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

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| IN THE MATTER OF | ) | |
| Surplus Review and Determination for Group Hospitalization and Medical Services, Inc. | ) | Order No.: 14-MIE-019 |

**PETITION FOR RECONSIDERATION AND MOTION TO STAY FURTHER PROCEEDINGS BY GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC.**

Group Hospitalization and Medical Services, Inc. (GHMSI), respectfully requests that the Commissioner of the Department of Insurance, Securities and Banking (DISB) reconsider the August 30, 2016, Order. GHMSI also respectfully requests that DISB stay all further proceedings in this matter, including execution of the relief required by that Order, until the D.C. Court of Appeals has ruled on any appeal filed by GHMSI and a directly related federal suit has been resolved.

The conclusions and directives contained in August 2016 Order are fundamentally mistaken on the merits, for the array of reasons GHMSI has delineated in previous filings before the Commissioner. Moreover, the Order failed to account for a number of important technical concerns. Reconsideration is warranted so that the Commissioner can give full and appropriate weight to GHMSI's arguments. Reconsideration is further needed so that the Commissioner can, among other things, properly evaluate the Order's impact on taxable income for employee subscribers and determine whether the federal Office of Personnel Management would permit payment of rebates to federal employee subscribers—all of which would directly affect the content of a corrected Order.

GHMSI will also suffer irreparable harm if it is required to implement the Commissioner's August 2016 Order now—distributing rebates to eligible subscribers within 120 days, and having any premium rate increases denied until the rebates are distributed—before any appeal is taken up and decided. If GHMSI later prevailed on appeal, it would be unable to recoup the disbursed funds or recover any losses from denied premium rate increases that are otherwise justified. This case also presents unique and significant legal issues that deserve an opportunity for full consideration by the D.C. Court of Appeals before any irrevocable steps are taken. No parties would be harmed by a stay in the interim, and the public interest supports a stay. GHMSI is prepared to seek expedited review in the D.C. Court of Appeals if a stay is granted, in order to bring this proceeding to resolution as quickly as practicable.

In addition, GHMSI has filed suit in the United States District Court for the District of Maryland, seeking a declaration from the federal court as to the application of GHMSI's federal Charter and to resolve the conflict between the Commissioner's Orders in these proceedings and conflicting orders issued by the Maryland Insurance Commissioner and the Virginia State Corporation Commission. GHMSI has requested expedited resolution of the federal suit as well. The Commissioner is a party to that action, and GHMSI asks that, at a minimum, the August 2016 Order be stayed until the federal court rules on the federal law questions and addresses the conflicting orders by differing state regulators.[1]

## BACKGROUND

The Commissioner's August 2016 Order sets forth a surplus plan for GHMSI. In that Order, the Commissioner (1) states that DISB will continue to deny any filed requests for

[1] To be clear, a stay may not actually be needed until both cases are resolved. It would only be needed until one of the two courts rules in GHMSI's favor. If *either* the D.C. Court of Appeals or the federal court grants GHMSI's requested relief, the stay would become moot.

premium rate increases in the District; (2) requires GHMSI to "pay rebates in the total amount of its revised excess 2011 surplus attributable to the District" to "Eligible Subscribers" in six designated categories; (3) sets a scheme for calculating each rebate, based on a subscriber's current annual premiums; (4) stipulates that "[t]he cost of calculating, preparing and distributing the rebates shall be borne by GHMSI"; and (5) provides that the rate-increase denial will be lifted when GHMSI certifies that all required rebates have been issued. DISB Order No. 14-MIE-019 at 31-33 (Aug. 30, 2016).

The August 2016 Order constitutes a final order in the proceedings related to GHMSI's 2011 surplus.[2] *See* Order, Nos. 15-AA-108, 15-AA-109 at 2 (D.C. Apr. 28, 2015) (per curiam) (dismissing petitions for review) (explaining that a final order must "impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process" (quoting *Levy* v. *D.C. Bd. of Zoning Adjustment*, 570 A.2d 739, 749 n.14 (D.C. 1990))). GHMSI intends to appeal the August 2016 Order and, *inter alia*, findings in the June 14, 2016, and December 30, 2014, Orders entered in these proceedings. GHMSI asks the Commissioner to stay the effects of the August 2016 Order until the resolution of GHMSI's appeal before the D.C. Court of Appeals and the resolution of the federal proceedings in Maryland.

