February 25, 2016

The Honorable Vincent Orange, Chairman
Committee on Business, Consumer and Regulatory Affairs
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue NW
Suite 504
Washington, D.C. 20004

Re: Review of Group Hospitalization and Medical Services, Inc.’s 2011 Surplus

Dear Councilmember Orange,

As you know, in our February 11 letter to you, we expressed concerns about the D.C. Department of Insurance, Securities and Banking’s (DISB) delay in issuing a final order regarding Group Hospitalization and Medical Services, Inc.’s (GHMSI) 2011 surplus under the Medical Insurance Empowerment Amendment Act (MIEAA).

The DISB Commissioner, properly exercising authority granted by the Council pursuant to MIEAA, has already issued an order finding that GHMSI’s 2011 surplus is excessive and directing GHMSI to develop a plan to reinvest the $56 million surplus attributable to the District. GHMSI flouted that order by refusing to develop the required community reinvestment plan. Despite the DISB’s authority to act and the Commissioner’s representations to this Council on October 7 and 28, the Commissioner has yet to act to enforce the DISB’s own order.

During the months-long hiatus, Congress acted to amend GHMSI’s charter with respect to surplus reviews for years after 2011. Our concerns with the DISB’s continuing delay in issuing a final order have only grown after reviewing the DISB’s responses this week to your Committee’s oversight questions. In those responses, the DISB expressed uncertainty about the Commissioner’s legal authority to issue a final order in this proceeding—due to action by Maryland and Virginia, and due to the December 18 congressional amendment to GHMSI’s charter, which GHMSI would invoke as a defense to a DISB order for reinvestment of excess surplus for surplus reviews after 2011.

We strongly disagree with the DISB’s uncertainty about its current authority under MIEAA. And we think the District would be ill-advised to give the congressional amendment retroactive effect by interpreting it to overturn decisions taken by the Commissioner concerning the 2011 surplus. These decisions were made pursuant to the duly-enacted statute
of the District of Columbia, which under the congressional amendment remains the law governing the 2011 surplus.

However, given the uncertainty on these issues expressed by the DISB, we believe the Council urgently needs to enact emergency legislation amending MIEAA to affirm that the agency can and must issue a final order for reinvestment of the excess surplus in this too-long-delayed proceeding.

Specifically, we think the Council should amend MIEAA to (1) clarify that, based on the recent congressional amendment, the Commissioner retains full authority to issue a final order regarding the 2011 surplus review; (2) clarify that the Commissioner has authority to develop a reinvestment plan regarding the $56 million of excess surplus attributable to the District and to order GHMSI to implement it; and (3) direct the Commissioner to issue a final order by a date certain. We explain each of these three points below.

1. The Council Should State that the Congressional Amendment Does Not Affect the Commissioner’s 2011 Surplus Review.

The Council should clarify that the recent congressional amendment does not affect the DISB’s authority and obligation under MIEAA to issue a final order regarding the pending 2011 surplus review. The amendment states that “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.” Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 747(a) (2015). The amendment further provides that it “shall apply with respect to the surplus . . . for any year after 2011.” § 747(b).

The most natural and reasonable reading of the plain language of this amendment—indeed, the only reasonable reading—is that express agreement among the three jurisdictions is required only for reviews of surplus for year-end 2012 and later. 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. Salimino, 501 U.S. 104, 112 (1991). Section 747(b) establishes an exception to the requirement for express agreement. This exception must be construed to apply to the review of the 2011 surplus; otherwise, there would be no review to which the exception could ever apply, and it would be stripped of its meaning.

Congresswoman Eleanor Holmes Norton underscored that the express language of this exception means just what it says. She issued a statement that 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.”1 Since the

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pending proceeding concerns GHMSI’s year-end 2011 surplus, the Commissioner can and should proceed with a reinvestment plan without express agreement from Maryland and Virginia. However, given the doubts about this expressed by the DISB, we think the Council should explicitly so state in emergency legislation.

2. The Council Should Clarify that the Commissioner Has the Authority to Develop a Reinvestment Plan and Order GHMSI to Implement It.

