through 2011 pursuant to a law or order of the District without the express agreement of all three jurisdictions in which it operates.

GHMSI argues that any such action will affect its present or future surplus—*i.e.*, its surplus after 2011—and therefore is prohibited by the Charter amendment. This argument makes nonsense of the savings clause found in Section 747(b). MIEAA requires the Commissioner to review GHMSI’s surplus and, if it is determined to be excessive, permits him to order dedication of the excess to community health reinvestment. By practical and logical necessity, any such order must affect GHMSI’s present or future surplus. In other words, it must affect the surplus after the reference date used to determine whether the surplus is excessive. In this proceeding, that date is December 31, 2011.

Congress was clearly aware of this fact when it enacted the Charter amendment. GHMSI itself acknowledges that Congress was “well aware of the [December 30, 2014 Order] and the changes in law enacted in Maryland and Virginia . . .” and was acting in

response to those developments when it amended the charter. *CareFirst, Inc. v. Taylor*, Case No. 1:16-cv-02656-CCB (D. Md. July 22, 2016), Complaint, ¶ 32. Moreover, under accepted principles of statutory construction, Congress is presumed to be aware of such circumstances when it enacts legislation. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742, 187 L. Ed. 2d 654 (2014) (“[W]e presume that ‘Congress is aware of existing law when it passes legislation.’”) (quoting *Hall v. United States*, 132 S.Ct. 1882, 1889 (2012)); *United States v. Wilson*, 290 F.3d 347, 354 (D.C. Cir. 2002) (interpreting statutory amendment by presuming that Congress considered the broader context of the amendment, including “the contextual background against which Congress was legislating, including relevant practices . . . which presumably informed Congress’s decision, prior legislative acts, and historical events”).

Therefore, in enacting the savings provision under Section 747(b), Congress could only have intended to preserve the Commissioner’s authority to order a distribution or reduction with respect to GHMSI’s excess 2011 surplus pursuant to the December 30, 2014 Order. To construe the savings clause otherwise would render it entirely superfluous and meaningless, as there would be no surplus to which it could apply. A basic principle of statutory interpretation is that statutes should be construed “so as to avoid rendering superfluous” any statutory language. *Astoria Fed. Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991). GHMSI’s suggested interpretation would render the savings clause a nullity and stands in direct conflict with basic principles of statutory construction.

GHMSI further argues that, in enacting the Charter amendment, Congress intended not to interfere with the Commissioner’s review of GHMSI’s 2011 surplus, but

to prohibit any decision by the Commissioner to order a distribution or reduction of excess 2011 surplus. This argument again renders the savings clause entirely superfluous. Creating an exception to the Charter amendment solely for the review of GHMSI's 2011 Surplus would be meaningless given that the review was completed under the December 30, 2014 Order nearly a year prior to when Congress amended GHMSI's charter on December 18, 2015.<sup>15</sup> As stated above, Congress was clearly aware of these facts and is presumed by law to have been aware of them. Thus, Congress cannot reasonably be said to have intended to create an exception for a review that had already occurred. The only reasonable interpretation of the savings clause is that it was intended to allow enforcement of MIEAA with respect to GHMSI's excess 2011 surplus.<sup>16</sup>

A statement released by Congresswoman Eleanor Holmes Norton just after the Charter amendment was passed indicates that the saving clause was intended to permit the Commissioner to enforce MIEAA with respect to GHMSI's excess 2011 surplus. According to Congresswoman Norton, she “did succeed in allowing any of the jurisdictions to order such a disposition without the consent of the other jurisdictions for any surplus before 2012, thereby allowing D.C. to enforce, if it so chooses, the D.C. Insurance Commissioner's order that GHMSI reinvest \$56 million from its 2011 surplus.” Press Release, Congresswoman Eleanor Holmes Norton, *Norton Gets Record Funding for DCTAG and Other D.C. Priorities, Prevents New Social Riders, Despite*

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<sup>15</sup> Indeed, the two petitions for reconsideration of the review were received by the Department in early 2015 and denied many months before Congress acted. See *supra* note 5.

<sup>16</sup> If Congress had intended the Charter amendment to prohibit enforcement of the December 30, 2014 Order, there was no need for the Congress to enact Section 747(b) as the language in section 747(a) would prohibit the District from enforcing the December 30, 2014 Order without consent from Maryland and Virginia.

*First Republican Controlled Congress in Eight Years* (Dec. 16, 2015). Accordingly, the only reasonable interpretation of the savings clause is to permit enforcement of the December 30, 2014 Order.