## ARGUMENT

### I. THE COMMISSIONER SHOULD RECONSIDER THE AUGUST 2016 ORDER.

The Commissioner has the inherent authority to reconsider his own orders. *See, e.g.*, *Spanish Int'l Broad. Co.* v. *FCC*, 385 F.2d 615, 621 (D.C. Cir. 1967); *Albertson* v. *FCC*, 182 F.2d 397, 399-400 (D.C. Cir. 1950). Reconsideration is warranted here to correct fundamental

[2] The Order is not deemed final while GHMSI's petition for reconsideration remains pending before the Commissioner. *See infra* note 3.

errors in the Commissioner's August 2016 Order (and in the earlier orders on which the August 2016 Order is based) and to address significant technical issues not discussed in the Order.

As GHMSI has previously explained, the course of action mandated by DISB is profoundly mistaken. Among its defects, and as outlined below, the August 2016 Order lacks support in the record, exceeds the requirements of the Medical Insurance Empowerment Amendment Act of 2008 (MIEAA), directly conflicts with decisions by the authorities in Maryland and Virginia, ignores Congress's express instructions in GHMSI's federal Charter, and disregards GHMSI's extensive community-reinvestment activities in the District. *See* GHMSI Comments in Response to June 2016 Order (July 14, 2016); GHMSI Motion for Reconsideration of December 2014 Order (Jan. 22, 2015); *infra* at 6-8. Moreover, by the time GHMSI submitted its remedial plan to address the "excess" 2011 surplus claimed by DISB, GHMSI had already reduced the surplus attributable to the District by more than was required under DISB's December 2014 Order. GHMSI Plan Pursuant to December 2014 Order at 4 (Mar. 16, 2015). By denying rate increases and requiring GHMSI to distribute tens of millions of dollars in rebates, the August 2016 Order converts DISB's prior analytic errors into a defective demand for duplicative relief. The Commissioner should reconsider the August 2016 Order in its entirety.

Furthermore, the Commissioner has failed to account for a number of consequential technical questions. For example, employees in the District who receive healthcare coverage through their employers may find that some of the money that employees collect through the rebates from GHMSI is taxable as income. The Commissioner may wish to evaluate the extent to which subscribers may incur tax liabilities through the ordered rebates, because their coverage was subsidized by employers. In addition, the federal government subsidizes the majority of the cost of its employees' health insurance. The Commissioner insufficiently addressed the

treatment of GHMSI subscribers in the District who are federal employees. In particular, the Commissioner has not indicated whether it has conferred with the United States Office of Personnel Management to resolve how any rebates from GHMSI would be allocated among the federal government and federal employee subscribers. The August 2016 Order thus not only was mistaken on the merits, but also specifically failed to give due consideration to important factors that could affect the proper disposition of this matter.[3]

## II. A STAY IS WARRANTED UNDER THE FOUR-PART TEST ARTICULATED BY THE D.C. COURT OF APPEALS.

"To prevail on a motion for stay, a movant must show [1] that he or she is likely to succeed on the merits, [2] that irreparable injury will result if the stay is denied, [3] that opposing parties will not be harmed by a stay, and [4] that the public interest favors the granting of a stay." *Salvattera* v. *Ramirez*, 105 A.3d 1003, 1005 (D.C. 2014) (quoting *Barry* v. *Wash. Post Co.*, 529 A.2d 319, 320-321 (D.C. 1987)). "These factors interrelate on a sliding scale and must be balanced against each other." *Id.* (quoting *Serono Labs., Inc.* v. *Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)). And where a case presents "serious legal question[s]," "[a]n order maintaining the *status quo* may be appropriate." *Walter E. Lynch & Co.* v. *Fuisz*, 862 A.2d 929,

[3] So long as GHMSI's petition for reconsideration remains pending before the Commissioner, the August 2016 Order is not considered final for the purposes of judicial review. *See* D.C. Ct. App. R. 15(b); *D.C. Dep't of Emp't Servs.* v. *Vilche*, 934 A.2d 356, 358-359 (D.C. 2007); *see also* 2 Am. Jur. 2d *Administrative Law* § 436 (rev. 2016). GHMSI reserves the right to file a timely petition for review of the Order to protect its right to an appeal, in the event that petition for reconsideration is denied. GHMSI therefore intends to seek review of the Order before the D.C. Court of Appeals promptly, "within 30 days after notice is given, in conformance with the rules or regulations of the agency." D.C. Ct. App. R. 15(a)(2); *see also Drivers, Chauffeurs & Helpers Local Union No. 639* v. *District of Columbia*, 631 A.2d 1205, 1213 (D.C. 1993) (concluding that, where an agency had "no Rule expressly authorizing petitions for reconsideration, but [did] accept such petitions for filing and acts upon them," the "time for seeking judicial review did not begin to run until the motion for reconsideration was acted upon by the [agency]").

