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SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION

IN THE MATTER OF
BULLETIN NO. 22-11

APPELLATE DIVISION
DOCKET NO: A-001626-22

ON APPEAL FROM THE AGENCY DECISION ENTERED ON DECEMBER 20, 2022, BY THE STATE OF NEW JERSEY, DEPARTMENT OF BANKING AND INSURANCE

BRIEF FOR APPELLANT RECIPROCAL ATTORNEY-IN-FACT, INC.

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PRELIMINARY STATEMENT

The Department of Banking and Insurance (the "Department") issued a December 20, 2022 Bulletin[1] purporting to "clarify" the laws and regulations applicable to reciprocal exchanges in this State, which is the subject of the present appeal by Reciprocal Attorney-in-Fact, Inc. ("RAF"), as the attorney-in-fact for New Jersey Physicians United Reciprocal Exchange ("NJ PURE") pursuant to Rule 2:2-3. On its face, the Bulletin appears straightforward—reciprocal exchanges are, and always have been, required to comply with the New Jersey Insurance Holding Company Systems Act, N.J.S.A. 17:27A-1 to -14 (the "Holding Act"), as well as Statement of Statutory Accounting Principle No. 25 ("SSAP No. 25") regarding certain related party transactions. This begs the question: If the language of the Holding Act and SSAP No. 25 clearly supported the Department's position, what did the Department need to "clarify" in the first place? The answer, candidly, is nothing. The Department issued the Bulletin, not to clarify, but to unilaterally and improperly change New Jersey law, contrary to its own prior interpretations and actions and the language of both the Holding Act and SSAP No. 25.

Indeed, the Department's pronouncements shocked reciprocal insurers, who have operated for decades under a set of laws, rules, and regulations that are different from other insurers as approved by the Department. Through countless financial

[1] 2022 Bulletin No. 22-11 (the "Bulletin") is attached as Ja1-2.

examinations of reciprocals, as well as its public statements and actions, the Department has repeatedly admitted that: (1) New Jersey reciprocal exchanges are exclusively regulated by the Reciprocal Exchange Act, N.J.S.A. 17:50-1 to -19 (the "REA"); (2) the Holding Act does not apply to reciprocal exchanges; and (3) new legislation would be required to bring reciprocals within the ambit of the Holding Act. The Department failed to enact such legislation. Thus, rather than properly amending the REA or the Holding Act, the Department seeks to achieve its goal through improper rulemaking under the Administrative Procedure Act (the "APA"). New Jersey law is clear that an agency determination effecting a material change in existing law, or altering the "status quo," must comply with the APA, or it will be deemed invalid. Here, the Department completely disregarded the APA, adopting the Bulletin without providing any public notice, comment or hearing in violation of the APA's procedural and substantive due process protections and interfering with RAF's right to contract with individual subscribers. Accordingly, the Department's action was substantively and procedurally deficient.

In addition to its new interpretation of the Holding Act, the Department is using the Bulletin to misapply and misuse language of SSAP No. 25 to subjectively regulate AIF fees paid by individual subscribers to the exchange. SSAP No. 25 governs accounting and disclosures for transactions between affiliates and related parties. The AIF for a reciprocal exchange is considered to be a related party to the

exchange, as it exercises control over and makes decision on behalf of the exchange. A transaction between the exchange itself and the AIF may implicate SSAP No. 25. In contrast, AIF fees, which are set forth in the Power of Attorney (the "POA") filed with the Department, are paid individually by each new subscriber as a pre-requisite to join the exchange, and do not involve a related party transaction between the AIF and the exchange itself. SSAP No. 25 has never been used by the Department to regulate transactions between individual subscribers to an exchange and the AIF because the payment of AIF fees is an arm's length transaction between two willing and unaffiliated entities—the individual subscriber and the AIF—who lack common interests or control/ownership. Indeed, NJ PURE has filed over seventy quarterly and annual financial statements, and the Department has never once sought to regulate RAF's AIF fees through SSAP No. 25 until now.

Accordingly, RAF appeals from the Bulletin because it is an improper and unilateral pronouncement of new law that has broad implications to all reciprocal exchanges and their respective AIFs. The Department's actions are clearly arbitrary, capricious, unreasonable and ultra vires and specifically designed to inhibit the development of a proper record. For all these reasons, this Court must strike the Bulletin and compel the Department to observe the APA's substantive and procedural due process requirements before imposing a sea change of regulation on reciprocals and their AIFs.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

A. Background of Regulation of Reciprocal Exchanges in New Jersey

Passed in 1945, the REA provides the authority to enter into reciprocal insurance contracts and exclusively regulates reciprocal exchanges, except where specifically stated. N.J.S.A. 17:50 et seq. The REA makes clear that "[s]uch contracts and the exchange thereof and such subscribers, their attorneys in fact and representatives shall be regulated by this act, and by no other statute of this State relating to insurance, except as herein otherwise provided." N.J.S.A. 17:50-1 (emphasis added); Ja79[3] (issuing certificate of authority pursuant to N.J.S.S.A. 17:50-1). Reciprocal exchanges are extremely rare entities. While there are three legal vehicles through which to provide insurance: 1) traditional for-profit stock companies 2) mutual insurance companies; and 3) reciprocal exchanges, approximately 98+% of the insurance industry is comprised of the first two types. See https://www.govinfo.gov/content/pkg/CHRG-111hhrg56778/pdf/CHRG-111hhrg56778.pdf). The United States has less than thirty-five active reciprocal exchanges, while there are over 3,000 active stock companies. Id.

By statute, a reciprocal exchange separates the two main functions that traditionally exist within a single insurance company—the executive management

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[2] The Procedural History and Statement of Facts have been combined for clarity and the convenience of the court.

[3] Ja refers to the Joint Appendix.

company and the insurance operation itself. N.J.S.A. 17:50-1 et seq.; Ja67-68, Sec. 10. By doing so, it isolates the function of the insurance operation (namely the reciprocal exchange)—allowing the insurance entity alone to be organically operated on a not-for-profit basis—stripping an incentive for executives inside the entity to purposely underprice risks in order to report profits on a short-term basis so it can trigger compensation. Id. In fact, while rare, some of the world's best performing insurance entities are reciprocals, such as USAA, Farmers Insurance Exchange, and Erie Insurance Exchange. See https://www.govinfo.gov/content/pkg/CHRG-111hhrg56778/pdf/CHRG-111hhrg56778.pdf.

Reciprocals are legally held to more stringent financial guidelines than traditional insurance companies. N.J.S.A. 17:50-1 et seq. Reciprocal exchanges cannot have outside stockholders who, in turn, can be enticed to profit from policyholders, because reciprocals are not-for-profit, and they generate additional capital organically from their insureds. Ja67-68. In summary, a reciprocal exchange operation is a fundamental self-help form of insurance, where a management company manages the operations of the exchange on behalf of the unsophisticated policyholders who simply want a lower cost insurance policy to cover their risk. N.J.S.A. 17:50-1 et seq.; see also https://www.pureinsurance.com/newsroom/pures-reciprocal-model.

As a result, the standalone financial solvency requirements for reciprocal exchanges are more stringent than those required of traditional stock companies (i.e. liquidity ratio requirements for certain capital levels to be maintained above the standards required of other insurance entities). N.J.S.A. 17:50-5. Indeed, the REA contains intentionally arduous and demanding standards to ensure the financial health of the reciprocal and its subscribers. Id. For example, in addition to general solvency requirements, reciprocal exchanges are also subject to a "liquidity test," which requires them to maintain a prescribed level of cash and investments compared to certain liabilities at all times. Id. Any decrease below that level automatically requires the attorney-in-fact to contribute its own funds to make up the deficit, to avoid the immediate liquidation of the reciprocal. Id. No similar requirements exist for other insurance entities. See generally N.J.S.A. 17.

As a prerequisite for an individual to obtain insurance from the reciprocal, he or she must execute an unrelated party contract with the AIF—the Power of Attorney ("POA")—that segregates the AIF from the not-for-profit reciprocal exchange. Ja67-68. The AIF and the subscriber do not possess common interests or control/ownership. See CURE v. Sherrod Vans, Inc., 2013 WL 3820937, n.1. The subscriber's rights and obligations are: a) statutorily prescribed; and b) clearly set forth in the POA, a form which is filed with the Department and which the Department repeatedly reviews. N.J.S.A. 17:50-3. Only the subscriber and the AIF

are parties to the POA; the Exchange (i.e., the entire collective group of subscribers itself) is not a party. Id.

The POA must be signed and executed by each individual policyholder, as the exchange is a product of individual contracts executed by the AIF and the policyholders. Id. at -7. The AIF does not have control over the terms of a reciprocal exchange, as evidenced by the fact that policyholder's signature is required. Id. If the individual subscriber does not agree to the POA/AIF Fee, he/she is free to decline coverage and seek insurance from another carrier. Id. No AIF, including RAF, can unilaterally increase or agree to increase the AIF Fee. Id. at -3, -7.

The individual subscriber, not the exchange, pays the AIF Fee to the AIF after signing the POA. Id. at -7. The AIF Fee is a percentage of each individual subscriber's premium as a fee for managing the reciprocal exchange. Id. In some situations, the exchange simply collects and forwards the AIF Fee to the AIF; effectively acting as a passthrough clearinghouse. The individual subscriber and the AIF remain independent. Id. The AIF cannot unilaterally increase its fees. Id. Therefore, the AIF's financial incentive is simply to make the reciprocal exchange grow so the AIF can make profits. See Delos v. Farmers Group, 93 Cal App. 3d 642, 652 (4th Dist. 1979).[4] The only way to grow a reciprocal exchange is to provide

[4] The Court can take notice of the operations of reciprocals as stated in other judicial opinions, , congressional and NAIC hearings. N.J.R.E. 201. Marchak v. Claridge Commons, Inc., 261 N.J. Super. 126, 131-32 (App. Div. 1992).

better service or better rates than the competition. Id. Both of these motives align with what a policyholder wants—better service and better rates. Ja67-68. In contrast, in a traditional stock company, the executives of the company are primarily focused on one item for their compensation—namely profits. Id. The desire to make profits from their policyholders does not always align with the desires of the policyholders, which is why reciprocal exchanges are considered the most altruistic forms of insurance. Id.

