ORDER NO. A22 -14

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF: APPLICATION BY HORIZON HEALTHCARE SERVICES, INC., TO FORM A MUTUAL HOLDING COMPANY PURSUANT TO N.J.S.A. 17:48E-46.1	)	ORDER DENYING REQUEST FOR A STAY

INTRODUCTION

This matter arises out of a request for a stay pending appeal filed on behalf of two Horizon group policyholders, New Jersey Citizen Action and the Health Professionals and Allied Employees Union (collectively, "NJCA/HPAE"). NJCA/HPAE appealed Order No. A22-09 that was entered by the Department of Banking and Insurance ("the Department"), which approved, on November 1, 2022, with immediate effect, an application to form a mutual holding company pursuant to N.J.S.A. 17:48E-46.1 et seq. filed by Horizon Healthcare Services, Inc. ("HHSI" or "Horizon"). After review and consideration of the submissions by NJCA/HPAE, dated December 14, 2022 and December 20, 2022, and the submission by Horizon, dated December 16, 2022, and for the reasons set forth below, NJCA/HPAE's request for a stay is **DENIED**.

BACKGROUND

The Legislature enacted Public Law 2020, Chapter 145 ("Chapter 145") effective December 23, 2020. Chapter 145 permits the sole licensed health service corporation ("HSC") in New Jersey, HHSI, to reorganize as a nonprofit mutual holding company ("MHC") system. Prior to the Order, HHSI was required to make all of its investments and hold all of its assets through legal entities subject to regulation as insurance entities. When enacting Chapter 145, the Legislature found that "[i]t is in the interest of the subscribers of the health service corporation and the State of New Jersey that the health service corporation be afforded the ability to modernize its corporate structure, subject to appropriate standards, oversight, and approval, in order to meet the evolving health care needs of its subscribers, while continuing its statutory mission, and maintaining its status as a charitable and benevolent institution . . . . [This opportunity for reorganization] will facilitate increased utilization of 21st century technologies and tools to better address current challenges, improving both the State's healthcare infrastructure and its readiness to address future crises such as those resulting from the ongoing COVID-19 pandemic [and] will promote vital investments and growth in health services and diversified businesses for the benefit of its members and the State."[1]

Under Chapter 145, the Commissioner of Banking and Insurance ("Commissioner") "shall approve a plan of mutualization and reorganization unless the Commissioner finds the plan:

> (1) is contrary to law;
>
> (2) would be detrimental to the safety or soundness of the proposed reorganized insurer and insurance company subsidiaries of the proposed mutual holding company; or
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> (3) does not benefit the interests of the policyholders of the health service corporation or treats them inequitably."[2]

I shall refer to these three numbered clauses, collectively, as the "Disapproval Factors."

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[1] N.J.S.A. 17:48E-46.1(a)-(b).
[2] N.J.S.A. 17:48E-46.5(b).

On August 21, 2022, HHSI submitted its plan for mutualization and reorganization to the Department (the "Plan"). Pursuant to Chapter 145, the Commissioner engaged the services of experts and consultants to advise on any matters related to the application. More specifically, the Department engaged Manatt, Phelps, & Phillips, LLP, and Manatt Health; Oliver Wyman Actuarial Consulting, Inc.; and Rudmose & Noller Advisors, LLC (collectively, the "Consultants") to assist in the Department's review of HHSI's application.[3]

The Department held three public hearings on October 6 (in person), 11 (virtual), and 17 (virtual), 2022, at various times of the day to accommodate diverse schedules, which it publicized through a press release, media advisories sent by the Department to numerous media outlets on October 11, 2022 and October 14, 2022 prior to the second and third hearings, the Department's social media pages, and paid advance notice in seven New Jersey newspapers.[4] The Department additionally accepted written comments on HHSI's application through October 18, 2022.[5] After consideration of all relevant materials including, a "Post-Hearing Report and Summary and Consultants' Evaluations of Horizon Healthcare Services, Inc.'s Application for Mutualization & Reorganization," dated October 31, 2022 (the "Report"),[6] and a "Health Impact Study on Horizon's Proposed Reorganization Completed at the request of New Jersey Department of Banking and Insurance," dated October 30, 2022 (the "Study"),[7]and all public input, I issued the Order on November 1, 2022. The Department created a dedicated website, promoted on the Department's home page, where the application, public documents and the public hearings were posted for the public to access. The dedicated website launched with the application being deemed complete on September 22, 2022.The website was continuously updated as information became

[3] Post-Hearing Report and Summary and Consultants' Evaluations of Horizon Healthcare Services, Inc.'s Application for Mutualization & Reorganization, 1 (Oct. 31, 2022), available at https://nj.gov/hschearings/documentation/PostHearingReport.pdf (the "Report").

[4] Horizon's application and the hearing dates were also reported in news articles through various media outlets.

[5] Report, supra note 3, at 3.

[6] Report, supra note 3

[7] Health Impact Study on Horizon's Proposed Reorganization, 3 (Oct. 30, 2022), available at https://nj.gov/hschearings/documentation/HorizonImpactStudy.pdf (the "Study").

public, including all public documents related to the Application, video recordings of all public hearings live as they occurred and recordings available continuously thereafter, and the reports described above.[8] Per the Order, the Department "completed its comprehensive review of the application and supporting documentation submitted by HHSI, as well as the public testimony from the three public hearings, written public comments, the entire record in this proceeding, and analyses thereof by the Consultants, and has determined that the reorganization and mutualization of HHSI, as ordered further herein, is not contrary to law, would not be detrimental to the safety or soundness of the proposed reorganized insurer and insurance company subsidiaries of the proposed mutual holding company, and is neither contrary to the interests of the policyholders of the health service corporation nor would it treat them inequitably, consistent with the authority assigned to the Commissioner by N.J.S.A. 17:48E-46.5."