### **C. Coordination with Maryland and Virginia**

MIEAA requires any review of GHMSI's surplus by the Commissioner to determine whether it is excessive to be "undertaken in coordination with the other jurisdictions in which the corporation conducts business." D.C. Code § 31-3506(e). At various points in this proceeding, GHMSI has argued that the Department did not coordinate sufficiently with Maryland and Virginia. *See, e.g.*, Plan at 6-7. The Maryland Insurance Commissioner also asserts that the Department has not sufficiently coordinated with his state, citing the conflict between Maryland law and the December 30, 2014 and June 14, 2016 Orders. *See* Redmer Comment at 3.

As a threshold matter, the Commissioner notes that MIEAA requires coordination with Maryland and Virginia only as to any review to determine whether GHMSI's surplus is excessive. *See* D.C. Code § 31-3506(e). Once such a determination is made, MIEAA does not contemplate coordination with other jurisdictions with respect to ordering a plan to dedicate excess surplus attributable to the District to community health reinvestment, the imposition of a rate freeze if timely plan is not provided, or the issuance of other orders necessary to enforce the purposes of the statute. *See id.* §§ 31-3506(h), (i). Thus, to the extent that GHMSI or the Maryland Insurance Commissioner contends that the Commissioner is required by MIEAA to coordinate with other jurisdictions with respect to these aspects of the statute, their assertions are incorrect.

As to the determination under the December 30, 2014 Order that GHMSI's 2011 surplus was excessive, the fact remains that the Department fully coordinated with Maryland and Virginia in reaching that determination. As explained in the December 30, 2014 and June 14, 2016 Orders, during the review of GHMSI's 2011 surplus, the Department actively coordinated with Maryland and Virginia by communicating with the state insurance commissioners and their staff, advising them of the review, soliciting their participation, carefully considering their comments, and responding to their inquiries. *See* June 14, 2016 Order at 16. Indeed, Virginia regulators reported not that the Department failed to coordinate with them, but rather that they did not take full advantage of the opportunities presented by the Department to coordinate and intend to participate more fully in future surplus reviews. *See* Commonwealth of Virginia State Corporation Commission Bureau of Insurance, Bureau Report Regarding the Impact of the Distribution of GHMSI's Excess Surplus on Virginia Residents at 7 (Apr. 15, 2015).

As the Department also has explained previously, *see* June 14, 2016 Order at 16, at its root, GHMSI's assertion that the Department failed to coordinate with Maryland and Virginia rests on the erroneous assumption that MIEAA's requirement for coordination requires agreement among the affected jurisdictions. This conclusion is directly contrary to the plain language of MIEAA. Nothing in MIEAA suggests that the Commissioner must come to agreement with regulators in Maryland and Virginia in determining whether GHMSI's surplus is excessive or, as explained above, issuing orders to enforce the purposes of MIEAA once such a determination is made. To the contrary, MIEAA vests sole authority in the Commissioner in this respect. *See* D.C. Code §§ 31-3506(e)-(i).



#### **D. Reductions in Surplus After 2011**

In its comments to the Commissioner, GHMSI repeats many of the arguments it has made in the past concerning expenditures, costs, underwriting losses and changes in surplus it asserts should be credited as community health reinvestment with respect to the excess 2011 surplus. *See* GHMSI Comments at 5-14. The Department reviewed and addressed these arguments, *see* June 14, 2016 Order at 6-15, and will not revisit them here, except to reiterate the following: As stated in the June 14, 2016 Order, it is important to recognize that the analysis the Acting Commissioner conducted of GHMSI's 2011 surplus to determine whether it was excessive was based on reasonable projections of GHMSI's post-2011 performance, including the possibility of underwriting losses and fluctuations in surplus. *See, e.g.*, December 30, 2014 Order at 30, 39 (discussing modeling generally and the rating adequacy and fluctuation risk factor in particular). In other words, the fact that GHMSI has experienced some underwriting losses and has undergone modest fluctuations in surplus does not change the determination that the 2011 surplus was excessive. In this regard, the Commissioner notes that GHMSI's surplus as of June 30, 2016 was \$982 million, which is above its level of \$964 million on December 31, 2011.

GHMSI also argues that expenditures such as its annual community giving should be credited as community health reinvestment of the excess 2011 surplus. *See* GHMSI Comments at 9-10. As the Commissioner explained in the June 14, 2016 Order, the determination that the 2011 surplus was excessive took into account anticipated, programmatic expenditures by GHMSI for community giving as well as open enrollment subsidies and contributions to the District's Healthcare Alliance. *See* June 14, 2016

Order at 9. In other words, the excess 2011 surplus identified by the December 30, 2014 Order is in excess of amounts needed by GHMSI to satisfy these obligations.