B. The Holding Act Does Not Apply To Reciprocals.

In 1970, twenty-five years after it enacted the REA, the Legislature enacted the Holding Act, which was based on the National Association of Insurance Commissioner's ("NAIC") model Insurance Holding Company System Regulatory Act. N.J.S.A. 17-27A-1. The NAIC model act does not specifically define "insurer," instead noting that "insurer shall have the same meaning as set forth in Section [insert applicable section]." https://content.naic.org/sites/default/inline-files/MDL-440.pdf (alteration in original). Thus, the NAIC left the decision on what types of insurers are subject to the terms of the states' respective holding acts up to the state legislatures to decide. Id.

Unlike other states, New Jersey's Holding Act does not include reciprocal insurance exchanges in its provisions or any of its relevant definitions. N.J.S.A. 17:27A-1(d). Specifically, the Holding Act defines an "insurance holding company

system" as "two or more affiliated persons, one or more of which is an insurer" and "[a] mutual holding company system resulting from a mutualization and reorganization of a health service corporation pursuant to [N.J.S.A. 17:48E-46.5]." Id. The Holding Act defines "insurer" as "any person or persons, corporation, partnership or company authorized by the laws of this State to transact the business of insurance or to operate a health maintenance organization in this State." N.J.S.A. 17:27A-1(e). Similarly, the Holding Act defines "person" as "an individual, a corporation, a limited liability company, partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert." N.J.S.A. 17:27A-1(f). Noticeably absent from the relevant definitions is a reciprocal insurance exchange. Id. at (d-f).

This is crucial because the Holding Act imposes different reporting and oversight requirements than the REA. Compare N.J.S.A. 17: 27A-1 et seq. with N.J.S.A. 17:50-1 et seq. When passing the Holding Act, the Legislature could have specified that it applies to reciprocals, as the Legislature has with other laws. See infra. For example, N.J.S.A. 17:23-21, which relates generally to reports and examinations of insurance companies, defines "Insurer" to include a "reciprocal exchange." See, e.g., N.J.S.A. 17:30C-1 to -31 (the Rehabilitation and Liquidation Act) (applying to reciprocals); see also N.J.S.A. 17:23-41 (definitions relating to the corporate governance of insurers, which defines "Insurer" to include "reciprocal

insurance exchanges," while notably (and separately) identifying "Insurance group" to mean "those insurers and affiliates included within an insurance holding company system as defined in section 1 of P.L.1970, c. 22 (C.17:27A-1) [the Holding Company Act]"); N.J.S.A. 17:23B-1 (Insurance Regulatory Information System, which defines "Insurer" to include a "reciprocal exchange"); N.J.S.A. 17:29C-1.1 (Cancellations and Renewals, which also includes "reciprocal exchange" within its definition of "Insurer"). Like the above examples, the Holding Act could have included an omnibus definition of "insurer," or referred to the REA itself, but did not do so. N.J.S.A. 17:27A-1(d). Instead, the Legislature chose to exempt reciprocals from the requirements of the Holding Act. N.J.S.A. 17:27A-1. Cognizant of the REA's exclusive jurisdiction over reciprocals, the Department has never successfully required stand-alone reciprocal exchanges to comply with the Holding Act, until now. Ja74-76. To the contrary, in its examinations and management letters, the Department has repeatedly admitted that legislation was necessary in order for it to require reciprocals to comply with the Holding Act statutes, including complying with SSAP No. 25.[5] Id.; See also Transaction ID#E1554683-03312023.

[5] Notably, the Department objected to the inclusion of these documents as part of the record, but that does not change reality or the history of its actions. Ja1-80.

The NAIC developed such a model act in November 1990 and adopted it in June 1991. See Reciprocals Working Group Report of Special Insurance Issues (E) Committee, NAIC Proceedings – 1991 Vol. IIB at 1091-1096 ("1991 NAIC Report"). However, the NAIC recommended the model act for deletion in 2004 and formally deleted it in September 2004. See Reciprocals Working Group Report of Special Insurance Issues (E) Committee, NAIC Proceedings – 2004 2dQ at 1251 ("1994 NAIC Report"). State regulators, including the Department, were given the opportunity to comment on or oppose the removal of the model legislation and not one did. Ibid. The New Jersey Legislature **never** adopted any legislation that imposed upon reciprocals the reporting requirements that the Department now seeks, including the now defunct NAIC model act.[6] See 1991 NAIC Report and 1994 NAIC Report.

Moreover, in 2010, the NAIC submitted written testimony to Congress to explain the role of the Holding Act to insurance providers and to answer questions regarding the insurers regulated by the Holding Act. https://www.govinfo.gov/content/pkg/CHRG-111hhrg56778/pdf/CHRG-111hhrg56778.pdf.[7] As a supplement to this testimony, the NAIC attached a list of

[6] The NAIC is an organization, founded in 1871, governed by the chief insurance regulators from the 50 states (including New Jersey), the District of Columbia, and five U.S. territories to coordinate regulation of multistate insurers. See https://content.naic.org/about.

[7] The Court can also take judicial notice of this congressional testimony.

every single insurer in the United States, identifying whether the Holding Act applied, based upon information provided by state regulators. Id. NJ PURE is included and is specifically identified as **not** being subject to the Holding Act. See https://www.govinfo.gov/content/pkg/CHRG-111hhrg56778/pdf/CHRG-111hhrg56778.pdf at p. 142. Thus, the Department's position in 2010 was that NJ PURE was not subject to the Holding Act—since that time, NJ PURE and RAF have not altered their corporate structure, and no laws, rules, regulations, or amendments to existing law have been passed to change the Department's position. Ja67-68.

This just confirms that when its legislative amendment failed, the Department dropped the Holding Act applicability issue for nearly twenty years. Id. Indeed, the Department did not raise the issue of the applicability of the Holding Act or SSAP No. 25 to AIF Fees during NJ PURE's subsequent quarterly and annual financial statements. Id. Instead, the Department remained silent and accepted the status quo until now. Id.

To be clear, the Department repeatedly acknowledged to NJ PURE and other reciprocals during its examinations and follow-ups that they were not subject to the Holding Act, and therefore the only way to apply these requirements to reciprocals would be to pass a new statute. See Ja67-68. That never occurred and, to date, the Department has never required reciprocals to comply with the Holding Act. Id. Indeed, if the Holding Act applied, reciprocals would have been required to file the

following forms with the Department on an **annual basis**: 1) Insurance Holding Company System Annual Registration Statement ("Form B"); and 2) Summary of Changes to Registration Statement ("Form C"). See N.J.S.A. 17:27A-1 to -14. Reciprocals would also have been required to file a "Form D" to provide advance notice of significant affiliate transactions or modifications to existing affiliate agreements. Id. None of these forms have ever been requested by or filed with the Department. Ja72-76. Despite this, the Department is now claiming that reciprocal exchanges are, and always have been, subject to the Holding Act pursuant to its newly issued Bulletin. [8]

C. SSAP No. 25.

All insurance entities are, of course, required to comply with all Statutory Accounting Principles, which are articulated in NAIC's handbook and adopted by statute in all jurisdictions, including New Jersey. Ja48-65. These principles promulgate various reporting and disclosure requirements for a variety of financial transactions. Id.

Specifically, as discussed above, SSAP No. 25 governs accounting and disclosures for transactions between affiliates and related parties, which it defines as

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[8] The Department demanded that CURE agree to submit to the Holding Act as a condition of its acquisition, despite knowing that CURE disagreed. Ja36-47. No such demand would have been necessary if CURE had already been subject to the Holding Act.

"entities that have common interest as a result of ownership, control, affiliation or by contract." Id. at (4). According to SSAP No. 25, the AIF for a reciprocal exchange is considered a related party to the exchange, and therefore transactions between the exchange itself and the AIF may be subject to SSAP No. 25. Id. Thus, a transaction between the exchange (not the individual subscribers) and the AIF may implicate SSAP No. 25 and its accounting principles.[9] Id. Conversely, a transaction between the AIF and an individual subscriber does not because they are not under common control or ownership. Id.

The Department has demonstrated, however, through action and word that it intends to change this longstanding law and start using SSAP No. 25, contrary to its own plain language, to improperly govern and regulate fees collected from the individual subscribers (i.e., profits earned) by the AIF. Ja1-2. The Bulletin provides:

> SSAP No. 25 refers to related party transactions, including loans, transactions involving the exchange of assets or liabilities, and transactions involving services between related parties. SSAP No. 25, paragraph 4, defines related parties, which definition includes the attorney-in-fact of a reciprocal reporting entity or any affiliate of the attorney-in-fact. Further, paragraph 19 requires transactions involving services between related parties to be on an arm's length basis and meet fair and reasonable standards. In doing so, considerations may include, but are not limited to, management representations along with the opinion of the reciprocal exchange's independent auditor.

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[9] For example, if the AIF owned office space and leased that to the Exchange, that lease would be a related party transaction and subject to SSAP No. 25.

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> [Ja1-2 (2022 Bulletin No. 22-11: Subject: Compliance With Relevant Laws and Requirements Reciprocal Exchanges, 2022 WL 18427017, at *2).]