The Order contains twelve conditions. Those conditions include that not more than $300 million may be transferred to Horizon Mutual Holdings, Inc. ("HMH"), the new MHC, from the regulated insurance entities; that no other distributions, including ordinary dividends, can be made for the following three years without express prior written approval of the Commissioner (referred to here as the "dividend moratorium"); and that HHSI, Horizon Healthcare of New Jersey ("HHNJ"), and Horizon Insurance Company ("HIC") will each be subject to a minimum risk-based capital ("RBC") of 425% of authorized control level (ACL) RBC and that Horizon Healthcare Dental, Inc. ("HHD") shall be subject to a minimum RBC of 200% of ACL RBC. The Order also establishes a methodology for calculating HMH's "system-wide health RBC," along with reporting requirements for system-wide health RBC, including special requirements should HMH expect its system-wide health RBC to fall below 550%. Among other conditions, the Order requires HMH to execute a parental guarantee from HMH to its regulated insurance subsidiaries to ensure HMH will rectify any shortfalls should the RBCs of the regulated insurers fall below the levels described in the Order. The methodology used and conditions put in place are consistent

[8] https://nj.gov/hschearings/index.shtml

with the Legislature's adoption of Chapter 145 and refute claims that the Department's decision was "arbitrary or capricious."

The Report summarizes the review the Department and its Consultants conducted of the Plan and explains the basis for certain of the Order's conditions.

STANDARD OF REVIEW

My review of NJCA/HPAE's request for a stay pending appeal begins with a review of the grounds for a stay. A stay of a final administrative decision pending appeal is an extraordinary form of equitable relief primarily used to prevent irreparable harm; it requires sound discretion and consideration of the equities involved. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982); Zoning Bd. of Adjustment of Sparta v. Svc. Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). A stay is not a matter of right, even if irreparable injury may otherwise result. Yakus v. United States, 321 U.S. 414, 440 (1944). A stay is only appropriate where the moving party demonstrates that each of the following conditions have been satisfied: (1) the moving party has a reasonable probability of success on the merits, (2) the public interest favors granting relief, (3) considering the relative hardships to the parties in granting or denying relief, benefit to the movant will outweigh harm to other interested parties, including the general public, and (4) the relief is necessary to prevent irreparable harm. Crowe, 90 N.J. at 132-34.

The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div.2012). Based on the record before me, NJCA/HPAE has failed to carry its burden to demonstrate that a stay should be entered.

DISCUSSION

NJCA/HPAE requests that I stay the Order pending the Appellate Division's review of the Appeal, and contend that a stay is warranted to preserve the status quo.[9] However, on December

[9] Letter from Renee Steinhagen and Jason B. Adkins to Commissioner Marlene Caride, N.J. Dep't of Bus. & Ins., re Request for a Stay at 1-2 (Dec. 14, 2022) ("Request for a Stay").

16, 2022, NJCA/HPAE filed an application for an emergent stay motion in the Appellate Division ("Application"). The Appellate Division denied the request for an emergent stay that same day.[10] The arguments advanced by NJCA/HPAE appear to express disagreement with Chapter 145, rather than the Department's implementation of it. The lack of sufficient grounds upon which NJCA/HPAE would have a reasonable probability of success on the merits, as well as the absence of other factors required for me to enter a stay, weighs heavily against its request. Each of the Crowe factors are addressed below.

I. Reasonable probability of success on the merits

NJCA/HPAE seeks a stay pending the Appellate Division's review of the Order. The question is whether or not NJCA/HPAE has a reasonable probability of success on the merits. To answer that question, I evaluated whether NJCA/HPAE has produced clear and convincing evidence that the Appellate Division would likely conclude the Order violates the law and should be vacated. On balance, based on a review of the record before me, I conclude that NJCA/HPAE have not carried their burden of proof.

1) NJCA/HPAE contends that the "[n]otice of the proceedings was contrary to law and treated policyholders inequitably"

Initially, NJCA/HPAE argues that the Department failed to provide proper notice and alleged "affirmative acts" by Horizon that render the Order contrary to law. As to the former, they misinterpret the law and argue that I failed to give direct notice to policyholders prior to the public hearings".[11]

[10] In denying NJCA/HPAE's request for an emergent stay, the Appellate Division stated, "[t]he application on its face does not concern a threat of irreparable injury, or a situation in which the interests of justice otherwise require adjudication on short notice. The applicant may file a motion with the Clerk's Office in the ordinary course."
[11] Request for a Stay, supra note 11 at 10.

Chapter 145 sets forth general notice and hearing requirements for the Commissioner as part of the application evaluation, but defers to the Commissioner in some important respects. Chapter 145 provides that: "[t]he commissioner shall hold three public hearings on the plan to form a mutual holding company within 90 days after the commissioner determines that the filing is complete, with notice provided by publication in a manner satisfactory to the commissioner."[12]

Here, I adhered to Chapter 145's requirements for public notice and hearing and made efforts to provide as much notice and opportunity for public comment as is reasonable. Before holding public hearings, the Department published to its website all non-confidential components of the application for public inspection. Specifically, on September 22, 2022, two weeks in advance of the first public hearing and almost four weeks in advance of the final public hearing, the Department issued a press release with information regarding the Application and notifying the public of the hearing dates and times.[13] The Department also published paid advance notice of public hearings in seven different newspapers in the State. Additional notice as discussed above was provided by the Department for the second and third hearings via media advisories, as well as reminders placed on the Department's social media pages, which provided electronic public notice of the hearing dates. After providing notice to the public, the Department held three public hearings during the allotted 90 days as per Chapter 145. The hearings were held at various times of day to accommodate diverse schedules, including after the 9-5 workday. Additionally, media advisories were posted on the Department's social media pages for the second and third hearings as well. Accordingly, NJCA/HPAE's claims of lack of advance notice are unsupported.