In addition, GHMSI argues that, beginning in 2011, it took steps to reduce its rates in order to reduce surplus, which should be credited as expenditures of the excess 2011 surplus for community health reinvestment. *See* GHMSI Comments at 10-13. As explained in the June 14, 2016 Order, the Commissioner believes rate filings that reduced or moderated premium rates can reasonably be characterized as dedication of excess surplus to community health reinvestment if they demonstrably were intended by GHMSI as a deliberate effort to reduce surplus to benefit subscribers. *See* June 14, 2016 Order at 10. Such rate filings are distinguishable from reductions merely aimed at bringing rates in line with experience or made purely for competitive reasons and are not intended to reduce surplus. *See id.* at 9-10.

On this basis, the Commissioner concludes that six rate filings made by GHMSI that affected premium rates after December 31, 2011, set forth in Table 1 below, should be credited as community health reinvestment of excess 2011 surplus. Each of these filings identifies an express negative Contribution to Reserves (“CTR”)<sup>17</sup> resulting from the filed rates. These filings are distinguishable from other rate filings for which GHMSI claims credit for community health reinvestment in that they can reasonably be characterized as intended to reduce surplus for the benefit of subscribers.

GHMSI claims that certain other rate filings also should be credited as community health reinvestment because they identify two rates—a “proposed rate” for which approval was requested and higher “required rate” for which GHMSI claims it could have

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<sup>17</sup> CTR is the portion of premium that is intended to impact the surplus of GHMSI. A negative CTR equates to a reduction in surplus.

sought approval but did not. GHMSI Comments at 11 n.5. None of these filings expressly identifies a negative CTR. On the contrary, all of them expressly identify either zero or a positive CTR. GHMSI's argument appears to be that by not charging the unfiled, hypothetical higher rates, it was foregoing what would have been a greater CTR and therefore should be credited with the difference between the estimated higher contribution that would have resulted from the "higher rate" and the estimated contribution that was identified for the filed rate for which Department approval was actually sought and obtained. The Commissioner cannot agree with this argument. No documentation was provided by GHMSI at the time of the filings to show that the higher rates were appropriate, and there is nothing to suggest that the Department would have approved the higher rates if they had been presented for review. Thus, there is no credible basis for GHMSI's assertion that these filings were intended to expend excess surplus for community health reinvestment.

Table 1 below identifies the six filings which the Commissioner will credit as expenditures of excess surplus for community health reinvestment and explains the Commissioner's calculation of their effect on surplus.

The Commissioner concludes that the rate filings identified in Table 1 resulted in an aggregate reduction in surplus of \$4,887,618. Applying the aggregate reduction in surplus attributable to these filings to the total excess 2011 surplus attributable to the District of \$56,213,088.72 yields a revised excess 2011 surplus attributable to the District of \$51,325,470.72.

**Table 1: GHMSI Rate Filings Credited as Community Health Reinvestment of Excess 2011 Surplus**

SERFF Tracking #	Effective Period	CTR <sup>18</sup>	Annualized \$ Impact <sup>19</sup>	Effective \$ Impact <sup>20</sup>	Effective \$ Impact after 12/31/2011 <sup>21</sup>
CFAP-127118704	Aug. 1 - Oct. 31, 2011	-7.10%	(14,462,645)	(3,676,493)	<b>(2,450,995)</b>
CFAP-127350283	Nov. 1 - Dec. 31, 2011	-6.10%	(12,296,447)	(2,112,187)	<b>(1,848,164)</b>
CFAP-127159629	Oct. 1 - Dec. 31, 2011	-8.00%	(1,780,699)	(443,331)	<b>(369,443)</b>
CFAP-127159563	Oct. 1 - Dec. 31, 2011	-8.00%			
CFAP-127360767	Jan. 1 - Mar. 31, 2012	-4.00%	(945,266)	(219,016)	<b>(219,016)</b>
CFAP-127360790	Jan. 1 - Mar. 31, 2012	-4.00%			
Total					<b>(4,887,618)</b>

### **E. Dedication of Excess 2011 Surplus to Community Health Reinvestment**

The public comments submitted in response to the June 14, 2016 Order provide a range of suggestions for the reinvestment of the 2011 excess surplus, including establishing a fund for community reinvestment administered by one or more private foundations, requiring GHMSI to pay rebates to its subscribers or engage in rate reductions, ordering GHMSI to reinvest the excess using its existing procedures for making community grants, or ordering GHMSI to contribute the excess to a fund that would provide financial support for individuals and families insured by GHMSI.

<sup>18</sup> “CTR” is Contribution to Reserves and is the portion of premium that is intended to impact the surplus of GHMSI.