This application of SSAP No. 25 is contrary to its plain language and at odds with the REA. Compare Ja1-2 with N.J.S.A. 17:50-1 et. seq. The Department has made clear that it intends to use SSAP No. 25 to scrutinize and ultimately regulate profits of the AIF—that action is unlawful and must be curtailed. Ja1-2. In recent routine financial examinations and other questioning by the Department, for example, it has begun asking reciprocals for the quantum of the AIF fees collected from subscribers and other onerous reporting, allegedly to confirm that those fees are reasonable, arms-length, and market rate. Ja72-76. The Department is declaring its ability to scrutinize and regulate the AIF fees, i.e., the profits of an AIF.[10] Id. For example, the Department's recent questions to RAF, the AIF for NJ PURE, misapplied SSAP No. 25 to the AIF fee and under that false pretense, attempted to scrutinize the profits of RAF:

> This Request is meant to gather information to review the POA service fees for compliance with SSAP No. 25; transactions involving services between related parties. *"SSAP No. 25, paragraph 19 requires transactions involving services between related parties need to be on*

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[10] It appears that the Department may seek to rely on NJ PURE's Certificate of Authority (based on the documents it added to the record without a motion). However, that Certificate simply requires RAF to submit a financial statement related to its management of NJ PURE, not its AIF Fees. Furthermore, the reservation of rights does not allow the Department to unilaterally determine what statutes apply to RAF. Ja79. That is the job of the Legislature.

> *an arm's length basis."* Amounts charged (up to 12.5% of DWP as in the current POA) by RAF for current and future services need to be supported by current market rates or on allocations of costs and reasonable in relation to the services provided to NJ PURE.
>
> - Expense analysis performed, if any, by RAF establishing the "up to 12.5%" service fee included in the POA agreement.
> - Description of the process to review / re-perform the expense analysis and POA service fee periodically, if such a process exists.
> - Analysis of actual expenses incurred by RAF for each year, 2017 through 2021, in performing the POA services for these years (itemized if possible) and the fees charged to NJ PURE.
> - RAF's proforma financial [statements] for each of the years, 2017 through 2021.
>
> [See Ja69-70 (Request received from the Department on July 6, 2022 in connection with their 2020 financial examination of NJ PURE).]

The Department then compounded its improper questioning, asking the following:

> In relation to NJ PURE, the Department is following up from your note from Q2 and now requesting an update for Q3. The Department's request relates to the fees incurred by NJ PURE for RAF's services which are charged by an AIF as a related party.
>
> Please provide the Department with the following:
> 1. Total service fees charged by RAF to NJ PURE through Q3?
> 2. Were there any service fees due to RAF which were reflected as payables by NJ PURE in Q3?
> 3. An estimate of the gross written premiums for Q4.

> 4. Total service fees to be charged by RAF to NJ PURE in Q4.
> 5. Total service fees to be charged by RAF to NJ PURE for 2022.
>
> To ensure clarity and consistency, please be aware that the services provided and fees charged by RAF are considered a related party transaction subject to SSAP 25 and that all laws and requirements, including but not limited to, NJSA 17:27A-1 through 14, and that the application of relevant SSAPs such as SSAP 25 apply to reciprocals.
>
> [See Ja71(Question received from the Department on December 7, 2022 in connection with their review of NJ PURE's Q3 2022 Quarterly Statement).]

RAF and NJ PURE objected to this request. Id. Only thirteen days later, the Department issued the Bulletin. The Department is clearly now attempting to use SSAP No. 25 and the Bulletin to scrutinize and regulate profits of an AIF. Id.

On January 27, 2023, RAF and NJ PURE submitted a letter to the Department objecting to the Bulletin, the attempted imposition of the Holding Act to NJ PURE and the application of SSAP No. 25 to RAF's AIF Fees, and asked the Department to rescind the Bulletin or stay enforcement, requesting a response on or before February 1, 2023. See Transaction ID#E1554683-03312023. The Department's only response was to note that it was reviewing the letter. Id. Because the Department has acted improperly and not allowed for notice and comment, it claims that these documents are not part of the record on this appeal. But that misses the point; it is precisely because the Department acted improperly in issuing the Bulletin

without developing a proper record that these letters could not have been sent before the Bulletin was issued.

That the Department is improperly overstepping its authority through the issuance of the Bulletin was confirmed by two recent and identical bills introduced in the Senate and Assembly. First, unlike the Department's "Bulletin," these are properly enacted bills. Second, again unlike the Department's "Bulletin," these bills are consistent with and intended to confirm and preserve New Jersey's long-standing principle that contracts between subscribers and the attorney-in-fact for a reciprocal are not related party transactions. See supra pp. 6-7. "Such contracts between subscribers and the attorney-in-fact and any fees charged pursuant to those contracts or arising out of those contracts shall not be construed to be a related party transaction." See S. 3636, 220th Leg. (2023), *available at* https://pub.njleg.state.nj.us/Bills/2022/S4000/3636_I1.PDF; A. 5317, 220th Leg. (2023), *available at* https://pub.njleg.state.nj.us/Bills/2022/A5500/5317_I1.PDF ("Related Party Transaction Bill").

Despite the undisputed history of the Department's treatment of attorneys in fact and the pending legislation intended to preserve same, the Department has persisted in its improper attempts to regulate AIF fees. Ja1-2. Accordingly, RAF filed this appeal. See NOA. The Department filed its Statement of Items Comprising the Record on March 6, 2023. See Ja1-80. On March 31, 2023, RAF

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filed a motion for leave to supplement/correct the record because that record did not include its communications with the Department about these issues—including the Department's admissions that it could not impose the requirements of the Holding Act on reciprocals or SSAP No. 25's requirements on the fees paid by subscribers to the reciprocal's AIF without legislation, which predate the Bulletin. See Ja72-76. On April 7, 2023, the Department filed a motion seeking a thirty-day extension of time to respond, which RAF did not oppose. See Transaction ID#E1555971-04072023. On May 10, 2023, the Department submitted its "opposition" in which it conceded that the majority of the documents RAF sought to include in the Appendix were proper. See Ja1-80. Tellingly, the Department objected to including a redacted copy of one of its 2007 examinations in which it admitted that legislation was required; the Department objected not because the statement or document was inaccurate but because other irrelevant information was redacted. Id. The Department objected even as it sought to add more documents to the record to bolster its argument. Id.

On May 11, 2023, RAF sought leave to file a reply brief nunc pro tunc. See Transaction ID#E1562356-05112023. On May 31, 2023, the Appellate Division granted that motion, but denied RAF's motion to supplement the record. See Ja1-80.

STANDARD OF REVIEW

Regulations are "presumed to be reasonable and valid" and if such regulation is "procedurally regular, it may be set aside only if it is proved to be arbitrary or capricious or if it plainly transgresses the statute it purports to effectuate, or if it alters the terms of the statute or frustrates the policy embodied in it." Matter of Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 160 (App. Div. 1985). Any rulemaking that does not "conform[] with basic tenets of due process and provide[] standards to guide both the regulator and the regulated," will be set aside. Lower Main St. Assocs. V. N.J. Hous. & Mortg. Fin. Agency, 114 N.J. 226, 236 (1989). Courts will also set aside rulemaking if it is not "authorized by or consistent with the agency's enabling legislation." Id. at 243.

As such, in reviewing administrative actions, the judicial role is ordinarily confined to three inquiries:

> (1) whether the agency's action violates the enabling act's, express or implied legislative policy; (2) whether there is substantial evidence and records to support the findings upon which the agency based application of the legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [In re Twp. of Warren, 132 N.J. 1, 28 (1993).]

In that context, "[f]ailure to address critical issues, or to analyze the evidence in light of those issues, renders the agency's decision arbitrary and capricious and is grounds

for reversal." Green v. State Health Benefits Comm'n, 373 N.J. Super. 408, 415 (App. Div. 2004).

LEGAL ARGUMENT

I. THE DEPARTMENT'S BULLETIN REQUIRING THE IMPOSITION OF THE HOLDING ACT IS CONTRARY TO THE REA'S PLAIN LANGUAGE AND THE DEPARTMENT'S PRECEDENT. (A1-2).

The Appellate Division defined the term "reciprocal," or "reciprocal insurance," as a

> system of insurance whereby several individuals, partnerships, or corporations underwrite each other's risks against loss . . . through an attorney in fact, common to all, under an agreement that each underwriter acts separately and severally and not jointly with each other. The authority to enter reciprocal insurance contracts is set forth at N.J.S.A. 17:50-1 to -19.
>
> [DeVito v. Sheeran, 165 N.J. 167, 171 n. 2 (2000) (alteration in original).]

Relatedly, N.J.S.A. 17:50-1 provides:

> Individuals, partnerships, trustees and all corporations of this State, herein designated "subscribers," are hereby authorized to exchange reciprocal or interinsurance contracts with each other and with individuals, partnerships, trustees and corporations of other States, districts, provinces and countries, for any or all of the kinds of business for which a company may be formed or authorized to transact under the provisions of chapter seventeen of Title 17 of the Revised Statutes, except life insurance.
>
> [N.J.S.A. 17:50-1.]

The REA, which was passed in 1945, expressly "incorporated a provision that exchanges created under the statute 'shall be regulated by this act, and by no other statute of this State relating to insurance, except as herein otherwise provided.'" In re Reorganization of Med. Inter-Ins. Exch. of N.J., 328 N.J. Super. 344, 355–56 (App. Div. 2000) (quoting N.J.S.A. 17:50–1). Importantly, this Court has held "[a] reciprocal association differs from a mutual company in that it has no corporate existence." Id. at 355.

Conversely, the Holding Act—the statute the Department seeks to apply here—was passed twenty-five years later in 1970, and yet it defines an "insurer" as

> any person or persons, corporation, partnership or company authorized by the laws of this State to transact the business of insurance or to operate a health maintenance organization in this State, except that it shall not include agencies, authorities or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state.
>
> [N.J.S.A. 17:27A-1(e).]

The statute defines "person" as "an individual, a corporation, a limited liability company, partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert." Id. at -1(f). Thus, the Department's assertion that "[a] reciprocal exchange falls squarely within the definition of insurer in the [Holding Act] as

defined in N.J.S.A. 17:27(A)-1(e)" is incorrect. 2022 WL 18427017, at *1 (Ja2).