The Council should also clarify that MIEAA gives the Commissioner the authority to develop a reinvestment plan and order GHMSI to implement it, given GHMSI’s failure to submit a valid plan. It is particularly important that the Council make this clear given that almost a year has passed since GHMSI failed to file its proposed plan as ordered by the DISB.

MIEAA expressly gives the Commissioner authority for two remedies in the event that “the Commissioner determines that the corporation failed to submit a plan as ordered.” D.C. Code § 31-3506(i). First, “the Commissioner shall deny for 12 months all premium rate increases.” Id. Second, the Commissioner “may issue such orders as are necessary to enforce the purposes of [MIEAA].” Id. Since the Council gave the Commissioner the authority to “issue such orders as are necessary” as a remedy in the case of noncompliance, we think the Council intended for the Commissioner to be able to compel compliance though those orders. The Commissioner could compel compliance by rejecting the corporation’s plan and developing and ensuring implementation of his own plan.

The legislative history confirms that this was the Council’s intent. As Councilmember Cheh, the principal author, said at the MIEAA hearing:

If . . . the surplus exceeded the maximum established, the corporation would of course have the opportunity to demonstrate, by clear and convincing evidence, that this failure was appropriate under the circumstances. If the corporation were not able to make a showing and did not take the steps as required, it would be prohibited from increasing its premium rates for 12 months, and it would have to implement a plan to divest the appropriate amount toward community health reinvestment.2

Even so, given the delay and the reservations expressed by the DISB, we think the Council should adopt emergency legislation clarifying that the Commissioner has the authority to develop a reinvestment plan and to order GHMSI to implement it. Doing so will not only help ensure that a final order will be promptly issued, but it will also further the purpose of MIEAA as expressly stated in the Act and in the legislative history.

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2 Hearing on Bill 17-934, the “Medical Insurance Empowerment Amendment Act of 2008”, before the Committee on Public Services & Consumer Affairs (Oct. 10, 2008), dec/ctarchive.oct.dc.gov/services/on_demand_video/channel13/October2008/10_10_08_PUBSVRC_1.asx (Cheh remarks at 6:05) (emphasis added).
3. The Council Legislation Should Require the Commissioner to Issue a Final Order by a Date Certain.

As you know, there has already been great delay in issuing a final order in this proceeding. And as we explained in our February 11 letter, this delay has undermined the Council’s legislative authority, threatened the integrity of the DISB’s orders, degraded the District’s autonomy, and deprived District residents of $56 million in excess GHMSI surplus that could be used to address pressing community healthcare needs.

For these reasons, we think the Council’s emergency legislation clarifying the Commissioner’s authority should also direct the Commissioner to issue a final order by a date certain. We suggest that the legislation:

(1) direct the DISB to publish notice of its intent to develop a community reinvestment plan for $56 million in excess GHMSI 2011 surplus consistent with MIEAA in the D.C. Register within 10 days of the emergency legislation’s effective date;
(2) require the DISB to allow public comment on a community reinvestment plan for 60 days after publication of notice in the D.C. Register; and
(3) require the DISB to approve a plan within 45 days of the deadline for public comment and order GHMSI to implement it within 30 days.

Setting specific dates for action in this case is appropriate not only given the long delay, but also by MIEAA’s own terms. As initially unanimously adopted, MIEAA required the Commissioner to conduct the surplus review and “issue a determination as to whether surplus is excessive” within 120 days of it becoming law. Medical Insurance Empowerment Amendment Act, A. 17-704, § 2(d) 56 D.C. Reg. 1346, 1347 (Mar. 25, 2009). But of course, we are now seven years later, and the plan ordered by the Council has not yet been adopted. For all the reasons stated, we urge the Council to act now to implement its will and to protect the interests of District residents.

Thank you for your continued attention to this important matter.

Sincerely,

Walter Smith, Executive Director
DC Appleseed Center

Deborah Chollet, Ph.D.

cc: The Honorable Charles Allen
The Honorable Brianne Nadeau
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