932 (D.C. 2004). If the other factors are satisfied, "it will ordinarily be enough that the [appellant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Wash. Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (quoting *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

Here, *all* of the factors counsel in favor of a stay: (1) GHMSI has identified significant legal issues that require consideration by the D.C. Court of Appeals, as well as the federal court; (2) irreparable injury will result without a stay because GHMSI will be unable to recoup any disbursed funds; (3) no party will be harmed by a stay; and (4) the public interest weighs in favor of granting a stay until these questions are resolved.

### A. GHMSI Has Raised Unique Legal Issues That Deserve A Full Hearing Before The D.C. Court Of Appeals And The Federal Court.

GHMSI expects to base its appeal on issues raised in response to the December 2014, June 2016, and August 2016 Orders in these proceedings. These are significant legal questions, and they include but are not limited to the following issues:

1. GHMSI intends to appeal the findings in the December 2014 Order, for all of the reasons set out in GHMSI's January 22, 2015, Motion for Reconsideration. A ruling in GHMSI's favor on any one of those points, among others, would void that Order and the subsequent remedial plan:

a. The conclusions in the December 2014 Order that GHMSI's 2011 surplus was excessive, and the methodology and findings leading to that conclusion, are unsupported by any evidence in the record and ignore the testimony of DISB's own expert consultant.

b. DISB failed to coordinate with Maryland and Virginia, as required by the MIEAA, leading directly to the conflicting orders among the three jurisdictions that the federal court now must resolve.

c. DISB failed to apportion GHMSI's surplus in the manner required by the MIEAA.

2. GHMSI intends to appeal the findings in the June 2016 Order, upon which the remedial plan is also based. In particular, GHMSI has undertaken substantial community reinvestment in the District since 2011, at a substantial loss. DISB has taken the position that only a small portion of GHMSI's rate reductions are to be counted as a reduction of "excess surplus"—despite the fact that, from 2012 to 2014, GHMSI provided $11 million in direct community giving, incurred $62 million in underwriting losses in the District, contributed $15 million to the Healthy DC fund, and provided $24 million in subsidies for the District's open enrollment program, and did so by drawing down its surplus. GHMSI Comments at 9, 10, 13, 14.

3. The course of action ordered by DISB is directly contrary to the terms set by Congress in GHMSI's federal Charter. As GHMSI has stated in its pleadings before the federal court, GHMSI's federal Charter requires DISB to reach an explicit agreement with Maryland and Virginia before ordering GHMSI to reduce its present or future surplus. In essence, when it amended the Charter in December 2015, Congress imposed the same concurrence requirement already mandated by the MIEAA—so it is now a matter of federal law. *See* Financial Services and General Government Appropriations Act, 2016 § 747, *enacted in* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113; D.C. Code § 31-3506(e). As with the issues

referenced above, should the D.C. Court of Appeals or the federal court agree with GHMSI on this issue, the remedial plan would be improper.

All of those issues, and others, present unique questions of first impression, and success on any one of them will result in reversal of the Commissioner's August 2016 Order. For the purposes of granting a stay, GHMSI need not prove it *will* prevail; all it must do is raise "serious" and "substantial" questions requiring "more deliberative investigation." *Holiday Tours*, 559 F.2d at 844. GHMSI has cleared that bar. The important questions in this case require full consideration by the D.C. Court of Appeals and the federal court before a remedial plan may be imposed.

**B. GHMSI Will Suffer Irreparable Harm Without A Stay.**

Executing the Commissioner's plan while an appeal remains pending would cause irreparable harm to GHMSI. The Commissioner's plan requires GHMSI to pay and distribute tens of millions of dollars in rebates to subscribers across the District. It also forbids DISB from approving any increase in GHMSI's filed premium rates until all rebates have been issued, which forces GHMSI to relinquish any income that it would otherwise receive during that period. Both before the 120-day deadline (while rate increases are denied) and afterward (once the rebates are paid), compliance with the Commissioner's Order will cause continued financial harm to GHMSI.

Financial harm is irreparable when it cannot be redressed through legal proceedings. *See, e.g.*, *Tex. Children's Hosp.* v. *Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014); *Brendsel* v. *Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66-67 (D.D.C. 2004). To implement any remedial plan, GHMSI must distribute funds—which could *never* be retrieved from the various recipients across the District—and offer insurance at artificially low rates—which may

not be raised retroactively. Either way, once disbursed, those tens of millions of dollars in funds would not exist in any recoverable place. Requiring GHMSI to execute on DISB's remedial plan now would thus remove any "possibility that adequate compensatory or other corrective relief will be available at a later date," should GHMSI prevail on appeal. *Zirkle* v. *District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003) (quoting *Va. Petrol. Jobbers Ass'n* v. *Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). If GHMSI cannot recoup its funds after prevailing on appeal, that harm is "irreparable," by definition. *Black's Law Dictionary* 958 (10th ed. 2014) (describing "irreparable" as "[i]ncapable of being rectified, restored, remedied, cured, regained, or repaired"). GHMSI could not be made whole again. Effectively "mooting" a case in this way is disfavored. *See, e.g., FTC* v. *Weyerhaeuser Co.*, 665 F.2d 1072, 1077 (D.C. Cir. 1981) (noting that "the suggestion of mootness" during the appeal "was made possible only by the district court's resistance to a holding order of any kind," and rebuking the district court for not entering a stay).