The Department recently has claimed that the Holding Act's provisions control, stating that "[a]ll laws and parts of laws of this State inconsistent with this chapter are hereby superseded with respect to matters covered by this chapter." N.J.S.A. 17:27A-13. The Department is again incorrect. The terms of the Holding Act and the REA are not inconsistent; rather, the Holding Act just does not apply to reciprocals. As stated above, the words "reciprocal exchange" do not appear anywhere, nor does the Holding Act express an intention to overrule the exclusive jurisdiction of the REA. This is obvious by the forty years of history since the Holding Act was enacted, during which time the Department never sought to apply it to reciprocals and repeatedly admitted that it did not and could not apply absent new legislation. Rather, it enforced the REA. The Department cannot now simply ignore decades of its own admissions and conduct in regulating reciprocals simply because it wants to impress a new and different interpretation of the law.

This is true regardless of the Bulletin. The Bulletin, which purports to be issued in response to unspecified questions about the regulation of reciprocal exchanges, proclaims, for the first time and without explanation, that reciprocal exchanges are subject to the Holding Act. The Bulletin seeks to reverse the current status of the law.

"When interpreting a statute, [this Court's] main objective is to further the

Legislature's intent," In re Pontoriero, 439 N.J. Super. 24, 35 (App. Div. 2015) (TAC Assocs. v. N.J. Dep't of Envtl. Prot., 202 N.J. 533, 540 (2010)), "in light of the language used and the objects sought to be achieved," Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 554 (2009). This Court "ascertain[s] the intent of the Legislature by first looking to the plain words of the statute," and "give[s] 'the statutory words their ordinary meaning and significance, and read[s] them in context with related provisions so as to give sense to the legislation as a whole." N.J. Election Law Enf't Comm'n v. DiVincenzo, 451 N.J. Super. 554, 576 (App. Div. 2017). The Court further assumes that the legislature is fully aware of existing laws when enacting a new statute. Squires v. Atl. Cty. Bd. of Chosen Freeholders, 200 N.J. Super. 496, 502 (Law. Div. 1985). "Where a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning." N.J. DYFS & Family Servs. v. I.S., 214 N.J. 8, 29 (2013).

Importantly, "[i]n interpreting a statute, [a court] strive[s] to give effect to every word rather than to ascribe a meaning that would render part of the statute superfluous." Id. at 36. "[I]n order to give proper effect to the Legislature's intent, a provision must be read sensibly within the entire legislative scheme of which it is part." Ibid. "When the plain meaning is unclear or ambiguous, [the court] next consider[s] extrinsic evidence of the Legislature's intent, including legislative history and statutory context." Pontoriero, 439 N.J. Super. at 36. However, "[w]here

plain language 'leads to a clear and unambiguous result, then the interpretive process should end, without resort to extrinsic sources.'" Sterling Laurel Realty, LLC v. Laurel Gardens Co-Op, Inc., 444 N.J. Super. 470, 476 (App. Div. 2016) (quoting State v. D.A., 191 N.J. 158, 164 (2007)).

In interpreting a statute, "[Courts] do not add terms which may have been intentionally omitted by the Legislature, speculate, or otherwise engage in an interpretation which would avoid its plain meaning." State v. Perry, 439 N.J. Super. 514, 523 (App. Div.) certif. denied, 222 N.J. 306 (2015). Pursuant to the doctrine of expression unius est exclusion alterius, the mention of one thing usually implies the exclusion of another. Squires, 200 N.J. Super. at 503.

Here, the Legislative intent is clear. The Holding Act does not, nor was it meant to, apply to reciprocal exchanges. First, the REA, under which NJ PURE was created, excludes the applicability of any other statute unless specifically noted; reference to the Holding Act is glaringly absent from the REA, even though the REA does expressly incorporate other statues, such as the Rehabilitation and Liquidation Act. N.J.S.A. 17:50-1, -5. Next, the Holding Act specifically describes what entities fall under its scope, and it does not include reciprocal exchanges. See id. Therefore, neither the Court, nor the Department, should append "reciprocal exchanges" to the defined terms, nor should they speculate as to whether the Legislature intended this term to be included. Furthermore, NJ PURE is not and cannot be both a reciprocal

exchange and a corporation because as this Court has held, a reciprocal exchange does not have a corporate existence. In re Reorganization of Med. Inter-Ins. Exch. of N.J., 328 N.J. Super. at 355. The Legislature was clearly aware of reciprocal exchanges when it passed the Holding Act and was clearly capable of drafting statutory language ensuring the applicability of the Holding Act to "reciprocal exchanges," but it purposefully did not include them in its scope.[11]

Not only is the Holding Act not incorporated into the REA, but the Department has also repeatedly admitted for the last two decades that the Holding Act does not apply to reciprocals and cannot absent the Legislature passing a new statute, which it never did. See Reciprocals Working Group Report of Special Insurance Issues (E) Committee, NAIC Proceedings – 1991 Vol. IIB at 1091-1096. This rogue action by the Department in attempting to apply the Holding Act through the Bulletin is clearly unlawful on procedural and substantive grounds.

II. THE DEPARTMENT'S BULLETIN REQUIRING THE IMPOSITION OF SSAP NO. 25 TO THE AIF FEE IS CONTRARY TO SSAP NO. 25's PLAIN LANGUAGE. (A1-2).

Like the inapplicability of the Holding Act, the Department knows and has acknowledged in its decades of examinations and follow-ups that it cannot apply SSAP No. 25 to RAF's AIF Fees. If that were not sufficient, the Legislature has confirmed this history through pending legislation, which is intended to codify the

[11] See supra page 9.

past practice of the past with respect to reciprocals. See S. 3636, 220th Leg. (2023), *available at* https://pub.njleg.state.nj.us/Bills/2022/S4000/3636_I1.PDF; A. 5317, 220th Leg. (2023), *available at* https://pub.njleg.state.nj.us/Bills/2022/A5500/5317_I1.PDF ("Related Party Transaction Bill"). The impropriety of the Department's actions in unilaterally adopting a contrary Bulletin is obvious.

As a threshold matter, by its plain language SSAP No. 25 does not apply to RAF's AIF Fees, nor has the Department ever applied SSAP No. 25 to NJ PURE, RAF, or any other reciprocal exchange in New Jersey in the manner set forth in the Bulletin.

As set forth above, SSAP No. 25 governs accounting and disclosures for transactions between affiliates and related parties, which it defines as "entities that have common interest as a result of ownership, control, affiliation or by contract." SSAP No. 25(4). Per SSAP No. 25, an Attorney-in-Fact for a reciprocal exchange is considered a related party to the Exchange,[12] and transactions between the Exchange itself and the Attorney-in-Fact may be subject to SSAP No. 25. However, as detailed above the payment of the AIF Fees does not involve any transaction between RAF and the Exchange itself. There is no agreement between the Exchange

[12] NJ PURE's collective group of subscribers is referred to as the "Exchange."

and RAF related to the management fee, and the Exchange does not pay the AIF Fee to RAF.

The AIF fees, which are set forth in the POA signed individually by each new subscriber/policyholder as a pre-requisite to join the Exchange, do not involve a related party transaction between the AIF and the Exchange itself. Rather, the POA is an agreement between two unrelated parties, namely the individual subscriber/policyholder and the management company/AIF.

Thus, the payment of the AIF Fee involves a transaction between the AIF and the individual subscribers—consumers looking for insurance coverage—who wish to obtain insurance through the Exchange. This is an arm's length transaction between two willing and unaffiliated entities. The AIF does not control the individual subscriber's decision.

This is key because such unilateral control is a fundamental trait of a related party transaction. See SSAP No. 25, 4 (referring to common control, ownership or affiliation); Schering-Plough Corp. v. United States, 651 F. Supp.2d 291, 244-45 (D.N.J. 2001) (noting for tax purposes that parties are not acting at arm's length where one had the ability to control the other); Altor, Inc. v. Sec. of Labor, 498 Fed. Appx. 145, 148-49 (3d Cir. 2012) (noting that common operation, management and control refuted arm's length transactions). If RAF controlled the Exchange and the terms to which each policyholder agrees, it could unilaterally alter the fees/other

terms and simply impose a new POA on the Exchange. It cannot. Instead, RAF would need to amend the form of the POA, file it with the Department, and obtain the individual subscriber's signatures as it has done in the past. In fact, RAF had to undergo this arduous process of securing tens of thousands of new POA signatures once during its long twenty-year history.[13] Each individual subscriber has an opportunity to consent to the new POA or seek insurance elsewhere. In other words, the individual subscriber is not and cannot be compelled to participate or commit to the new POA. Thus, the subscriber's payment of the AIF Fee bears none of the characteristics of transactions between related entities that are subject to SSAP No. 25.

Here, the POA—by virtue of both the voluntary execution by each individual subscriber and its transparent terms, including the management fee—requires the mutual assent of two unrelated and uncontrolled parties. The subscriber and RAF are both "willing parties" that are not under the compulsion to buy or sell and are willing to participate in the contract. That is the definition of an arm's length transaction. SSAP No. 25(13). Thus, the relationship between RAF and the

[13] When the Exchange was created in 2003, the POA terms were executed by each individual policyholder; they changed with the approval of a new POA in 2013 for surplus contributions. This change required: 1) an entirely new POA to be filed with the Department; 2) the new POA to be issued and delivered to every individual policyholder; and 3) each subscriber to execute it.

subscriber is an arm's length transaction to which SSAP No. 25 does not apply. See Delaney v. Dickey, 244 N.J. 460, 488 (2020) (noting that in an arm's length transaction both parties are "free to negotiate mutually acceptable contractual terms pursuant to their individual best interests"); JPC Merger Sub LLC v. Tricon Enter., Inc., 474 N.J. Super. 145, 164 (App. Div. 2022) (enforcing contracts that are free from duress, mistake or unconscionability).