[12] N.J.S.A. 17:48E-46.5(b).
[13] https://www.state.nj.us/dobi/pressreleases/pr220922.html

The Department accepted written public comments until after the public hearings had been held. In total, about 600 people submitted oral or written testimony over the course of the public comment period.[14] Department staff and the Consultants engaged by the Department attended each of the three public hearings, read all written public comments, and analyzed whether the Plan as presented in the application, or any public comments, identified a basis that would require the Commissioner to disapprove HHSI's application under Chapter 145. During this process, the Department and the Consultants made various observations regarding HHSI's application and concerns raised by the public and the Study to ensure no Disapproval Factors had been triggered.[15]

NJCA/HPAE's preferred interpretation of Chapter 145's notice requirements are incorrect. As previously noted, N.J.S.A. 17:48E-46.5(b) contains the pre-hearing notice requirement: "by publication in a manner satisfactory to the commissioner." The Department's September 22, 2022 press release, media advisories, publication in seven New Jersey newspapers, as well as publication of the hearing dates on the Department's social media, provided more than adequate notice and an opportunity to be heard by the public. Again, any claims challenging the reasonable advance notice provided for the Application are unsupported.

The requirements of N.J.S.A.17:48E-46(2)(a)(5), made applicable to Chapter 145 by N.J.S.A. 17:48E-46.5(a), are straightforward. That statute provides that the Plan include "a provision that each policyholder shall be notified of the conversion, which notification process shall be approved by the commissioner." This plainly does not require prehearing notice of the Application directly to each policyholder. First, ordinary canons of statutory interpretation suggest that the specific statutory plain language governing prehearing notice controls. Second, since the

[14] Report, supra note 3, at 7.
[15] Id. at 12.

notice described in section 17:48E-46(2)(a)(5) relates to notice "of the conversion," it clearly cannot happen until the Plan has been approved, as there is no conversion to provide notice of until after the Plan has been approved. NJCA/HPAE appear to be reading into the statute a requirement that each policyholder be notified of the "application," but that requirement does not exist.

Next, NJCA/HPAE contends that certain members of the public who submitted testimony were affiliated with Horizon, despite not identifying themselves as such. NJCA/HPAE challenge the testimony of Horizon employees, or individuals otherwise affiliated with Horizon. NJCA/HPAE's argues that such testimony should be disregarded. NJCA/HPAE's arguments in this regard are unpersuasive. As discussed above, the Department provided reasonable notice of the hearings and opportunity to submit testimony and welcomed and considered any such testimony that was provided in support or opposition to the application. There is no legal prohibition on testimony from individuals affiliated with Horizon; any individual was permitted and welcome to provide testimony, and no evidence was offered that others were denied or discouraged from submitting oral or written comments.

2) NJCA/HPAE contends that the "[t]he Commissioner applied the incorrect legal standard to the third [Disapproval Factor], rendering the Order contrary to law"

NJCA/HPAE argues that the third Disapproval Factor is that the Plan "benefits the interests of policyholders," and that the Commissioner incorrectly applied the "not contrary" standard instead. NJCA/HPAE raise two aspects of the order in support of their argument. First, they contend that the Order distinguishes a different standard for each of Chapter 145's three Disapproval Factors. Second, they argue that the Commissioner's reasoning as applied to the third

Disapproval Factor shows that the Commissioner applied the "not contrary to" standard when evaluating the Plan.[16]

NJCA/HPAE misinterprets the third Disapproval Factor, which sets forth the requirements for the Commissioner to approve the Plan. The third Disapproval Factor reads: "the commissioner shall approve a plan of mutualization and reorganization unless the commissioner finds the plan: . . . does not benefit the interests of the policyholders of the health service corporation or treats them inequitably."[17] Plainly, the statute creates a presumption of approval *unless* the Commissioner finds that the plan does not benefit policyholders' interests. This does not require the Commissioner to make an affirmative finding that the reorganization would *benefit* policyholders' interests, only that the Commissioner determine that the reorganization would not be contrary to (i.e. "not benefit") policyholders' interests.

This presumption of approval is reinforced by a reading of Chapter 145 as a whole, which shows that the Legislature believed that reorganization of the HSC under the conditions required in the law would itself benefit the policyholders, the public, and the state of New Jersey.[18] Thus, it is reasonable to interpret the Disapproval Factors to create a presumption in favor of approval unless the Commissioner explicitly finds that the record shows the Plan "does not benefit" policyholders.

