September 14, 2017

The Honorable Stephen C. Taylor, Commissioner
D.C. Department of Insurance, Securities and Banking
810 First Street NE
Suite 701
Washington, D.C. 20002

Re: Surplus Review and Determination of Group Hospitalization and Medical Services, Inc.

Dear Commissioner Taylor:

We are writing in response to GHMSI’s September 1 letter rejecting your proposed changes to GHMSI’s Proposed Consent Order. As you know, we believe that the Medical Insurance Empowerment Amendment Act (MIEAA) requires GHMSI to dedicate much more than your proposed $95 million of excess 2011 surplus to be spent on community health reinvestment. We also believe that MIEAA requires the excess surplus to be dedicated to community health reinvestment over a much shorter period than ten years. Even so, we think GHMSI was wrong to summarily reject your proposed consent order, not only because some of your proposed changes are clearly required to bring the order into compliance with MIEAA, but also because of the additional delay that has been caused by the DISB’s review of GHMSI’s Proposed Consent Order.

In our view, it is time to end the unreasonable and still accumulating delay in this case so that GHMSI at long last begins returning excess to the public and the D.C. Court of Appeals can resolve outstanding issues. It is nearly nine years since MIEAA was passed; it is almost five years since the D.C. Court of Appeals remanded the case to the DISB to conduct a surplus review that accords with MIEAA; it is nearly four years past the October 2013 date the Court of Appeals said that MIEAA set for the completion of the new surplus review; it will soon be three years since the DISB determined that GHMSI has excess surplus of $268 million; it is more than a year since you determined that GHMSI must spend approximately $51 million of this excess in rebates to subscribers; and it is almost a year since GHMSI filed its reconsideration motion and
request for a stay pending appeal, and began its effort to obtain a consent order.

We therefore urge the Commissioner to promptly (1) deny GHMSI’s pending motions and (2) enter a final appealable order. This will allow the parties to promptly seek expedited review in the D.C. Court of Appeals and bring about a belated implementation of MIEAA. Below we propose how the Commissioner should make these two determinations.

1. **The Commissioner Should Deny GHMSI’s Pending Motions.**

   There are two GHMSI motions pending before the Commissioner, both of which should be denied.

   First, the Commissioner should of course deny the company’s April 17, 2017 Motion to Approve Proposed Consent Order (GHMSI’s Proposed Consent Order) because a consent order is no longer viable. After receiving public comment and convening two settlement meetings with GHMSI and DC Appleseed, on August 3, the Commissioner issued a Decision and Order on GHMSI’s Motion to Approve Proposed Consent Order (DISB’s Proposed Consent Order). This Order proposed changes to GHMSI’s Proposed Consent Order and provided for the Commissioner to approve the DISB’s Proposed Consent Order if GHMSI filed an appropriate motion within 30 days. On September 1, GHMSI wrote to the Commissioner stating that it would not accept the DISB’s Proposed Consent Order and would “continue to pursue its legal remedies.” Letter from Chet Burrell, Pres. & Chief Exec. Officer, CareFirst BlueCross BlueShield, to the Honorable Stephen C. Taylor, Comm’r, D.C. Dep’t of Ins., Secs., & Banking (Sept. 1, 2017). Since the attempt to reach a consent order has failed, the Commissioner should deny GHMSI’s Proposed Consent Order.

   Second, the Commissioner should deny both GHMSI's September 22, 2016 Petition for Reconsideration and its Motion to Stay Further Proceedings. As we have shown, the GHMSI Reconsideration Petition raises arguments that the Commissioner has already considered and rejected without offering a “new explanation as to how the Commissioner erred in rejecting GHMSI’s arguments, and presents no new evidence or intervening events to support reconsideration.” D.C. Appleseed’s Opposition to GHMSI's Petition for Reconsideration and Motion to Stay Further Proceedings at 2 (Sept. 30, 2016). Further, as we have already explained, the GHMSI Stay Motion does not meet the requirements for a stay. *Id* at 3–9. In fact, the DISB has already found that none of the requirements had been met for a stay of the underlying excess surplus determination. Notably, it determined that GHMSI is unlikely to succeed on the merits, and that a stay would harm the public interest because there is a “strong public interest in ensuring that GHMSI fulfills its obligation to ‘engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency.’” DISB Order No. 14-MIE-15 at 3, 4–5 (Mar. 2, 2015) (quoting D.C. Code § 31-3505.01). And furthermore, as we showed in our August 10 letter to the Commissioner, GHMSI has not and cannot show any irreparable injury from being required at long last to reinvest its excess surplus.

2. **The Commissioner Should Issue a Final Order Dedicating GHMSI’s Excess Surplus Attributable to the District to Charitable Giving.**
Once the Commissioner disposes of GHMSI’s pending motions, it will be necessary to issue a final order that includes a reinvestment plan. In making a final order, the Commissioner must determine how excess surplus should be spent and how the expenditures should be administered. We have four points to make in this regard:

First, we believe that expenditures in the plan should consist entirely of grants to “non-profit providers that are certified by the District as DC Healthy People 2020 providers,” as provided in the DISB’s Proposed Consent Order. As the Commissioner explained in that Order, the expenditure of excess surplus on charitable giving constitutes a plan to dedicate that “excess to community health reinvestment in a fair and equitable manner” as required by MIEAA. The record since the Commissioner issued GHMSI’s Proposed Consent Order indicates support from the Commissioner’s staff, Office of the Attorney General staff, GHMSI, DC Appleseed, and other interested members of the public for dedicating excess surplus to grants for non-profit healthcare providers. Given this overwhelming preference, the Commissioner should proceed with the grants contemplated by the DISB’s Proposed Consent Order and not revive his August 30, 2016 Order for rebates to current subscribers.

