



South Carolina Department of Insurance

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CONFIDENTIAL

Ms. Holly Pisarik
Chief Legal Counsel
Office of Governor Nikki Haley
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Holly:

As Director of the South Carolina Department of Insurance, I am the court-appointed receiver of Consumers' Choice Health Insurance Company in Liquidation (Consumers' Choice). Chapter 27 of Title 38 provides for my appointment receiver of financially insolvent insurers transacting business in South Carolina. In this capacity I serve as an arm of the court, as the General Assembly recognizes that "court has neither the expertise nor the time for operating an insurance company receivership." *Insurance Commission v. New South Life Insurance Company*, 270 S.C. 612, 627, 244 S.E.2d 289, 297 (1978). Instead, the court acts in a general supervisory capacity, approving or disapproving my recommendations and actions as the receiver. *Id.* As the receiver, I "stand in the shoes" of policyholders, creditors and shareholders of the defunct insurer; and am empowered by statute to marshal the assets of the insolvent insurer and to institute actions to recover assets to pay claims. S.C. Code An. §§ 38-27-400(12)-(13), -430 & -530 (2015); *see also Carwile v. Metropolitan Life Ins. Co.*, 136 S.C. 179, 134 S.E. 285 (1926).

For Consumers' Choice, I am contemplating filing or joining an action instituted by Receivers in other states to recover funds due to Consumer Operated and Oriented Plans organized under the Affordable Care Act (ACA). States Department of Health and Human Services (HHS) which has taken the position that it may set off funds due the CO-OPs by the amount of the balance of the loans owed by the CO-OP. It is estimated that the federal government owes the Consumers' Choice receivership estate the net sum of \$70,000,000.

Background on Consumers' Choice Health Insurance Company and the Receivership

Consumers' Choice was a Consumer Operated and Oriented Plan (CO-OP) organized under the provisions of the ACA by the Centers for Medicare and Medicaid Services. It was one of the insurers on the federally facilitated exchange in South Carolina. Even though Consumers' Choice received federal funding, it was licensed as a South Carolina domestic insurer. It was placed into receivership via Order of the Richland County Court of Common Pleas on January 8, 2016 due to concerns that it would be unable to fulfill its policyholder obligations. This Order appointed the Director of Insurance as the Receiver for purposes of the rehabilitation of Consumers' Choice, and Michael J. FitzGibbons was appointed Special Deputy Receiver.

On January 26, 2016, the Special Deputy Receiver provided the Receiver with a preliminary estimate of Consumers' Choice's provider obligations. The Special Deputy Receiver's review of the operations and financial condition of the insolvent insurer indicated that the provider obligations of Consumers' Choice approximated \$48 million; and on that basis, that rehabilitation of the insolvent insurer was not possible. The Special Deputy Receiver also informed the Receiver that the CMS through the United States Department of Justice had indicated it would set off any funds due Consumers' Choice by the amount of the initial start-up loan and other amounts.

The ACA established the "CO-OP" program, which authorized creation of nonprofit health insurance issuers to offer qualified health plans to individuals and small groups. 42 U.S.C. § 18042(a)(1)-(2). Through the ACA, Congress authorized and directed HHS/CMS to establish and operate the CO-OP program. Consumers' Choice applied for federal funding to operate as a CO-OP and received a start-up loan and a solvency loan. Consumers' Choice was funded by a start-up loan of \$18,709,800, and an interest bearing solvency loan of \$68,868,408 from the federal government pursuant to a contract between the Centers for Medicare & Medicaid Services (CMS) and the Consumers' Choice.

Consumers' Choice was informed in October, 2015 that it would only receive 12.6% of the risk corridor payments it was scheduled to receive for benefit year 2014. Subsequently, Consumers' Choice and the South Carolina Department of Insurance (Department) were informed that it was unlikely that any additional risk corridor payments would be forthcoming. As a result, the Department determined that the insurer would be in hazardous financial condition without receiving the outstanding risk corridors receivables or a significant financial capital infusion. The Department initiated regulatory action to monitor the financial condition of the insurer and to protect South Carolina consumers.

On December 23, 2015, CMS issued a letter notifying Consumers' Choice that its start-up and solvency loan agreements would terminate effective December 31, 2015 and that the amount of the loans, together with all interest, costs, fees and expenses were due immediately. The Richland County Court of Common Pleas entered the liquidation order on March 24, 2016.

Consumers' Choice was a member of the South Carolina Life and Accident and Health Insurance Guaranty Association (Guaranty Association) which was established to guarantee the payment of benefits of insolvent companies. The Guaranty Association was triggered and is in the process of paying claims. The covered claims of individuals insured by Consumers Choice will be paid by the Guaranty Association up to \$300,000. As of June 1, 2016, the Guaranty Association has paid about \$31.4 million in claims. As such, it is the largest creditor of the receivership estate. It has hired the law firm of Lewis, Roca, Rothgerber and Christie to advise on its rights.

CMS has referred the collection of the start-up loans to the United States Department of Justice. The Special Deputy Receiver notified the Department of Justice of the estate's position regarding its set off claim. Additionally, the Special Deputy Receiver has filed an appeal with CMS for the nonpayment of the interim reinsurance balance due Consumers' Choice of \$9 million. The Department of Justice has referred this, and other similar claims by receivership estates, to collection. Given the fact that CMS has ramped up its collection efforts against Consumers' Choice, it is necessary for the receivership estate to secure counsel to initiate litigation to collect funds due the estate.

General Summary of the Receiver's Position

The ACA created three risk mitigation programs, referred to as the "3R" programs, standing for federal Reinsurance, Risk Adjustment, and Risk Corridor programs. Under the ACA

and HHS's implementing regulations, Consumer's Choice is owed \$70 million under the Risk Corridor program for the 2014 and 2015 policy years. Under the statute, the "Secretary [of HHS] is required to pay this amount. Despite its statutory mandate and assurance, HHS/CMS announced that participating plans would receive only up to 12.6% owed to plans under the Risk Corridor program for 2014 policy year. CMS has not made *any* payment to Consumers' Choice for the Risk Corridor amount (\$59 million) owed for 2015 policy year.

The Solvency Loan (and possibly the start up loan) is subordinated and, by its terms, may be repaid only after all other creditor claims. The Guaranty Association Claim would take priority over any other claims, including the federal government under South Carolina law. This position is consistent with that taken by other states that are now administering insolvent CO-OP plans and already involved in, or about to initiate, litigation to collect the funds due the insolvent CO-OP estates.

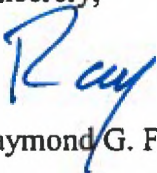
No decisions have been made, yet about proceeding with litigation, but I am contemplating joining the action filed by the Iowa Commissioner who is administering the CO-Opportunity receivership on behalf of Iowa and Nebraska policyholders and creditors. This would be an action on behalf of Consumers' Choice instituted by the Receiver to collect funds due the receivership estate. Engagement of counsel is contemplated per the order of liquidation. Even though the State of South Carolina is not specifically involved, any litigation involving the ACA may receive state and national attention and indirectly affect the state.

For this reason, we wanted to confer with you concerning any possible ramifications. Please let me know of any concerns that you may have concerning the contemplated action. The Special Deputy Receiver will be in town next week and we will make ourselves available to meet with you. I will make myself available to meet with you to address any questions that you may have at your convenience.

Once we have received your input, Mr. FitzGibbons and I will meet with the South Carolina Attorney General about identifying and securing local counsel to represent the receivership estate.

Please do not hesitate to contact me if you have any questions or concerns about the content of this letter or if I may provide additional information.

Sincerely,



Raymond G. Farmer