<sup>19</sup> “Annualized \$ Impact” represents the total dollar impact on surplus of the CTR factor as stated by GHMSI in the Actuarial Memorandum provided with the rate filing.

<sup>20</sup> “Effective \$ Impact” represents the Department’s estimated dollar impact on surplus. This amount is calculated by applying the CTR factor to the premium for the experience period as stated in the Actuarial Memorandum for the filing, as adjusted based on the effective period of the filing (*e.g.*, if the effective period spans one calendar quarter, or three months, then the CTR factor is applied to one quarter of the premium for the experience period).

<sup>21</sup> “Effective \$ Impact after 12/31/2011” represents the estimated amount of the dollar impact that was realized after December 31, 2011, the closing date of the surplus review. For example, for a rate filing effective between 8/1/2011 and 10/31/2011, there are three possible renewal dates for the affected policies (8/1/2012, 9/1/2012, and 10/1/2012). Of the aggregate 36 months during which the rates for these policies could possibly be in effect (8/1/2011 - 7/31/2012, 9/1/2011 - 8/31/2012, 10/1/2011 - 9/30/2012), the rates are effective for 7, 8, or 9 months in 2012, respectively. Therefore, the effective dollar impact of the CTR factor applies to (7 + 8 + 9) = 24 out of 36 aggregate months for the effective rates in the filing, and the “Effective \$ Impact after 12/31/2011” would be (24/36) x the “Effective \$ Impact.”

As discussed above, the expressly stated purpose of MIEAA, as affirmed by the Court of Appeals, is to obligate GHMSI to reinvest in community health to the maximum feasible extent but without undermining GHMSI's financial soundness and efficiency. *See D.C. Appleseed*, 54 A.3d at 1214; D.C. Code § 31-3505.01 ("A corporation shall engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency."). MIEAA defines "community health reinvestment" as "expenditures that promote and safeguard the public health or that benefit current or future subscribers, including premium rate reductions." D.C. Code § 31-3501(1A). MIEAA further states that a plan for community health reinvestment must be "fair and equitable," *id.* § 31-3506(g)(1), and "may consist entirely of expenditures for the benefit of current subscribers of the corporation." *Id.* § 31-3506(g)(2).

The Commissioner has carefully considered the comments received and the record in this proceeding<sup>22</sup> and concludes that the purposes of MIEAA are best served by requiring GHMSI to issue rebates for current subscribers. Appleseed argues that the payment of rebates to current subscribers of GHMSI would likely not be fair and equitable because the rebates would benefit many current subscribers, who may not have contributed premium dollars to the surplus build-up that resulted in the 2011 excess. *See Appleseed Comments* at 9. This argument ignores MIEAA's definition of community health reinvestment, which includes "expenditures that . . . benefit current or future subscribers . . . ." D.C. Code § 31-3501(1A) (emphasis added). Moreover, Appleseed

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<sup>22</sup> The Commissioner is very appreciative of the innovative concepts advanced by the foundation coalitions, the Members of the Council, and Appleseed that could promote and safeguard public health in the District. However, the Commissioner could not find the authority in the MIEAA to establish a trust as contemplated by the foundations, or the regulations and procedures required to administer such a trust. Additionally, MIEAA does not provide authority for the Commissioner to oversee and regulate a private trust. In the absence that necessary authority, the Commissioner cannot implement such a plan.

ignores the fact that the type of expenditures it advocates would benefit persons who may not have contributed any amount to the excess 2011 surplus. That such expenditures are authorized by MIEAA further confirms there is no requirement that a plan benefit only persons who contributed to the excess 2011 Surplus.

The dedication of the excess surplus to rebates will have three beneficial effects, all of which directly advance the purposes of MIEAA to promote and safeguard the public health and benefit subscribers. First, it will ensure that the funds are distributed now, to the immediate benefit of GHMSI's subscribers and in an administratively efficient manner. Second, it will promote and safeguard public health by reducing the cost of health insurance for subscribers, including not only the costs associated with the payment of insurance premiums and contributions, but also deductibles, co-pays, coinsurance and other out-of-pocket costs. Finally, the payment of rebates for the benefit of all subscribers provides for a dedication of the excess surplus in the most fair and equitable manner.