With respect to each reciprocal, the Department is well-aware of the amount of the AIF Fee, given that it is and always has been clearly set forth in the POA that the Department has repeatedly reviewed. The Department has never before applied SSAP No. 25 to AIF Fees. Consistent with the pending legislation, the Department has never raised any concern over the management fee or, until now, sought to review AIF's financial information, expenses or pro forma financial statements.

This is because N.J.S.A. 17:50-8 subjects the "records, affairs and financial condition of the exchange" to the Department's review—not those of the AIF. The AIF Fee is not part of the Exchange's "records, affairs and financial condition." It has nothing to do with the financial health of the Exchange or its obligations to subscribers.

III. THE DEPARTMENT'S PAST PRECEDENTS CONFIRM THAT NEITHER THE HOLDING ACT NOR SSAP NO. 25 APPLY. (Ja1-2; Ja72-76).

The plain language of the Holding Act confirms that it does not apply to reciprocals, just as the plain language of SSAP No. 25 confirms that it does not apply to the AIF Fee the subscriber pays. The Department's past practices and own admissions confirm it as well.

As stated, the Department acknowledged that a legislative amendment was necessary to enable it to apply the Holding Act or SSAP No. 25. However, the New Jersey Legislature did not enact any such legislation, and the NAIC unanimously deleted the model law governing Attorney-in-Fact reciprocal exchanges in 2004, on which the Department's recommended legislation was based, and it is no longer in effect.

Following the Department's failure to obtain legislative modification of the statutes to apply to reciprocals, the Department dropped the issue of the applicability of the Holding Act and SSAP No. 25, remaining silent and accepting the status quo until now. Thus, the Department acknowledged the current law in New Jersey does not subject reciprocals to the Holding Act or the AIF Fees to SSAP No. 25, but also admitted that the only way to apply these requirements to reciprocals would be to pass a new statute. To date, the Department has never required NJ PURE to comply with the Holding Act nor has it ever attempted to apply SSAP No. 25 to the contract between RAF and its subscribers.

The pending legislation simply codifies this reality and confirms that the Department is not free to impose SSAP No. 25's requirements on the AIF Fees because it is not a related party transaction. (Related Party Transaction Bill). The Department's Bulletin cannot change this, particularly given that it is the product of improper rulemaking.

Despite this, contrary to all of the above law and precedent, the Department is arguing that NJ PURE is subject to the Holding Act and that because the Exchange simply operates as a pass-through entity that collects fees on behalf of the AIF, that collection is a related-party transaction. By applying the Holding Act and SSAP No. 25—which, again, is simply a reporting/disclosure accounting principle—to the AIF Fee, the Department is attempting to justify a means to its desired end: opening the flood gates to exert control over the profits of the AIF, despite having no statutory or regulatory authority to do so.

Not only is the Department's attempt to apply the Holding Act and SSAP No. 25 unenforceable as improper rulemaking, but it is also simply impossible. The Department cannot simply reverse its position after decades and demand that a business agree that what historically was an "unrelated party transaction" is now a "related party transaction." This is contrary to the plain language, and the intent of, both the Holding Act and SSAP No. 25 and the Department's procedural obligations under the APA.

The law has not changed, nor has the Department's inability to apply the Holding Act or SSAP No. 25. The Department's arbitrary and capricious actions regarding same constitute improper rulemaking and cannot be allowed to stand. In short, both by its words and its actions, the Department has admitted that the Holding Act does not apply to NJ PURE and SSAP No. 25 cannot be applied to AIF Fees absent the adoption of new legislation, which has never occurred.

IV. THE BULLETIN CONSTITUTES IMPROPER RULEMAKING AND IS INVALID AS A MATTER OF LAW. (Ja1-2).

As set forth above, the Department's actions are substantively improper; however, even if the actions were substantively proper (which they were not), the APA requires that administrative agencies follow specific procedures when adopting new rules. The Department violated/ignored these procedures in adopting the Bulletin, which is yet another basis on which this Court should reverse the Department's actions.

An administrative rule is an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2. Any agency determination that qualifies as an administrative rule must comply with the APA's rulemaking requirements. N.J.S.A. 52:14B-3a(a); In re N.J.A.C. 7:1B-1.1, et seq., 431 N.J. Super. 100, 134 (App. Div.), certif. denied, 216 N.J. 8 (2013) ("If an agency . . . action constitutes an 'administrative rule,' then its validity

requires compliance with specific procedures of the APA that control promulgation of rules.").

Administrative agencies are part of the Executive Branch and are "creatures of legislation," such that their powers are "limited to those expressly granted by statute or fairly implied as necessary." N.J. Dep't of Labor v. Pepsi-Cola Co., 170 N.J. 59, 65 (1980). While agencies have significant authority, their powers are not absolute and they must follow specific rules to be fair, uniform and predictable to members of the regulated community. In general, agencies may not engage in formal action without complying with the APA. An agency's ability to select procedures it deems appropriate to accomplish its statutory mission is limited by "the strictures of due process and of the [APA]." In re Solid Waste Util. Cus. Lists, 106 N.J. 508, 519 (1987); see also In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 347 (2011) ("[A]dministrative agency action, and an agency's discretionary choice of the procedural mode of action, are valid only when there is compliance with the provisions of the Administrative Procedure Act . . . and due process."). Included in these procedural requirements are mandatory notice provisions and opportunity for public comment before an agency may set a rule or policy in place. N.J.S.A. 52:14-B-4(a)(1) to (3). Notice and an opportunity to be heard and to gather and submit information is crucial to the overall essence of rulemaking as without it, those affected would have no opportunity to participate in

the process. Because the APA requires the Department to comply with its rulemaking procedures in imposing the Holding Act and SSAP No. 25 to reciprocal exchanges, the informally adopted policies through the Bulletin are invalid.

A. The Bulletin is an Administrative Rule Subject to APA Compliance. (Ja1-2).

The Department's unilateral decisions to apply the Holding Act to reciprocals and to apply SSAP No. 25 to the AIF Fees both represent a complete sea change compared to decades of the Department taking the exact opposite stance. Such agency action is not enforceable as a matter of law as it constitutes impermissible "de facto rulemaking" under the test announced by our Supreme Court in Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 328 (1984). "When an agency's determination alters the status quo, persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination." Northwest Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 136 (2001) (quoting Metromedia, 97 N.J. at 330). The Department must comply with the APA before it changes an existing policy that alters the status quo and "substantially impacts the right of [RAF] and others." B.H. v. State of N.J., Dept. of Human Srvs., 400 N.J. Super. 418, 430 (App. Div. 2008). The Bulletin is an administrative rule that must comply with the APA.

In Metromedia, our Supreme Court provided guidance on when a particular

agency action should be considered de facto rulemaking. "Th[is] guidance is important because informal agency action that is de facto rulemaking will be voided for failing to comply with the APA rulemaking procedures." Besler & Co. v. Bradley, 361 N.J. Super. 168, 171 (App. Div. 2003). Agency action may constitute rulemaking **regardless** of the label the agency gives it. Metromedia, 97 N.J. at 331-32 (emphasis added). Agency action will be considered rulemaking when it:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rulemaking or adjudication.
>
> [Ibid.]

These factors are applicable whenever the authority of an agency to act without conforming to the requirements of the APA is questioned, for example, in adopting orders, guidelines, or directives. In re Protest of Coastal Permit Program

Rules, 354 N.J. Super. 293, 362 (App. Div. 2002) (citing Doe v. Poritz, 142 N.J. 1, 97 (1995)).

Not all factors need to be present for improper rulemaking. Metromedia, 97 N.J. at 332. "The pertinent evaluation focuses on the importance and weight of each factor," not "a quantitative compilation of the number of factors which weigh for or against labeling the agency determination as a rule." In re Provision of Basic Generation Serv., 205 N.J. at 350; see also State v. Garthe, 145 N.J. 1, 6 (1996); In re N.J.A.C. 7:1B-1,1, et seq., 431 N.J. Super. at 135 (noting the factors "need not be given the same weight, and some factors will clearly be more relevant"); Bullet Hole, Inc, v. Dunbar, 335 N.J. Super. 562, 588-89 (App. Div. 2000) (holding an agency action meeting only four of the six factors constituted rulemaking because "in the circumstances of this appeal it is evident that the [action] . . . should have been considered in a formal rulemaking proceeding").

For example, in In re Disapproval of Commercial Insurance Policy Forms of Insurance Company of North America, the Department disapproved Cigna's proposed endorsement containing an absolute pollution exclusion because the Department believed it could exclude coverage for asbestos claims. 264 N.J. Super. 228, 233 (App. Div. 1993) ("Cigna"). Cigna challenged the denial, arguing that the Department had effectively adopted a policy regarding the validity of asbestos exclusions without notice or compliance with the APA. Id. at 234. The Appellate

Division agreed, finding that the Department engaged in improper rule making. Id. at 236. "[T]he widespread, continuing, and prospective effect of an agency pronouncement is the hallmark of an administrative rule." Ibid. The Court noted that the Department's position reflected "an administrative policy that has not previously been expressed in any official or explicit agency determination, adjudication or rule." Id. at 237. The Department could not rely on its "own yet to be expressed policy" to evaluate Cigna's proposed policy exclusion. Id. at 238.