In its legislative findings, the Legislature noted many benefits of reorganization, including: modernizing the HSC's "corporate structure, subject to appropriate standards, oversight, and approval, in order to meet the evolving health care needs of its subscribers"; facilitating "increased utilization of 21st century technologies and tools to better address current challenges, improving

[16] Request for a Stay, supra note 9, at 11-12.
[17] N.J.S.A. 17:48E-46.5(b)(3).
[18] N.J.S.A. 17:48E-46.1.

both the State's healthcare infrastructure and its readiness to address future crises such as those resulting from the ongoing COVID-19 pandemic"; and promoting "vital investments and growth in health services and diversified businesses for the benefit of its members and the State."[19] The Legislature further noted the need for the statute to provide a "clear path" for the HSC to update and improve its corporate structure for its members' and the State's benefit, while "continuing to adhere to the statutory mission to provide affordable and accessible health insurance and promote the integration of the health care system to meet the needs of its members."[20] Because the Legislature found that the reorganization set forth by statute would benefit policyholders, the standard in N.J.S.A. § 17:48E-46.5(b)(3) functions as a safeguard should the Commissioner find that the statutory presumption is incorrect. The Order carried out the law correctly, which belies any claim by NJCA/HPAE that they will succeed on the merits.

3) NJCA/HPAE contends that the "the Order fails to establish by substantial evidence that the Plan meets the actual 'benefit the interests of the policyholders' or does not 'treat[] them inequitably' standards in N.J.S.A. 17:48E-46.5(b)(3)"

NJCA/HPAE next argues that the Order failed to establish "by substantial evidence" the Plan benefits the interests of the policyholders or does not "treat them inequitably."[21] As described in the prior section, this is not the proper standard. Chapter 145 does not require the Department to find by any quantum of evidence that the Plan would "benefit the interests of the policyholders" or not treat them inequitably. Instead, as described at length above, Chapter 145 requires the Department to approve the Plan unless it finds that any of the three Disapproval Factors are present. The Department, with the assistance of the Consultants engaged for this purpose, conducted a thorough review of the administrative record in this matter, and found no basis upon which to find

[19] N.J.S.A. 17:48E-46.1(a)-(b).
[20] N.J.S.A. 17:48E-46.1(c).
[21] Request for a Stay, supra note 9, at 12.

any of the Disapproval Factors were present. Therefore, per Chapter 145, the Department was required to approve the application. NJCA/HPAE has not identified anything to demonstrate that the Plan does not benefit policyholders or treats them inequitably. The Department's evaluation of the record not only found that there is no basis to determine the Plan does not benefit the policyholders or treat them inequitably, its evaluation found that "the proposed transaction does achieve the legislative intent of enabling modernization while maintaining the policyholder benefits associated with Horizon's unique status in the New Jersey market." [22]

NJCA/HPAE contends that the Department should not have considered HHSI's promise to continue offering coverage throughout the state in the individual market, as the reorganized insurer is required to do, to be a "benefit" of the Plan.[23] Though it is legally irrelevant under Chapter 145 whether or not this requirement is a "benefit" of the Plan or reinforcing an existing statutory requirement, the Department's view is that same is an important aspect of the Order because it removes any doubt that Horizon must continue to operate statewide in the individual market. In recognition of the existing statutory requirement, the Department's post-hearing report notes that, "the Conditions reinforce the statutory requirement that HHSI, both in its current form and as the reorganized insurer, is obligated to offer individual market coverage in every county in the state." Regardless, applying the correct legal standard, it is apparent that this fact is not a basis to conclude the Plan "does not benefit" the policyholders.

Next, NJCA/HPAE appears to disagree with the financial review conducted by the Department and the experts that were retained for that purpose, contending that the Consultants' conclusion that the record contained no information from which they [the Consultants] could

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[22] Health Impact Study, supra note 7, at 29.
[23] Request for a Stay, supra note 7, at 13.

conclude that the Plan is likely to result in higher insurance premiums could not satisfy the standard that the Plan would benefit policyholders.[24] However, applying the correct legal standard, that there was no evidence to support the conclusion that the Plan would increase premiums clearly supports the conclusion that there is not a basis to conclude the Plan does not benefit the interests of policyholders. NJCA/HPAE next challenge the basis for the Consultants' conclusion that the Plan was unlikely to result in higher premiums, but do so only by omitting critical passages of the Consultants' analysis.[25] NJCA/HPAE did not address the Consultants' discussion of the initial state assessment due from Horizon by June 1, 2023, of $600 million: "The Consultants observed that financial projections attached to the application indicate that HHSI does not intend to fund the initial $600 million state assessment through premium increases."[26] Nothing in the record or NJCA/HPAE's submissions provide any basis to dispute the financial projections showing that the initial assessment will not be funded through premium increases.

Finally, NJCA/HPAE argues that the restrictions the Department imposes on Horizon's future use of capital somehow rendered the Order "arbitrary, capricious and unreasonable."[27] But NJCA/HPAE's concerns here appear to reflect a disagreement with the statute the Legislature approved and the Governor signed, rather than an actual argument that the Department's Order implementing that statute was unlawful.

As set forth above, the Legislature declared in Chapter 145 itself that its intent in enacting this law was to preserve Horizon's "statutory mission" and "status as a charitable and benevolent institution," while permitting a reorganization that "will promote vital investments and growth in health services and diversified business for the benefit of its members and the State." N.J.S.A.

[24] Id. at 13-15.
[25] Id. at 14-15.
[26] Report, supra note 3, at 13.
[27] Request for a Stay, supra note 9, at 15-17.

17:48E-46.1(a), (b). Prior to the reorganization, as the state's sole HSC, Horizon was required to hold all its assets within the HSC, which is regulated as an insurance entity and subject to the state insurance law's limits on investments, capital and operations.

