APPLICATION OF THE MIEAA TO MIA'S REVIEW OF GHMSI'S SURPLUS

By act of Congress, Group Hospitalization and Medical Services, Inc. ("GHMSI") was established as a District of Columbia corporation and is "licensed and regulated by the District of Columbia in accordance with the laws and regulations of the District of Columbia."[1] Pursuant to this authority, the D.C. Council enacted the Medical Insurance Empowerment Amendment Act of 2008 ("MIEAA"),[2] which requires GHMSI to engage in community health reinvestment "to the maximum feasible extent consistent with financial soundness and efficiency."[3] MIEAA further requires the D.C. Insurance Commissioner to evaluate GHMSI's surplus and order a spend-down of any amount deemed to be excessive under that standard. D.C. Insurance Commissioner Gennett Purcell held a hearing on September 10 and 11, 2009, after receiving and considering voluminous filings from GHMSI's parent company, CareFirst, Inc., and CareFirst of Maryland, Inc. (collectively, "CareFirst"), as well as from interested third parties. Commissioner Purcell is expected to announce her determination regarding GHMSI's surplus level by the end of this year.

The Maryland Insurance Administration ("MIA") will hold a similar hearing on November 19, 2009. We understand that MIA intends to consider the surplus levels of both GHMSI and CareFirst of Maryland, Inc. For the purpose of this memorandum, we accept that MIA has the authority to review the surpluses of both entities—but only to the extent that it applies District law to its evaluation of GHMSI's surplus. In particular, MIA must review GHMSI's surplus in a manner that is consistent with the regulatory scheme and legal standard codified by the MIEAA. As discussed in our August 31, 2009 submission to the District of Columbia Department of Insurance, Securities, and Banking ("DISB") (which is separately submitted herewith), MIEAA requires GHMSI to demonstrate that its surplus is justifiable under the "maximum feasible extent" standard, which GHMSI has to date failed to do.

A. GHMSI Was Incorporated in the District of Columbia Pursuant to Its Federal Charter, and It is Thus Limited in its Powers by District Law.

Pursuant to federal law, GHMSI was incorporated in the District of Columbia. As a creature of the laws of the District, GHMSI "cannot exercise powers not expressly or impliedly provided by those laws."[4] These limitations control GHMSI's actions in all jurisdictions where GHMSI does business and "must be recognized by those who deal with the corporation elsewhere."[5] Whether GHMSI can maintain a certain surplus is therefore a question of whether the laws of the District grant GHMSI the authority to do so. For this reason, any review of the surplus held by GHMSI must be done with reference to the laws of the District. Failing to apply

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1 Pub. L. No. 103-127, 107 State. 1336 (1993).

2 D.C. Law 17-369, Sec. 2(g) now codified at D.C. Code § 31-3506(g).

3 *Id.* at § 31-3505.01.

4 *See* 36 Am. Jur. 2d Foreign Corporations § 72.

5 *Id.*

D.C. laws would risk granting GHMSI authority beyond that given to it by the laws which created it.

Although GHMSI does business in Maryland,[6] the amount of surplus that can be held by GHMSI is a question of D.C. law. To the extent that MIA seeks to evaluate GHMSI's surplus, its review must conform to all requirements set forth in the laws of the District. MIA must, in particular, apply the standard established by the MIEAA. If it determines that GHMSI's surplus is inconsistent with the company's statutory obligation to engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency, MIA must conclude that GHMSI's surplus is unreasonably large.

B. Pursuant to the McCarran-Ferguson Act, GHMSI's Charter is an Act of Congress that Specifically Relates to the Business of Insurance, and Its Directive that the Laws of the District of Columbia Shall Be Applied to Regulating GHMSI Supersedes Any State Law to the Contrary.

The McCarran-Ferguson Act gives states the authority to regulate the "business of insurance" without federal government interference.[7] Although it grants broad authority to states, acts of Congress that specifically relate to the business of insurance supersede any state laws.[8] The Supreme Court has provided examples of activities that constitute the business of insurance, such as fixing rates, selling and advertising policies, and licensing companies and their agents, to demonstrate that federal "statutes aimed at protecting or regulating [the relationship between the insurance company and the policyholder] are laws regulating the 'business of insurance.'"[9]

Given that Congress established GHMSI by federal charter to provide insurance, the charter is clearly an act of Congress that relates to the business of insurance. GHMSI's charter therefore supersedes any contrary state law regulating business of insurance as conducted by GHMSI. GHMSI's charter also authorizes GHMSI to be governed by the laws of the District. Any laws passed by the District related to the business of insurance, as they pertain to GHMSI, also supersede contrary state law. Therefore, under the McCarran-Ferguson Act, the laws of the District—and only the laws of the District—must be applied to GHMSI. To the extent that Maryland law purports to create a different framework for evaluating GHMSI's surplus, the MIEAA governs and must be applied by MIA.

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6 "By doing intrastate, interstate, or foreign business in this State, a foreign corporation assents to the laws of this State." MD Code, Corporations and Associations, § 7-105.

7 15 U.S.C. §§ 1011-1015.

8 *See id.* § 1012(b).

9 *SEC v National Sec., Inc.*, 393 U.S. 453, 460 (1969).

C. GHMSI's Charter Constitutes Federal Law and Preempts Any State Law that Conflicts With or Impedes Its Execution.

Pursuant to the Supremacy Clause of the United States Constitution and federal-state preemption jurisprudence, a federal law pre-empts any state law that conflicts with or impedes its execution. As an Act of Congress, the charter creating GHMSI is federal law, and "as such, the charter is a 'legislative act[]' that must be construed and interpreted just like any other federal statute."[10] By virtue of its status as federal law, the GHMSI charter is the supreme law of the land and pre-empts state law in instances where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[11]

One of the key provisions of the charter is that GHMSI "shall be licensed and regulated by the District of Columbia in accordance with the laws and regulations of the District of Columbia."[12] Thus, it is clear that regulation of GHMSI shall be conducted in accordance with the laws of the District. The District has established a regulatory scheme by which to review the surplus held by GHMSI, namely the MIEAA. A *de novo* review of GHMSI's surplus by Maryland not conducted in accordance with the MIEAA would conflict with and impede the execution of federal law—and would therefore be preempted by GHMSI's charter and the MIEAA. To the extent that Maryland assesses GHMSI's surplus in the course of its review of the surplus held by CareFirst, this review must comply with the MIEAA.

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Accordingly, based on GHMSI's charter—which defines GHMSI's ability to maintain surplus, and which has implications insofar as the McCarran-Ferguson Act and federal preemption are concerned—MIA must apply the legal standard of MIEAA in the evaluation of GHMSI surplus. That standard requires GHMSI to engage in community health reinvestment "to the maximum feasible extent consistent with financial soundness and efficiency," which the MIEAA has established in order to live up to its status as a "charitable and benevolent" institution under GHMSI's charter.

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10 *District of Columbia v. Group Hospitalization and Medical Services, Inc.*, 576 F. Supp. 2d 51, 54 (2008); *see also Supreme Lodge K. of P. v Mims,* 241 U.S. 574, 578 (denying motion to dismiss on jurisdictional grounds as "the case necessarily will turn on the construction of the present charter, an act of Congress").

11 *English v. General Elec. Co.*, 496 U.S. 72, 74 (1990); *see also* U.S. Const. Art. VI, cl. 2.

12 Pub. L. No. 103-127, 107 State. 1336 (1993).