The Bulletin is clearly improper rulemaking that meets all six Metromedia factors. First, the Bulletin will have widespread, continuing and prospective impact on all reciprocal insurance exchanges. Second, although on its face the Bulletin purports to be limited to responding to questions, it is actually improper rulemaking forcing reciprocal exchanges to comply with new, never before applied, regulations governing their financials. Although designed to give the most superficial appearance that the Department has not adopted a process of general application, the Bulletin was undeniably intended to allow the Department to regulate AIF fees. Why did the Department adopt this Bulletin if the REA already has a process in place for financial examinations of AIF fees? Because it knows it is required to amend the REA and as the pending legislation demonstrates, the Legislature does not agree with the Department's position. (Related Party Transaction Bill). Third, here, like in Cigna, the Department is seeking to impose requirements on reciprocal exchanges

and the respective AIFs that are based on a "yet to be expressed policy" regarding the Holding Act and SSAP No. 25. Fourth, the guidelines unlawfully adopted by the Bulletin are not "expressly provided by or clearly and obviously inferable from the enabling statutory authorization." This is because the REA governs reciprocal exchanges, and it is contrary to the Department's guidance. Fifth, the Bulletin "constitutes a material and significant change" in the Department's past position with respect to the Holding Act and SSAP No. 25 and the provisions' plain language. Finally, the Bulletin "reflects a decision on the administrative regulatory policy in the nature of the interpretation of law" because it furthers a new procedure intended to apply to reciprocal exchanges and which it presumably asserts is in accordance with the REA. Metromedia, at 331-32. This is the embodiment of rulemaking that must comply with the APA.

Indeed, as many other cases reviewing agency overreach make clear, "[e]very agency action which qualifies as a rulemaking by the standards of Metromedia must conform with APA requirements. In the absence of compliance with APA rule-making requirements, the standards at issue are not enforceable." Hampton v. Dep't of Corr., 336 N.J. Super. 520, 530 (App. Div. 2001) (citing Metromedia, 97 N.J. at 338); see also Besler & Co., 361 N.J. Super. at 178 ("'[A]n agency may not use its power to interpret its own regulations as a means of amending those regulations or adopting new regulations' . . . . The manner in which an agency exercises broad

discretion 'may be governed by the APA.'"); Matter of Assignment of Producers to Travelers Grp., 261 N.J. Super. 292, 302-03 (App. Div.), certif. denied, 133 N.J. 438 (1993) (holding that producer assignment program constituted improper rulemaking but was cured by emergency regulation).

The fact that the Department is seeking to accomplish this change through a "bulletin" is irrelevant. Indeed, the Appellate Division has invalidated similar guidance documents. For example, in In re Adoption of Reg'l Affordable Housing Dev. Program Guidelines, 418 N.J. Super. 387, 389 (App. Div. 2011), the Council on Affordable Housing ("COAH") adopted "guidelines" for the implementation of an amendment to the New Jersey Fair Housing Act. The Court concluded these guidelines "set forth specific standards and conditions for regional planning that COAH will find acceptable in its administration of [the applicable statute]" and therefore constitute rules. Id. at 395.

The Court similarly invalidated Department of Environmental Protection (the "DEP") guidance documents in In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super. 100 (App. Div. 2013) relating to the "waiver" rules excusing certain regulatory compliance. In doing so, it noted the invalidated guidance document "lists specific procedures and instructions that waiver applicants should follow to prove and satisfy each of the four bases for waivers." Id. at 136. The Court held that all six of the Metromedia factors applied to these guidance documents and much of the DEP's

website postings concerning the waiver rules. Id. at 137; see also In re Highlands Master Plan, 421 N.J. Super. 614, 629-33 (App. Div. 2011) (invalidating a "[g]uidance document" promulgated by the COAH that provided formulas for municipalities to calculate "growth projections" that effectively lowered COAH's regulatory requirements).

The law has not changed, nor has the Department's inability to apply the Holding Act or SSAP No. 25. Therefore, any argument that this policy shift is a mere "informal intra-agency document designed to clarify existing policy," must be rejected because it is contrary to the Department's previous policy. B.H., 400 N.J. Super. at 431. Here, because the "change advanced by [the Department is] not merely an internal instruction," but, rather, is a change in existing policy that alters the status quo and "substantially impacts the right of" all reciprocals, the law requires APA compliance. Ibid.

The constitutional rights of those affected by the change command no less formal a process than is set forth in the APA, a concept that the Legislature underscored specifically in passing the APA. See N.J.S.A. 26:2H-5(b). It is clear in light of such strong legislative and judicial recognition of the due process rights of a regulated class that, when an agency materially and significantly changes its position on the application of the Holding Act or the precise circumstances in which SSAP No. 25 is applied to AIF fees, such modifications must be affected through

the formal rulemaking process set forth in the APA. Am. Emp'r Ins. Co. v. Comm'r of Ins., 236 N.J. Super. 428, 432-34 (App. Div. 1989). The Department's arbitrary, capricious, unreasonable and ultra vires actions must be challenged because while "[a]dministrative agencies possess wide latitude in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals[,] . . . this flexibility does not allow an agency to ignore the dictates of the [APA]." St. Barnabas Med. Ctr. v. N.J. Hosp. Rate Setting Comm'n, 250 N.J. Super. 132, 142 (App. Div. 1991).

Despite the clear law that governs how agencies may act and change existing policy, the Department now seeks to sub silentio reverse the thirty-plus year history of regulation of Exchanges through the Bulletin without even attempting to comply with the APA or any due process protections. The Department's attempt to change the law by way of a Bulletin and without any substantive and procedural due process is a blatant example of agency abuse and overreach.

It is no surprise that the Department chose to forego formal rulemaking or a hearing—had the Department complied with the APA, the faulty rationale for applying the Holding Act and SSAP No. 25 would never have seen the light of day. However, because the Bulletin is a rule under the APA and the Department failed to proceed with rulemaking, a hearing, or with any other appropriate process under the APA, the Bulletin should be set aside as invalid and the Department should be

directed to comply with the APA. See N.J. Animal Rights All. v. Dep't of Environ. Prot., 396 N.J. Super. 358, 362 (App. Div. 2007) ("[A]ll agency actions taken subsequent to the adoption of the [earlier pronouncement] were invalid since the initial [pronouncement] did not lawfully exist.").

B. The Department Failed to Comply with the APA When It Published The Bulletin. (Ja1-2).

As set forth above, the Department clearly failed to comply with the APA in adopting the Bulletin.

> "Rulemaking is a legislative-like activity . . . . The purpose of the APA rulemaking procedures is 'to give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences which they may not have anticipated.'"
>
> [In re Provision of Basic Generation Serv., 205 N.J. at 349.]

"The APA's section on rulemaking notice and opportunity to comment has specific requirements." Id. at 349 n. 1. Among those requirements is N.J.S.A. 52:14B-4(a)(2), which compels the agency to "prepare a report for public distribution which provides a set of analysis of the expected impact of the proposed rule." Ibid. Where the due process requirements of the APA are not met in connection with promulgating a regulation, including situations where N.J.S.A. 52:14B-4(a)(2) is not complied with, it is a Court's duty to invalidate the regulation as an improper exercise of the agency's rulemaking power. See Lower Main St.

Assocs., 114 N.J. at 243-44 (invaliding noncompliant regulation and finding courts have a "clear and compelling" duty to set aside a regulation when the agency has misused its rulemaking power).

N.J.S.A. 52:14B-4(a)(2) requires that, prior to adoption of a rule, the agency shall

> (2) Prepare for public distribution . . . and make available for public viewing . . . a statement setting forth a summary of the proposed rule, as well as a clear and concise explanation of the purpose and effect of the rule, the specific legal authority under which its adoption is authorized, [and] a description of the expected socio-economic impact of the rule . . . .

An agency engaged in rulemaking must give notice, principally by publication of the proposed regulations in the New Jersey Register. N.J.S.A. 52:14B-4(a)(1); N.J.A.C. 1:30-5.2(a). Notice must occur at least thirty days before the intended action and must include a statement of the terms or substance of the intended action and the time, place and manner in which comments may be presented. N.J.S.A. 52:14B-4(a)(1); N.J.A.C. 1:30-5.1(b)(9).

In addition to publication in the New Jersey Register, the agency must mail notice to all parties who have notified that agency of its desire to receive advance notice of agency rulemaking activities. N.J.S.A. 52:14B-4(a)(1); N.J.A.C. 1:30-5.2(a)(3). The agency must also provide notice of the rulemaking activity to the news media maintaining a press office in the State House Complex and through

electronic means. N.J.S.A. 52:14B-4(a)(1); N.J.A.C. 1:30 - 5.2(a)(4) – (5). Finally, the agency must afford all interested persons a reasonable opportunity to submit data, views, comments, or arguments, orally or in writing and summarize and respond to the information and comments submitted. N.J.S.A. 52:14B-4(a)(3).

Similarly, the New Jersey Administrative Code requires that rulemaking materials "shall be written in a reasonably simple and understandable manner which is easily readable" and "[t]he document shall be sufficiently complete and informative as to permit the public to understand accurately and plainly the legal authority, purposes and expected consequences of the adoption, readoption or amendment of the rule or regulation." N.J.A.C. 1:30-21(a)(6). The Department's rulemaking process for the Bulletin was fatally flawed because it did not provide the public with complete or accurate notice and disclosure, thereby violating the above-referenced statutory requirements, basic tenets of due process and fundamental principles of fairness. Fed. Pac. Elec. Co. v. N.J. Dep't of Envtl. Prot., 334 N.J. Super. 323, 343 (App. Div. 2000) ("The notice and comment requirements of the APA are not to be lightly applied or regarded as obstacles to be avoided. They are designed to serve the cause of fairness by providing a mechanism for informing the affected public adequately of the operation and impact of proposed administrative rules and regulations which, in these times, govern so much of our day-to-day existence.").

Moreover, in engaging in rulemaking or other agency action, an agency's power is limited to enforcing statutes and regulations, which of course the agency may not disregard. See G.C. v. Div. of Med. Assistance & Health Srvs., 249 N.J. 20, 40 (2021) (noting "[a]n agency cannot ignore or change legislative terms 'or frustrate the policy embodied in the statute'" (quoting T.H. v. Div. of Dev. Disabilities, 189 N.J. 478, 491 (2007)).