Second, the final order should provide safeguards to ensure that the reinvestment is administered consistent with MIEAA under DISB oversight. These safeguards are contained in the DISB’s August 3, 2017 Proposed Consent Order. They include the requirements that the reinvestment come from previously accumulated excess surplus, and that it be in addition to the company’s continuing obligation under MIEAA to engage in community health reinvestment to the maximum extent feasible, consistent with financial soundness and efficiency. As we urged in our August 10 letter, the order should clarify the Commissioner’s authority to ensure that these requirements are met. Specifically, the order should (1) affirm that the Commissioner will exercise oversight authority and responsibility to address these two issues for the duration of the order, and (2) require GHMSI to certify annually that it satisfied these two requirements, and demonstrate how it did so.

Third, the amount to be reinvested should be adjusted to account for interest already accrued on the excess surplus. The $51,325,470.72 excess determined by the Commissioner’s August 30, 2016 Order was excess as of the end of 2011. GHMSI has accumulated interest on that amount over the past six years. This accumulation stems from delays that are contrary to the Council’s purposes in adopting MIEAA, in which it contemplated a prompt review of excess surplus by the DISB, and a prompt expenditure of the excess in the form of community reinvestment. Obviously that prompt implementation has not happened, and instead there has been considerable delay in protecting the public’s interest in GHMSI’s excess surplus. GHMSI should not profit from this delay; the interest earned on the excess surplus belongs to the public, not to the company, and the Commissioner should take appropriate action to ensure that the interest is devoted to community reinvestment. See D.C. Code § 31-3506(i) (authorizing the Commissioner to “issue such orders as are necessary to enforce the purposes of” MIEAA).

At a minimum, even if the Commissioner does not require that interest earned since the end of 2011 be returned to the public, the Commissioner should require that post-judgment interest on the excess surplus be paid since the DISB’s December 30, 2014 Order. The public is due post-
judgment interest on the amount to be reinvested particularly as GHMSI gained that interest in large part by its own delay owing to its failure to file a reinvestment plan as ordered, followed by its attempt to seek the Commissioner’s approval of a consent order. And GHMSI has now undermined the latter strategy by rejecting the Commissioner’s Proposed Consent Order. Below, we show the present value of the excess surplus, increased by interest earned by GHMSI since the end of 2011, and since the end of 2014.

Fourth, rather than allowing the reinvestment of the excess surplus to be spread over ten years, we believe the Commissioner should order GHMSI to reinvest the entire excess surplus no later than the end of this year. MIEAA plainly contemplated an immediate reinvestment once excess surplus was determined and a reinvestment plan ordered. There is nothing in the record to explain why it is necessary or appropriate to depart from MIEAA’s intent and require a multiyear reinvestment period—especially one as long as ten years. In fact, given the delay that has already occurred, to add yet another ten years’ delay seems to us indefensible. Significantly, the Commissioner was prepared to require the company to immediately rebate the entire excess surplus to subscribers in his August 30, 2016 Order. If a prompt expenditure was appropriate for rebates, it is difficult to see why it is not also appropriate for reinvestment in health needs in the community.

We recognize that the Commissioner may nonetheless decide to allow GHMSI to reinvest the money over a period of years. In that case, the company should be required to complete the reinvestment within no more than 3 to 5 years, and the annual reinvestment amount should be increased to preserve the present value of the total reinvestment owed to the District. Again, if GHMSI is to be allowed to further delay reinvesting its excess surplus in the community, the interest earned by that delay should belong to the public, not the company. The table below shows the annual year-end amount to be paid by GHMSI, depending on when interest began to run, and upon the period of reinvestment, in all cases assuming a 3.5% interest rate on GHMSI’s bond portfolio. (Milliman reported to the Commissioner in its November 6, 2014 Post-Hearing filing (p. 15) that GHMSI’s average rate of return on its bond portfolio is 3.5%.)

<table>
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<th>Present value</th>
<th>Payment period</th>
<th>Annual year-end payment</th>
<th>Total payments</th>
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<tr>
<td>$51,325,470.72 with interest from January 2012</td>
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<tr>
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<td>$10,318,367</td>
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As the Table shows, if interest runs from the beginning of 2012, and GHMSI is required to reinvest the excess surplus plus interest by the end of 2017, the amount to be reinvested is $63,092,108. If GHMSI were allowed to spread that amount over 3, 5, or 7 years, the annual reinvestment would be $22,519,730, or $13,973,727, or $10,318,367, respectively. If, however, interest did not begin to run until the beginning of 2015, the amount to be reinvested is $56,905,467, and the annual payments during 3, 5, or 7 years would be $20,311,506, $12,603,501, or $9,306,576, respectively.

* * *

Thank you for considering our proposal for bringing about a final order in this long delayed proceeding. Please let us know if you have any questions.

Sincerely,

Walter Smith, Executive Director  
DC Appleseed Center

Richard B. Herzog  
Harkins Cunningham LLP

Deborah Chollet, Ph.D.  
Marialuisa S. Gallozzi  
Covington & Burling LLP

cc:  The Honorable Muriel Bowser  
The Honorable Karl Racine  
The Honorable Mary Cheh  
The Honorable Kenyan McDuffie  
The Honorable Brianne Nadeau  
Dr. LaQuandra Nesbitt  
Ms. Loren AliKhan  
Mr. Philip Barlow  
Ms. Betsy Cavendish  
Mr. Todd Kim  
Mr. Barry Kreiswirth  
Mr. Adam Levi  
Mr. Jim McKay  
Ms. Beverly Perry  
Ms. Lisa Schertler  
Mr. Dana Shepperd  
Mr. Mark Tuohey