The Legislature was concerned that New Jersey law did not permit Horizon to make investments that would further its policyholder interests and its charitable mission, unlike in other states where statutes had been modernized to give nonprofit health service corporations more flexibility in how they operate. Id. 17:48E-46.1(c), (d). To remedy this, Chapter 145 permits Horizon to reorganize into a MHC system, with a nonprofit MHC being the ultimate parent organization and the HSC converting into the "reorganized insurer." Id. 17:48E-46.3. Under this structure, the parent MHC retains Horizon's charitable mission and holds the reorganized insurer and other insurance subsidiaries, but is not itself regulated as an insurer and as such "shall be expressly excluded from insurance operations and reporting, investment limits, and risk-bearing provisions [of the law] because a mutual holding company is not a risk-bearer." Id. 17:48E-46.3(d). See also id. 17:48E-46.3(g) (MHC may pursue business through insurance and non-insurance subsidiaries without revenue limits on "nonconforming affiliates" imposed on HSC). The reorganized insurer is an insurance entity, subject to the insurance laws, and takes on the obligations of the HSC, except as modified by Chapter 145. Id. 17:48E-46.3(d), (h).

In short, a primary concern of the Legislature in enacting Chapter 145 was that the HSC structure deprived Horizon of the ability to make investments in businesses that would benefit its policyholders, the public, and its charitable mission, because Horizon was required to hold all its assets within a regulated insurance entity, the HSC. Chapter 145 permits Horizon to convert the HSC into a reorganized insurer to be held by a nonprofit MHC. The MHC is free to engage in any lawful business, consistent with its charitable mission, which is overseen by the Attorney General.

The reorganized insurer remains subject to the insurance law's limits on capital, investments, and revenue. As such, it is apparent that in order to achieve the goals of Chapter 145 to permit Horizon greater flexibility in how it carries out its nonprofit mission, some capital must be moved out of the regulated insurance subsidiaries into the MHC to be deployed in non-insurance subsidiaries or investments. Otherwise, the entire effort would have, at great administrative expense, resulted in an organization that would be legally entitled to make non-insurance investments, but possessing little or no financial wherewithal to do so. Based on the foregoing understanding of the Legislature's intent, the Department concluded in the Order that some distribution of capital to the MHC was reasonable and appropriate to carry out Chapter 145.

The Department and its Consultants studied carefully whether the amount of the distribution proposed by Horizon, $300 million, would trigger any of the Disapproval Factors. Based on the foregoing, such a distribution was clearly not "contrary to law." See also N.J.S.A. 17:48E-46.6 (permitting the Department to approve any "transaction set forth in the application to form a mutual holding company system" without requiring separate filing and approval).[28] Further, the Department and it Consultants, as laid out in the Report, concluded that three conditions would be imposed in the Order intended to ensure that $300 million could be distributed to MHC to further its charitable mission through more diversified investments while ensuring the Plan did not present any basis to conclude it was a detriment to the safety or soundness of the regulated insurance entities or did not benefit the interests of policyholders of the HSC or treated

[28] See Study, supra note 7, at 3 ("In order to modernize its corporate structure, Horizon proposes to create HMH as a non-profit mutual holding company with two intermediary holding companies: one that would hold HHSI and its existing subsidiaries engaged in the business of insurance and one that would hold all of HHSI's non-insurance business. In the restructured Horizon, HMH would have 100 percent ownership and control of HHSI, which would be reorganized as a stock insurer, to allow it to modernize. HMH would be capitalized through a $300 million distribution from HHSI and its subsidiaries.").

them inequitably.[29] First, the Order imposes a three-year moratorium on further distributions, whether ordinary or extraordinary dividends, from the regulated insurance entities to the MHC to ensure the MHC is not accumulating excess capital before it has a record of deploying the capital it obtains through the initial distribution. Second, the Order establishes RBC thresholds for the three major insurance subsidiaries within the holding company system at 425%, more than double the statutory minimum applicable to them of 200%.[30] Third, the Order requires HMH and its officers to execute a parental guarantee in favor of its insurance subsidiaries to ensure capital held elsewhere in the holding company system is available to the insurance subsidiaries if needed to satisfy the RBC thresholds set in the Order.[31] The Department continues to view these conditions as permitting HMH to fulfill the Legislature's objectives in enacting Chapter 145, including permitting diversified investments while ensuring the safety and soundness of the regulated insurers.

NJCA/HPAE argues that the dividend moratorium is not a benefit to the policyholders, again misstating the relevant legal standard. But even if Horizon had been required to show its Plan had an affirmative benefit to policyholders this dividend moratorium would be a relevant element.[32] As detailed above, the Legislature clearly believed that permitting Horizon to reorganize and make investments outside the restrictions of the HSC structure would benefit the public and policyholders. The dividend moratorium limits immediate future distributions from the regulated entities to the holding company for three years, allowing time for Horizon to demonstrate it has and will deploy capital to further its charitable mission and benefit policyholders.[33] Thus,

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[29] Report, supra note 3, at 14-15.
[30] N.J.S.A. 17B:18-67 et seq and N.J.A.C. 11:2-39A.1 et seq.
[31] Id.
[32] Request for a Stay, supra note 9, at 15-16.
[33] Report, supra note 3, at 15.

even if the Plan could have been approved without this condition, the dividend moratorium provides further assurance that the Plan did not trigger any of the Disapproval Factors.

