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February 4, 2014

**VIA FIRST CLASS MAIL & EMAIL**

Philip Barlow  
Associate Commissioner for Insurance  
D.C. Department of Insurance, Securities and Banking  
810 First Street, N.E., Suite 710  
Washington, D.C. 20002

Dear Associate Commissioner Barlow:

I write on behalf of Group Hospitalization and Medical Services, Inc. (GHMSI) in response to the January 29, 2014 letter from DC Appleseed, to which DC Appleseed has attached an extensive list of demands for information belonging to GHMSI; its actuarial consultant, Milliman Inc.; and the District's chosen surplus examiner, Rector & Associates (R&A). DC Appleseed already has access to the GHMSI-specific financial information necessary to conduct its own analysis. DC Appleseed's request for additional proprietary information belonging to Milliman (and to R&A) should be rejected. DC Appleseed is not entitled to such information in these proceedings, and GHMSI objects to production of such information for the reasons forth below.

**I. DC Appleseed Misconstrues the Court of Appeals' Ruling, And It Already Has Access To Extensive Information That It May Use To Conduct Its Own Analysis Of GHMSI Surplus.**

DC Appleseed already has access to ample information that it may use to develop its own analysis. GHMSI's underlying financial data is public and is made available each year in GHMSI's published annual financial statements. Indeed, the current proceedings examine GHMSI's surplus as of 2011 and therefore rely on data that has been public for some time. This public information is the same data related to GHMSI that R&A and Milliman utilize for their own reviews. DC Appleseed and its actuarial consultant, Mr. Shaw, are free to use this data to conduct their own surplus analysis, and may use their own proprietary methodologies if they choose. DC Appleseed thus has the data "necessary to the development of analyses by

participants that contribute to the Commissioner's determination," *D.C. Appleseed Center for Law & Justice, Inc. v. DISB*, 54 A.3d 1188, 1219 n.41 (D.C. 2012).

The DC Court of Appeals opinion *does not* entitle D.C. Appleseed to the enormous volume of information that it demands. DC Appleseed refers only to a single footnote where, in *dicta*, the Court observed simply that the Commissioner has a "role to play" in ensuring that "*the regulated entity* discloses information (subject to appropriate agreements and limitations on use) necessary to the development of analyses by participants that contribute to the Commissioner's determination." *D.C. Appleseed Center for Law & Justice, Inc. v. DISB*, 54 A.3d 1188, 1219 n.41 (D.C. 2012) (emphasis added). The Court referred only to information from GHMSI, not from R&A, Milliman, or any other third party, and it referred only to making information available in order for a party to conduct its own analysis of GHMSI's surplus.

The DC Court of Appeals did *not* state that DC Appleseed was entitled to data from third party consultants, whether GHMSI's or DISB's, and it did not state that DC Appleseed was entitled to obtain documents or information for purposes of undermining another party's presentation. DC Appleseed seeks to conduct "expert discovery" as if this were a civil litigation matter, not a statutory hearing before the Insurance Commissioner. No DC Statute authorizes discovery in this case, the hearing regulations adopted by the Commissioner do not provide for discovery, and the DC Court of Appeals opinion confers no broad discovery authority. DC Appleseed's request for documents and analyses should be rejected for this reason alone.

## **II. DISB And R&A Have Agreed To Maintain The Confidentiality Of Information Provided By Milliman.**

Milliman, the independent actuarial consultant retained by GHMSI, has made it clear throughout these proceedings that it considers its actuarial surplus model to be proprietary and confidential, and it has consistently labeled all of the materials submitted to R&A or DISB as proprietary and confidential. Accordingly, R&A has signed a confidentiality agreement with Milliman in which it agreed that it would not disclose such materials. In February 2013, before Milliman agreed to disclose the details of its surplus model to R&A, Milliman specifically asked for confirmation from DISB that the materials shared with R&A would not be disclosed, and DISB confirmed that Milliman's communications would be protected under DC Code § 31-1404. Milliman only made its disclosures to R&A after this confirmation was received. For that reason, too, it would be inappropriate to disclose to any third party, including DC Appleseed or Mr. Shaw, any of the materials that Milliman submitted to R&A or the DISB. *See* D.C. Appleseed Attachment A, Requests 1(a), 2(a)-(b), and 9 (requesting such Milliman materials). It likewise would be inappropriate to disclose any R&A data or analysis that contains or would, if disclosed tend to reveal Milliman's proprietary information. *See* D.C. Appleseed Attachment A, Requests 1(b)-(c), 3, 5, 6, 7, 8, and 9 (requesting such information from R&A).

### **III. DISB Is Obligated Under Its Existing Statutes To Maintain The Confidentiality Of The Milliman And Rector Information.**

DISB is obligated by statute to maintain the confidentiality of significant categories of financial information related to an insurer, particularly information obtained during an examination of an insurer, such as the DISB's surplus examination and RBC reports and analyses. *See* DC Code §§ 31-1404 & 31-2008; *see also id.* §§ 31-708 (holding company information); 31-853 (self-evaluation materials); 31-1004 (material transactions disclosures); 31-1903 (NAIC financial analysis ratios, examination synopses, and related information). The analyses by Milliman and Rector relate to and analyze GHMSI's RBC and its projected RBC positions as part of a statutory examination of surplus. Disclosure of confidential information relating to such analysis is not appropriate.

Nor may DC Appleaseed use the Freedom of Information Act (FOIA) to obtain information in the possession of R&A or confidential commercial information belonging to GHMSI. FOIA does not require disclosure of any documents in the possession of R&A – R&A is neither a “public body,” nor is it performing the governmental functions of a public body. D.C. Code § 2-532. R&A is an independent expert consultant, and documents received by R&A pursuant to a confidentiality agreement with GHMSI or Milliman are not properly subject to disclosure under FOIA. Further, in producing materials to Rector or to DISB during these proceedings, GHMSI and Milliman have identified and labeled the confidential and proprietary information that was produced – and such information is not disclosable under FOIA, pursuant to DC Code § 2-534(a).

### **IV. DISB Should Only Provide Information Provided By GHMSI (Not Milliman) That Is Not Labeled As Confidential.**

For the reasons stated above, GHMSI objects to the production to DC Appleaseed of any of the following categories of information:

1. All documents provided to Rector or DISB by Milliman.
2. Any documents containing proprietary information belonging to Milliman that was taken from the materials that Milliman provided, or containing information that could be used to derive Milliman's proprietary information.
3. Internal work papers or other materials in the possession of Rector, and not DISB.
4. Any materials provided by GHMSI that were labeled proprietary and confidential.

GHMSI has provided DISB and Rector with materials throughout the course of these proceedings that were not labeled as proprietary and confidential. While GHMSI does not concede that DC Appleaseed is entitled to copies of any of those materials, GHMSI does not object to the production of those materials on the condition that DC Appleaseed agrees not to further distribute those materials and to only use those materials for purposes of these proceedings.

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If you believe that we have mislabeled an item as confidential, I would be happy to review that designation or to explain our basis for it. I am available at your convenience to discuss any particular materials that you may be reviewing.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'RS', with a long horizontal line extending to the right.

Randolph S. Sergent