It is axiomatic that an agency, while entitled to deference in the interpretation of a statute it is charged with administrating, will be given no deference if the "interpretation of the law" is "outside its charge" or it "gives a provision of [the law] greater reach than the legislature intended." Comm. Workers of Am., Local 1034 v. N.J. State Policemen's Benevolent Ass'n, Local 203, 412 N.J. Super. 286, 291 (App. Div. 2010) (citations omitted); see also Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009) ("An agency's final decision is plainly unreasonable and violates express or implied legislative direction if it gives 'a statute any greater effect than is permitted by the statutory language[,] . . . alter[s] the terms of a legislative enactment[,] . . . frustrate[s] the policy embodied in the statute . . . [or] is plainly at odds with the statute.'" (alterations in original) (quoting T.H., 189 N.J. at 491). Once an agency policy is set, either formally or informally, the agency may not change that policy without due process—that is, without the opportunity for the regulated community to comment on the proposed change. In re CAFRA Permit No. 87-0959-

5 Issued to Gateway Assocs., 152 N.J. 287, 308 (1997) (citing N.J.S.A. 52:14B-5, which includes language indicating mandatory compliance with the requirements of the APA). This is because the Department is barred from unilaterally and precipitously amending policy without affording the regulated community the opportunity to be heard:

> When an agency's determination alters the status quo, persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination.
>
> [Northwest, 167 N.J. at 136 (quoting Metromedia, 97 N.J. at 330).]

See also B.H., 400 N.J. Super. at 430 (noting agency must follow APA when it "effects a material change in existing law or alters the status quo").

Where an agency pronouncement is a rule under the APA, as was done here, and the agency fails to engage in proper rulemaking, the pronouncement should be set aside and the agency directed to proceed in accordance with the APA. See In re Provision of Basic Generation Serv., 205 N.J. at 362 (reversing Appellate Division and remanding to agency "to commence the process anew, [to] provide the regulated parties and the public with notice and an opportunity to comment"); Grimes v. N. J. Dep't of Corr., 452 N.J. Super. 396, 408 (App. Div. 2017) (remanding "for prompt commencement of rulemaking"); In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super at 133 (finding agency "engaged in de facto rulemaking in violation of the APA's

notice and comment requirements" and invalidated documents "as de facto rulemaking without APA compliance"); N.J. Hosp. Assoc., 227 N.J. Super. at 568 (finding agency allocation decision a "rule" such that "the full panoply of provisions prescribed by the APA should be invoked" and finding those requirements "fundamental").

V. EVEN IF NOT A RULE, THE REQUIREMENTS IN THE BULLETIN VIOLATE THE REA AND ARE OTHERWISE AN ABUSE OF DISCRETION BECAUSE SSAP NO. 25 DOES NOT APPLY TO THE AIF FEE. (Ja1-2).

Even if this Court concludes that the Bulletin is not a rule under the APA, the Court should nonetheless still invalidate the Bulletin for two main reasons. First, through the Bulletin, the Department is attempting to impose the Holding Act on reciprocals and to use SSAP No. 25 scrutinize and regulate profits of an AIF. This application is at odds with the REA, such that if the Bulletin is accepted, it would alter the terms of the REA and frustrate its unique and specific requirements detailed above that apply solely to reciprocals and the objectives sought to be achieved by same. Second, the Bulletin fails to analyze the evidence in light of critical issues, which is a clear abuse of the Department's discretion. The Department grafts words on to the REA that do not appear and improperly seeks to extend the application of SSAP No. 25 to AIF Fees, so that if it finds that AIF fees "do not meet the fair and reasonable standard established by Appendix A-440, [such a finding] may result in (a) amounts charged being recharacterized as dividends or capital contributions, (b)

transactions being reversed, (c) receivable balances being nonadmitted, or (d) other regulatory action." See SSAP No. 25.

To be clear, this interpretation means that if the Department believes that AIF fees are too high, the AIF can be forced to reverse that transaction. This is a complete misuse of SSAP No. 25, and an about-face from decades of agency practice as confirmed by the pending legislation.

VI. THROUGH ITS IMPROPER RULEMAKING THE DEPARTMENT IS INTERFERING WITH RAF'S CONSTITUTIONAL RIGHT TO CONTRACT. (Ja1-2).

Subjecting the AIF fees to the scrutiny of SSAP No. 25 retroactively impairs RAF's constitutional right to contract with its individual subscribers. Indeed, "[b]oth the Federal and New Jersey State Constitutions bar the state legislature from passing any law impairing the obligation of contracts." Moynihan v. Lynch, 250 N.J. 60, 81-82 (2022) (citing U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .")); N.J. Const. art. IV, § 7, ¶ 3 ("The Legislature shall not pass any . . . law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.")); see also Fid. Union Tr. Co. v. N.J. Highway Auth., 85 N.J. 277, 299 (1981) (noting that United States and New Jersey Constitutions provide "parallel guarantees").

"The essential aim of the Federal and State Contract Clauses is to restrain a state legislature from passing laws that **retrospectively** impair **preexisting** contracts." Id. at 82 (emphasis in original); see also Cleveland & P.R. Co. v. City of Cleveland, 235 U.S. 50, 53-54 (1914) ("It is equally well settled that an impairment of the obligation of the contract, within the meaning of the Federal Constitution, must be by subsequent legislation."). "Contract impairment claims brought under either constitutional provision entail an analysis that first examines whether a change in state law results in the substantial impairment of a contractual relationship and, if so, then reviews whether the impairment nevertheless is 'reasonable and necessary to serve an important public purpose.'" Berg v. Christie, 225 N.J. 245, 259 (2016) (quoting U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25 (1977)). This inquiry involves a three-pronged analysis: whether 1) a contractual right exists in the first instance; 2) a change in the law impairs that right; and 3) the defined impairment is substantial. Ibid. The answer here to all three questions is a resounding yes.

As stated previously, the AIF fees are set forth in the POA signed individually by each new subscriber/policyholder as a pre-requisite to join the Exchange. The subscriber's rights and obligations, including the AIF fee are clearly set forth in the POA and freely agreed to by the subscribers. If the individual subscriber does not agree to the POA/AIF Fee, he/she is free to decline coverage and seek insurance

from another carrier. Through the Bulletin, the Department seeks to impair the parties' agreement (i.e., the POA) and the relationship established by that agreement so that it can control the profits of the AIF in blatant disregard of the contractual agreement between the subscriber and the AIF. The Department is trying to usurp the free will of RAF and the individual subscribers and upend the contractual arrangement between NJ PURE and its subscribers.

Indeed when "[a] law . . . retroactively applies to a contract previously entered into by parties," the "parties' reasonable expectations" may be upended. Berg, 225 N.J. at 259; see also Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983) (discussing the role that parties' reasonable expectations play in Contract Clause analysis). That concern about legislation reaching back to alter an already-existing contract and causing fundamental unfairness is precisely the issue here.

Further, the Bulletin's impositions on reciprocal exchanges lack any significant and legitimate purpose. The REA, which governs reciprocals, specifically excludes the applicability of any other statute unless specifically noted. The Department, try as it might, cannot rewrite the REA through the Bulletin and use it to hold RAF hostage to the Holding Act and SSAP No. 25. This is at odds with the language of the REA, which has exclusive authority over reciprocal exchanges. In re Reorganization of Med. Inter-Ins. Exch. of N.J., 328 N.J. Super. at

355–56. It is also an improper reading of SSAP No. 25, which by definition does not apply to the AIF Fees paid by the subscribers. The fees paid to the AIF simply are not a "related party transaction" no matter how much the Department wishes they were. Likewise, the Bulletin is grounded in unreasonable conditions and is wholly unrelated to appropriate government objectives. Had the Legislature wanted to incorporate reciprocal exchanges under the Holding Act, it would have done so. It did not. The Department is now attempting to do an end-run around the Legislature's rejection of the Department's proposed legislation by imposing retroactive conditions on the agreements between AIF's and their subscribers. There is no scenario under which that is a reasonable condition in pursuit of an appropriate governmental objective.

In short, the Bulletin should not be permitted to be used as a means to bar enforcement of an otherwise valid contract between the AIF and its subscribers.

CONCLUSION

For the foregoing reasons, the Bulletin should be set aside as improper rulemaking.

Respectfully Submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001626-22T2

IN THE MATTER OF BULLETIN NO. 22-11	Civil Action On Appeal from a Final Decision of the New Jersey Department of Banking and Insurance

BRIEF OF RESPONDENT, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE (Submitted November 6, 2023)

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PRELIMINARY STATEMENT

Appellant, Reciprocal Attorney-in-Fact ("RAF"), the attorney-in-fact for New Jersey Physicians United Reciprocal Exchange ("NJPURE" or "Exchange"), tethers its opposition to the Department of Banking and Insurance's issuance of Bulletin No. 22-11 to inaccurate interpretations of New Jersey's Reciprocal Exchange Act, L. 1945, c. 161 (N.J.S.A. 17:50-1 to -19), the State's Insurance Holding Company Systems Act, L. 1970, c. 22 (N.J.S.A. 17:27A-1 to -14) ("Holding Company Act"), and Statement of Statutory Accounting Principles No. 25 ("SSAP No. 25"). Bulletin No. 22-11 reminds the regulated industry that, among other regulatory requirements, the Holding Company Act and SSAP No. 25 apply to reciprocal exchanges. RAF also misstates the Department's history of interpreting all three sources of law.

The Holding Company Act is a comprehensive law that regulates an insurance company system, defined as two or more affiliated persons, one or more of which is an insurer. SSAP No. 25 is a Statutory Accounting Principle that requires related-party transactions to be arm's-length and fair and reasonable to the regulated entity, which is foundational to the protection of insurance consumers. RAF clearly admits that it is a related party to the Exchange, as it exercises control over and makes decisions on behalf of the Exchange. However, for what appears to be its own direct financial gain, RAF

objects to regulatory supervision of changes in control because it is displeased with being required to conduct related-party transactions at arm's length and in a manner that is fair and reasonable to the Exchange's policyholders.