Next, NJCA/HPAE attacks the capital requirements imposed by Chapter 145. NJCA/HPAE argues that the imposition of capital requirements on the three major insurance subsidiaries more than twice as high as minimum statutory level does not benefit policyholders because it is lower than the even higher capital requirement that applied to Horizon as an HSC.[34] However, Chapter 145 explicitly relieves the reorganized insurer and the other insurance subsidiaries from the 550% RBC threshold that the HSC statute imposed.[35] It would be unreasonable, and perhaps even statutorily impermissible, for the Department to require the same RBC level on the reorganized insurer as existing prior to the reorganization, absent a showing that such a capital level would be required for the safe and sound operation of the insurer. In fact, the Department and its Consultants carefully studied Horizon's current financial statements and financial projections and concluded a RBC level of 425% would permit safe and sound operation, while fulfilling the statutory objective of providing capital to permit Horizon to diversify its business and investments to better fulfill its charitable purpose and benefit policyholders.[36] It would be an absurd interpretation of Chapter 145 to permit Horizon to make investments through non-insurance entities, but deprive the holding company of the capital necessary to do so, absent a showing that the capital was actually required in the insurance entities for their safety and soundness.

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[34] Request for a Stay, supra note 9, at 16.

[35] Subsections d. and e. of N.J.S.A.17:48E-46.3 specifically relieve the mutual holding company and "the reorganized insurer or any insurance company or risk-bearing entity within the mutual holding company system" from the obligation contained in N.J.S.A 17:48E-17.3, which includes the 550% minimum RBC threshold.

[36] Report, supra note 3, at 14-15.

Although not a requirement in Chapter 145, NJCA/HPAE make much of the fact that Horizon did not commit to investing the distributed $300 million in particular ways. [37] But the Legislature made the decision to permit Horizon to transfer capital to a MHC so long as the standards in Chapter 145 were met, and determined that the flexibility this would provide was itself a benefit to policyholders and the public, assuming the safety and soundness of the regulated insurers was assured. It is also worth noting that the distribution of funds to the MHC is not the end of the Department's oversight role. Under Chapter 145, the Commissioner shall "possess supervisory powers with respect to the insurance holding company system which shall include the authority to monitor the mutual holding company system's financial health, enterprise risk, and examine its operations."[38] Further, the MHC remains subject to oversight by the Attorney General in his role as enforcer and protector of charitable corporations and charitable trusts, a fact the Attorney General affirmed in an October 17, 2022 letter to the Department in connection with this matter.[39] The mere fact that distribution to the MHC was approved and has occurred does not demonstrate that the Plan does not benefit policyholders.

4) <u>NJCA/HPAE contends that the "[t]he Order incentivizes Horizon to underfund its health insurers and amass profits in the MHC"</u>

As previously discussed, Chapter 145 requires the MHC to pay an annual assessment beginning each year after the initial assessment is paid, in varying amounts. The annual assessment must be paid for 25 years, or after 17 annual assessments are paid, whichever comes first. Chapter 145 says the MHC shall not pay any portion of the assessment for any given year if the MHC's "system-wide health risk-based capital authorized control level would fall below 550 percent based

[37] Request for a Stay, <u>supra</u> note 9, at 17-18
[38] N.J.S.A.17:48E-46.6
[39] <u>See</u> Exhibit 2 of the Report, <u>supra</u> note 3.

on the standard for risk based capital for health organizations as adopted by the National Association of Insurance Commissioners following the payment as applied against the prior calendar year's risk based capital." N.J.S.A. 17:48E-46.13.[40] Because Chapter 145 establishes specific conditions under which annual assessments could be deferred, and ultimately extinguished after 25 years from the effective time, NJCA/HPAE claims that HMH has an incentive to move capital out of the regulated health insurance entities so that they fail to meet this threshold and thereby HMH avoids paying annual assessments. NJCA/HPAE argues that the Order should have imposed conditions that would have prevented HMH from doing so.[41]

Given that the conditions for paying the annual assessment are set by statute, it is questionable whether the Department would have authority to impose additional conditions that trigger the assessments. Regardless, the 550% threshold is measured against all capital "system-wide" whether held directly by HMH or its regulated or non-regulated subsidiaries. It is not limited to capital within the regulated health insurance entities. Horizon, in its response to NJCA/HPAE's request for a stay, acknowledges that its liability for the annual assessments will be determined by measurement of its capital throughout the system, and not limited to capital within the health insurers.[42] As such, the incentives that NJCA/HPAE hypothesize do not exist.

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[40] The 550% RBC standard in N.J.SA.17:48E-46.13 is calculated for purposes of the annual assessment using "the system-wide health risk-based capital authorized control level," which should be distinguished from the "health service corporation's risk-based capital ratio" minimum threshold of 550% contained in N.J.S.A.17:48E-17.3. The former applies to the entire MHC system and is applicable only for the purposes of paying the annual assessment, while the latter was applied to the former health service corporation for purposes of regulating their surplus and is statutorily no longer applicable to either the reorganized insurer or the MHC.

[41] Request for a Stay, supra note 7, at 18-20.

[42] Opposition to Request for a Stay, at 6.

5) NJCA/HPAE contends that the "[t]he Order fails to establish by substantial evidence that the Plan satisfies the standard in the second [Disapproval Factor], that the Plan would [not] be detrimental to the safety or soundness of the proposed reorganized insurer(s), per N.J.S.A 17:48E-46.5(b)(2)"

NJCA/HPAE incorrectly argue that the Department lacked an adequate basis to conclude in the Order that the Plan would not be detrimental to the safety and soundness of the insurance subsidiaries of HMH.[43] As described in the Order and Report, the Department and its Consultants reviewed the entire record, including financial projections, business plans, and other documents that are confidential by law, and concluded that the Plan as approved in the Order would not be detrimental to the safety and soundness of the regulated insurers.