The clearly irreparable harm in this case, moreover, simplifies the Commissioner's overall stay evaluation. Because "irreparable harm is clearly shown" here, a stay may be entered if GHMSI shows merely that it has a "substantial case on the merits." *Akassy* v. *William Penn Apartments Ltd. P'ship*, 891 A.2d 291, 310 (D.C. 2006) (quoting *In re Antioch Univ.*, 418 A.2d 105, 110-111 (D.C. 1980)); *see also id*. ("[A] stay may be granted with either a high probability of success and some injury, or *vice versa*." (quoting *Cuomo* v. *U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985))). The irreparability of the prospective harm to GHMSI further underscores the point that if the Commissioner grants a stay, he should not be deemed to have conceded GHMSI's legal arguments on the merits.

### C. No Party Or Other Person Will Be Harmed By A Stay.

Granting a stay will not harm any opposing party, because there is no other party in this action. No person or entity would be harmed if GHMSI is given the opportunity to pursue its appeal before irrevocably disbursing funds. D.C. Appleseed, which is not a party and is pursuing its own appeal, would also not be harmed by affording time for an appeal. GHMSI's subscribers would likewise not be harmed, since subscribers in the District would still benefit from the DISB plan, if the plan were upheld on appeal. Those subscribers also have a countervailing interest in GHMSI's financial soundness—and that interest would be harmed if a remedial plan is imposed, and GHMSI's surplus is irrevocably reduced, when no such reduction should have occurred. This case, moreover, does not involve an ongoing alleged harm to others that requires immediate abatement: the subject of this action, after all, is GHMSI's *2011* surplus. DISB Order No. 14-MIE-012 at 1 (Dec. 30, 2014).

GHMSI also is willing to seek (or to join with DISB to seek) expedited review of its appeal before the D.C. Court of Appeals, to shorten the time between noticing the appeal and any decision, and it has already sought an expedited decision from the federal court.

### D. Granting A Stay Is In The Public Interest.

The public interest favors affording the D.C. Court of Appeals and the federal court an opportunity to consider GHMSI's arguments before GHMSI loses any prospect of recouping the disbursed funds. Entering a stay would serve the public interest in several specific ways.

First, the Commissioner has mandated a tremendous undertaking for GHMSI. He gave GHMSI 120 days to calculate, prepare, and distribute all the rebates—signaling the significant effort involved in satisfying this extraordinary Order. GHMSI will need to ascertain which of its subscribers qualify under the six categories enumerated in the Commissioner's Order, and then

determine the appropriate rebate amount for each eligible subscriber. August 2016 Order at 32-33. All the while, GHMSI will remain subject to the Commissioner's rate-increase denial. *Id.* at 31-33. The Commissioner, indeed, specifically ordered that any costs associated with the rebates "shall be borne by GHMSI." *Id.* at 33. In any event, GHMSI should at least be able to embark on this project with legal certainty from the D.C. Court of Appeals and the federal court.

Second, the 120-day implementation period may very well cover much of the time needed by the D.C. Court of Appeals and the federal court to consider and decide GHMSI's appeal, if GHMSI and the District join in seeking expedited review. A stay will simply maintain that status quo.

Third, declining to stay the proceedings will aggravate conflicts among the jurisdictions that regulate GHMSI. Maryland and Virginia have both already signaled that DISB should not act to draw down GHMSI's surplus without their participation and consent. *See, e.g.*, Maryland Insurance Commissioner Statement at 2 (July 11, 2016); Virginia Bureau of Insurance Report at 7 (Apr. 15, 2015).

Last, it is in the public interest for this process to advance in an orderly way, and it surely is in the public interest to permit GHMSI to pursue its appeal of right before irrevocably depriving GHMSI of tens of millions of dollars in funding. The same is true of fully resolving the substantive legal issues raised by GHMSI. If "there is a public interest in preserving contracts as written," *Akassy*, 891 A.2d at 310, then there is certainly a public interest in correctly interpreting and enforcing D.C. and federal laws as written.

## CONCLUSION

The Commissioner should reconsider the August 30, 2016, Order. DISB also should stay all further proceedings, including any attempt to execute the terms of that Order, until the conclusion of an appeal by GHMSI before the D.C. Court of Appeals and the resolution of GHMSI's pending federal complaint.

Respectfully submitted,

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