Consistent with the method by which a portion of GHMSI's excess 2011 surplus was attributed to the District under the December 30, 2014 Order, *see* December 30, 2014 Order at 50-58, the Commissioner focuses primarily on the location or "situs" of GHMSI's subscriber contracts to determine the eligibility of subscribers for rebates. Only subscribers insured under subscriber contracts with a situs in the District—*i.e.*, subscriber contracts issued in the District—will be eligible to receive a rebate. In addition, consistent with the surplus attribution methodology used in the December 30,

2014 Order, only Federal Employee Program (“FEP”) subscribers who reside in the District will be eligible for rebates.<sup>23</sup>

Because MIEAA defines community health reinvestment to include expenditures that “benefit current or future subscribers,” *see* D.C. Code § 31-3501(1A), without reference to contractholders, the Commissioner intends that rebates will be paid only to subscribers, and not to contractholders who are not also subscribers. A subscriber is “any person entitled to benefits under the terms and conditions of a subscriber contract.” D.C. Code § 31-3501(8). A contractholder is any “person entering into a subscriber contract with a [hospital or medical services] corporation.” *Id.* § 31-3501(1B). In the case of an individual contract, the contractholder also is a subscriber. In the case of a group contract, the contractholder, which may be an employer or other entity, may not be a subscriber. Thus, for example, in the case of employer group contracts, the employer contractholder will not be eligible for a rebate unless the employer is a natural person and a subscriber under the contract.

Finally, for practical reasons, the Commissioner intends that rebates will be paid to the primary insured subscriber under any group or individual contract, and not to spouses, domestic partners or dependents who also may be covered under the contract.

#### **IV. ORDER**

Based on the foregoing, the Commissioner hereby ORDERS:

1. The denial of requests for premium rate increases for subscriber contracts issued by GHMSI in the District, as established by the June 14, 2016 Order, shall remain

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<sup>23</sup> Under the method used to attribute excess surplus to the District, the Department followed the allocation of premiums by jurisdiction reported on Schedule T of the 2011 Annual Statements for GHMSI and CareFirst BlueChoice. *See* December 30, 2014 Order at 54. On the 2011 Annual Statements, only premiums for FEP subscribers who resided in the District were reported as allocated to the District.

in effect until GHMSI certifies in writing to the Commissioner that all rebates required by this Decision and Order have been issued.

2. No later than 120 days following the date of this Decision and Order, GHMSI shall pay rebates in the total amount of its revised excess 2011 surplus attributable to the District. The rebates shall be paid only to Eligible Subscribers, which are individuals who are GHMSI subscribers as of the date of this Decision and Order, who are the primary insured under the subscriber contract, and who meet one or more of the following criteria:

- a. Subscribers with an individual in-force major medical contract issued in the District;
- b. Subscribers with a policy or certificate from an in-force group major medical contract, excluding FEP business, issued in the District;
- c. Subscribers with a certificate from the FEP who reside in the District;
- d. Subscribers with a policy or certificate from an in-force group dental or vision contract issued in the District;
- e. Subscribers with an in-force Medicare Supplement contract issued in the District;
- f. Subscribers with any other type of in-force contract not listed above issued in the District.

3. The amount of each Eligible Subscriber's rebate shall be calculated in proportion to the Eligible Subscriber's current annual premium for health insurance as follows: A rebate percentage shall be calculated as the ratio of the total rebate amount

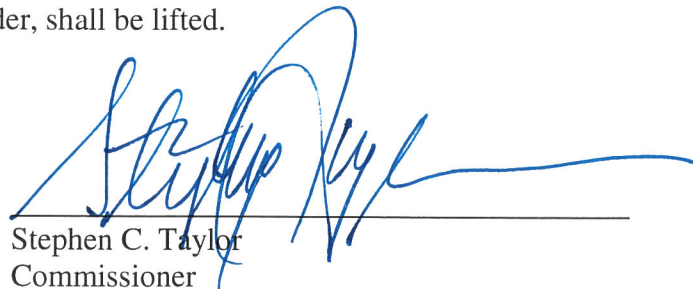


(\$51,325,470.72) to the sum of the annual premium (12 times the current monthly premium) as of the date of this Decision and Order for all Eligible Subscribers identified above. Each Eligible Subscriber's rebate will be the rebate percentage times the Eligible Subscriber's annual premium and then rounded to the nearest dollar. If an individual is an Eligible Subscriber under more than one contract—for example, a major medical contract and a dental or vision contract—all such contracts shall be taken into account in calculating the rebate.

4. The cost of calculating, preparing and distributing the rebates shall be borne by GHMSI.

5. As of the date that GHMSI certifies in writing to the Commissioner that all rebates required by this Decision and Order have been issued, the denial of requests for premium rate increases for subscriber contracts issued by GHMSI in the District, as established by the June 14, 2016 Order, shall be lifted.

Dated: August 30, 2016



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Stephen C. Taylor  
Commissioner  
Department of Insurance, Securities and Banking

[Seal]