NJCA/HPAE challenges this conclusion by arguing that the 425% RBC minimum established in the Order for the three major insurance subsidiaries is a misuse of the RBC metric, because it is "intended to be a regulatory standard and not necessarily the full amount of capital that an insurer would need to hold to meet its objective. . . . The purpose of RBC requirements is to identify weakly capitalized companies . . . ."[44] Since the question of whether a company is "safe and sound" is a regulatory examination into whether a company is weakly capitalized, and the Department has extensive experience and expertise in this regulatory function, it is entirely appropriate to the Department to use RBC standards as a tool in this pursuit. In any case, the Department examined the entire record before it and concluded there was nothing in the record that led it to believe the Plan was detrimental to safety and soundness.

NJCA/HPAE next argues that 550% RBC would have been the correct level and Horizon is unlikely to satisfy this standard.[45] But as noted, supra, Chapter 145 explicitly eliminated the requirement that the insurance entities maintain RBC in excess of 550% and instead subjects them

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[43] Request for a Stay, supra note 7, at 20-21.
[44] Request for a Stay, supra note 7, at 21.
[45] Id. at 22.

only to a 200% RBC standard. The 550% standard is used in Chapter 145 solely to determine the conditions under which Horizon is liable to pay annual assessments to the State, and, for that purpose the relevant measure is "system-wide health risk-based capital," which, as noted supra, encompasses all capital within the holding company system, including capital outside the regulated insurers. It does not reflect any legislative judgment that the regulated insurers themselves must maintain RBC at that level, and indeed Chapter 145's repeal of the 550% minimum standard reflects precisely the opposite. NJCA/HPAE's argument that the insurers' RBC could fall below 550% says little about their safety and soundness.

NJCA/HPAE appear to argue that based on HHSI's 2021 financial statements, the Plan could cause HHSI's RBC to fall below even 425%.[46] But in light of the significant changes that have occurred to HHSI since year-end 2021, including effectuation of the Plan, these financials are no longer relevant. The relevant question is whether the Plan is detrimental to the safety and soundness of the regulated insurers today and in the future. The Department reviewed the application as a whole and is convinced that the minimum RBCs, the dividend moratorium and the parental guarantee, together with the Department's ongoing oversight of all insurance companies, appropriately led the Department to conclude the Plan is not detrimental to the safety or soundness of the regulated insurers.

6) NJCA/HPAE contends that the public record's incompleteness violates Chapter 145 and undermines the public hearing process

NJCA/HPAE argues that the public record concerning the Plan is incomplete, which violated Chapter 145 and undermined both the purpose of and NJCA/HPAE's ability to participate in the public hearings. NJCA/HPAE asserts that my decision to withhold information regarding Horizon's projected RBC ratios, MHC's proposed bylaws, and the recovery plan were contrary to

[46] Id. at 23.

statute. Without citation or explanation, NJCA/HPAE insists they "have reason to believe that many other such documents have been improperly withheld as well."[47] NJCA/HPAE's arguments in this regard are without merit.

The record before me reflects the Department's steps to publish all information that the statute requires to provide a robust record for public comment. As discussed above, the Department took additional steps to provide information and public access to all relevant documents and information via a dedicated website[48]. Under the statute, the application itself is a public record, but certain documents are confidential and not public records: "documents deemed confidential by statute or regulation; the business plan, capitalization plan, financial projections, and market competitive data; and any other information the commissioner determines could result in harm to the health service corporation, mutual holding company, reorganized insurer or other insurance entity within the mutual holding company system, or the public interest, if disclosed."[49]

The Department appropriately exercised discretion to exclude certain materials from public review consistent with the law and the Department's customary practices. New Jersey regulations specifically designate RBC reports as confidential,[50] and thus fall squarely into the exemption set forth by N.J.S.A. 17:48E-46.12(a)(1) for "documents deemed confidential by statute or regulation." With respect to the amended corporate bylaws the Commissioner properly exercised discretion under N.J.S.A. 17:48E-46.12(a) to exclude them from publication, in light of the confidential business operations and processes the draft bylaws would reveal and the minimal likelihood that disclosing the draft bylaws would have better informed the public about the Plan.

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[47] Id. at 25.
[48] https://nj.gov/hschearings/ and https://nj.gov/hschearings/documentation/index.shtml

[49] N.J.S.A. 17:48E-46.12(a).
[50] N.J.A.C. 11:2-39A.10

Disclosure of such information could be harmful to Horizon, and the decision not to disclose was proper.

7) NJCA/HPAE contends that the "Enforcement of the Statutory Standards for Approval is Vital to Securing the Legislative Intent in Protecting Policyholders, and Preserving Horizon as a New Jersey Non-Profit, Charitable Corporation in Any Future (Hostile) Acquisitions"

NJCA/HPAE's appear to suggest that because at some future point the Department might approve a new transaction that would result in one or more of the HMH insurance entities being acquired by a for-profit entity,[51] "the statutory standard of review must be properly applied now."[52] As discussed throughout this order, I adhered to the mandates of Chapter 145 during my review and consideration of the Application. HCPA/HPAE's comments as to any possible future events do nothing to alter the statutory provisions that were followed. Based on the Order, the Report, and the foregoing, Chapter 145 was properly applied. Accordingly, based on the foregoing analysis of NJCA/HPAE's arguments, NJCA/HPAE has not established a likelihood of success on the merits in order to support the request for a stay.

II. Whether the public interest favors a stay

On the second Crowe factor, NJCA/HPAE have failed to meet their burden to show by clear and convincing evidence that the public interest favors a stay. As a preliminary matter, in evaluating where the public interest lies in this matter, and as set forth above, Chapter 145 evinces clear legislative intent in favor of mutualization and reorganization of an HSC. There is a presumption of approval, unless the Commissioner concludes one of the three Disapproval Factors are present. The legislative findings incorporated in the text of Chapter 145 extensively describe

[51] Whatever NJCA/HPAE are contemplating that HMH may do would likely require a statutory change, and certainly would require further approvals by the Department: Chapter 145 explicitly prohibits HMH form converting to a for-profit stock holding company. N.J.S.A. 17:48E-46.14.
[52] Request for a Stay, supra note 7, at 25-26.

the benefits to policyholders and the State from permitting Horizon to diversify its business and modernize its structure, while maintaining a charitable and benevolent mission.[53]

Consistent with Chapter 145, the Department conducted extensive analyses of the proposed plan and its effects on the public, engaged the public through three public hearings and a public comment process, and considered the impacts the reorganization would have on the insurer, the policyholders, and the public at large. Following this review, the Department approved the Plan. NJCA/HPAE waited 43 days to request a stay. That delay is at odds with the urgency they now convey in seeking extraordinary relief. Given the unlikelihood of NJCA/HPAE's success on the merits, the thorough public process in reviewing the Plan in the first instance, and the Legislature's clear determination that a reorganization consistent with Chapter 145 would benefit the public, it would not be in the public interest to grant a stay.

III. Benefits versus harms of granting a request for a stay

On the third Crowe factor, NJCA/HPAE have failed to meet their burden to show by clear and convincing evidence that considering the relative hardships to the parties in granting or denying relief, benefit to the movant will outweigh harm to other interested parties, including the general public.

While NJCA/HPAE's request for a stay does not clearly delineate their arguments on the second, third, and fourth factors, suffice to say that underlying NJCA/HPAE's argument that the benefits of a stay outweigh its harms is the assumption that the Plan approved with immediate effect by the Department on November 1, 2022, has not yet been implemented. But that is not the case. Instead, in Horizon's December 16, 2022 letter to the Department, Horizon explained that since November 1, among other actions implementing the Plan, the new MHC and various

[53] N.J.S.A. 17:48E-46.1.

intermediate holding companies have been legally formed and held an organizational meeting adopting various corporate documents; the board of the HSC no longer exists; new members have been elected to the HMH board, including those appointed by the Governor; HHSI no longer holds a certificate of authority as an HSC and now holds a certificate of authority as a stock insurer; the Blue Cross Blue Shield (BCBS) Association has approved the transfer of the BCBS license to HMH; Horizon's credit facility has been amended to reflect its new organization; and S&P has published a new credit rating for Horizon under its reorganized structure.[54]

Horizon, in its December 16, 2022 letter, has described the numerous steps it has taken to implement the Order. NJCA/HPAE appears to acknowledge, it would be wasteful, if not impossible, to ask Horizon to undo the transactions laid out in the Plan pending this appeal. In light of the Department's consideration of the other factors, including the unlikelihood of the NJCA/HPAE's success on the merits before the Appellate Division, and the harm to Horizon, its policyholders, and the public at large, the record before me demonstrates that the harm to Horizon and to the general public clearly outweighs any benefit to NJCA/HPAE by a entering a stay.

IV. Possibility of irreparable harm

Lastly, NJCA/HPAE failed to meet their burden to show by clear and convincing evidence the possibility of irreparable harm if the stay is not granted. The purpose of a stay is to prevent threatened irreparable harm until an opportunity is afforded for a full hearing on the merits. Outdoor Sports Corp. v. A.F. of L., Local 23132, 6 N.J. 217, 230 (1951). Crowe, supra, teaches that irreparable harm only occurs in equity when either the harm cannot be redressed adequately by monetary damages or, in certain circumstances, severe personal inconvenience which justify

[54] Letter from Anthony R. Coscia & Antonio J. Casas to Commissioner Marlene Caride re HHSI Opposition to Request for a Stay, at 11-13 (Dec. 16, 2022).

issuance of injunctive relief. While the reorganization was set to be effectuated immediately following the Order's November 1, 2022 effective date, NJCA/HPAE did not seek to prevent the irreparable harm they contend necessitates a stay until long after this date. The fact is, NJCA/HPAE waited 43 days to submit their request for a stay. Such a delay undermines arguments that the relief they seek is necessary to prevent immediate, irreparable harm. Pharmacia Corp. v. Alcon Labs., Inc., 201 F. Supp. 2d 335, 382-83 (D.N.J. 2002) (holding that a delay in filing may "knock[] the bottom out of any claim of immediate and irreparable harm); Lanin v. Borough of Tenafly, 2013 WL 936363, at *3 (3d Cir. Mar. 12, 2013) ("Delay in seeking enforcement of those rights . . . tends to indicate at least a reduced need for such drastic, speedy action." (citing Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985)); Bd. of Health v. Jennings, 129 N.J. Eq. 51, 66 (1941) ("Long delay may serve to outweigh a claim of threatened irreparable injury[.]").

With the reorganization well underway, there is no immediate and irreparable injury that granting a stay would prevent.

CONCLUSION

For the foregoing reasons, the request for a stay is **DENIED**.

December 23, 2022
Date

Marlene Caride, Commissioner
New Jersey Department of Banking and Insurance