RAF characterizes Bulletin No. 22-11 as rulemaking subject to the notice-and-comment procedure of the Administrative Procedure Act. Its characterization is wrong for two reasons. First, the applicability of both the Holding Company Act and SSAP No. 25 to reciprocal exchanges is clearly inferable from both the statute and the SSAP. Second, Bulletin No. 22-11 does not represent a change in law or practice by the Department. The Department has applied the Holding Company Act in prior changes of control, including the Acquisition of Control of Citizens United Reciprocal Exchange ["CURE"] and Reciprocal Management Corporation, Inc. ["RMC"], which were related parties to RAF. In fact, RAF and RMC were both owned by Eric Poe and Audrey Poe Knox. Further, SSAP No. 25 has applied to reciprocal exchanges since its inception in 2001.

RAF's reliance on proposed legislation that would amend the Reciprocal Exchange Act to provide the result it seeks is misplaced. Proposed legislation is not an expression of legislative intent and carries no weight under law; in this instance, it simply reflects the intent of two members of the Legislature who introduced an identical bill in the Senate and the General Assembly. To say that

introduction of a bill by two legislators represents the will of the Legislature as a whole turns the concept of legislative intent on its head. Additionally, the proposed legislation was introduced shortly after this appeal was filed, and it has not progressed past introduction in either the Senate or General Assembly.

And finally, Bulletin No. 22-11 does not impair any right to contract, retroactively or otherwise. The terms of the Power of Attorney that subscribers sign will be unaffected by the outcome of this appeal. In fact, reminding reciprocal exchanges and attorneys-in-fact that SSAP No. 25 requires that transactions involving services between related parties must be on an arm's-length basis and meet fair and reasonable standards only reinforces the terms of the Power of Attorney: in that the payment by the Exchange is not automatically 12.5%, and instead is an amount not to exceed 12.5%. Therefore, there is no impairment of contract.

For these reasons, this court should affirm the Department's issuance of Bulletin No. 22-11.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

RAF, an attorney-in-fact for New Jersey Physicians United Reciprocal Exchange ("NJPURE"), appeals from the Department's issuance on December 20, 2022, of Bulletin No. 22-11 (the "Bulletin"). (Ja1-2).[2] NJPURE is a reciprocal insurance exchange that received its Certificate of Authority as an insurance company on December 23, 2002, effective January 1, 2003. (Ja77-80).

A reciprocal exchange consists of subscribers, an attorney-in-fact, and the exchange. It is governed by N.J.S.A. 17:50-1 to -19 (the "Reciprocal Exchange Act" or the "REA"), which dates back to 1945. Under the REA,

> Individuals, partnerships, trustees and all corporations of this State, herein designated "subscribers," are hereby authorized to exchange reciprocal or interinsurance contracts with each other and with individuals, partnerships, trustees and corporations of other States, districts, provinces and countries, for any or all of the kinds of business for which a company may be formed or authorized to transact under the provisions of chapter seventeen of Title 17 of the Revised Statutes, except life insurance.
>
> [N.J.S.A. 17:50-1.]

[1] Because the Procedural History and Counterstatement of Facts are closely related, they are presented together for efficiency and the court's convenience.

[2] "Ja" refers to RAF's Appendix. "Ab" refers to RAF's brief. "Ra" refers to the Department's Appendix.

The contract(s) "may be executed by an attorney in fact . . . duly authorized and acting for such subscribers, and such attorney may be a corporation." N.J.S.A. 17:50-2. "The office or offices of such attorney, herein defined as an 'exchange,' shall be maintained at such place or places as may be designated by the subscribers in the power of attorney." Ibid. In this case, the attorney-in-fact is RAF, and the exchange of insurance contracts by subscribers (or "policyholders") is conducted within NJPURE – the reporting entity. The power of attorney ("POA") is the contract between the subscriber(s) and RAF, and it lays out the roles of the entities comprising the Exchange – subscribers, RAF, and NJPURE.

The Bulletin is a "regulatory guidance document," defined in the Administrative Procedure Act as "any policy memorandum or other similar document used by a State agency to provide technical or regulatory assistance or direction to the regulated community to facilitate compliance with a State or federal law . . . ." N.J.S.A. 52:14B-3a(d).

The Bulletin at issue here reminds the reciprocal insurance exchanges authorized to transact business in New Jersey of the insurance laws and requirements that apply to them, including the Holding Company Act and relevant Statements of Statutory Accounting Principles ("SSAPs"), including but not limited to SSAP No. 25. (Ja1-2). The Holding Company Act is a

comprehensive law that regulates an insurance company system, defined as two or more affiliated persons, one or more of which is an insurer. SSAP No. 25 is a Statutory Accounting Principle, requiring related party transactions to be arm's-length and fair and reasonable to the regulated entity and its policyholders.

RAF contends that the Bulletin improperly applies the Holding Company Act and SSAP No. 25 to reciprocal exchanges (Ab1) and constitutes de facto rulemaking that should have been conducted through the Administrative Procedure Act's notice-and-comment rulemaking procedure. (Ab2). However, neither allegation is correct; a reciprocal insurance exchange fits squarely within the Holding Company Act's definition of an insurer. Further, SSAP No. 25 does apply to a reciprocal exchange and its attorney-in-fact ("attorney-in-fact" or "AIF"). In fact, RAF concedes as much: "According to SSAP No. 25, the AIF for a reciprocal exchange is considered a related party to the Exchange, and therefore transactions between the Exchange itself and the AIF may be subject to SSAP No. 25." (Ab14 and n.9).

On March 6, 2023, the Department filed its Statement of Items Comprising the Record on Appeal ("SICRA") pursuant to Rule 2:5-4(b). The SICRA listed the Bulletin, SSAP No. 25, and three sets of Orders and Hearing

Officer Reports approving acquisitions under the Holding Company Act involving reciprocal exchanges:

> In the Matter of the Acquisition of Control of New Jersey Skylands Management, LLC, Attorney-In-Fact of New Jersey Skylands Insurance Association, and New Jersey Skylands Insurance Company by ACP RE, Ltd. And National General Holdings Corp., State of New Jersey, Department of Banking and Insurance, Order No. A14-112, Order Approving Acquisition (September 12, 2014) ("Skylands I"). (Ja3).
>
> In the Matter of the Acquisition of Control of New Jersey Skylands Management, LLC, Attorney-In-Fact of New Jersey Skylands Insurance Association, and New Jersey Skylands Insurance Company by ACP RE, Ltd. And National General Holdings Corp., State of New Jersey, Department of Banking and Insurance, Hearing Officer's Report (September 12, 2014). (Ja4-15).
>
> In the Matter of the Acquisition of Control of New Jersey Skylands Insurance Association and New Jersey Skylands Management, LLC by the Allstate Corporation and Allstate Insurance Holdings, LLC, State of New Jersey, Department of Banking and Insurance, Order No. A20-10, Order Approving Acquisition (December 29, 2020) ("Skylands II"). (Ja16-21).
>
> In the Matter of the Acquisition of Control of New Jersey Skylands Insurance Association and New Jersey Skylands Management, LLC by The Allstate Corporation and Allstate Insurance Holdings, LLC, State of New Jersey, Department of Banking and Insurance, Hearing Officer's Report (December 24, 2020). (Ja22-Ja30).
>
> In the Matter of the Acquisition of Control of Citizens United Reciprocal Exchange ["CURE"] and Reciprocal

Management Corporation, Inc., ["RMC"] By MGG RMC SPV LLC, MGG Structured Solutions Fund LP, MGG Structured Solutions Master Fund (Cayman) LP, MGG Investment Group GP LLC, MGG Investment Group GP III LLC, MGG Investment Group LP, Kevin F. Griffin and Eric Poe, Order No. A22-13, Order Approving Acquisition (December 22, 2022) ("CURE/RMC"). (Ja31-35).

In the Matter of the Acquisition of Control of Citizens United Reciprocal Exchange and Reciprocal Management Corporation, Inc., By MGG RMC SPV LLC, MGG Structured Solutions Fund LP, MGG Structured Solutions Master Fund (Cayman) LP, MGG Investment Group GP LLC, MGG Investment Group GP III LLC, MGG Investment Group LP, Kevin F. Griffin and Eric Poe, Hearing Officer's Report (December 22, 2022). (Ja36-47).

[Collectively the "Acquisition Orders."]

On March 31, 2023, RAF filed a motion to supplement and settle the record. Although RAF claimed that it sought to include "months" of correspondence between NJPURE's attorney-in-fact and the Department, it actually sought to add only two letters sent to the Department in January 2023, after the Bulletin was issued. One was a letter from L.H. Yesner, CFO of RMC on RMC letterhead representing RAF and NJPURE, to David Wolf, Acting Assistant Commissioner of Banking and Insurance, dated January 16, 2023 (the

"Yesner Letter").[3] The second was a letter from RAF's counsel, on behalf of NJPURE and RAF, to the Commissioner, dated January 27, 2023 (the "Argiropoulos Letter") (collectively the "January 2023 Letters"). The Argiropoulos Letter included five attachments totaling approximately ninety pages.

The Department opposed supplementing the record with the Yesner and Argiropoulos Letters because they were not sent to the Department until after its issuance of the Bulletin, but agreed to supplement the record with certain Appendix exhibits to the Argiropoulos Letter to the extent they evidenced that the Department considered them in drafting the Bulletin – specifically Exhibits 4 and 5. Exhibit 5 referenced portions of an email correspondence between the Department and NJPURE that began on September 22, 2022 and concluded with the Department's issuance of the Bulletin on December 21, 2022. The Department supplemented the record with the complete correspondence.

Exhibit 2 purported to be a June 29, 2007 Management Letter from the Department's Examiner to CURE's Chief Financial Officer, regarding the examination of CURE as of December 31, 2005. However, because Exhibit 2

[3] RMC and RAF are separate corporate entities. RMC and RAF were affiliated until January 27, 2023 when RMC and CURE changed control in accordance with the CURE/RMC Order. RMC and CURE are not parties to this appeal.

was heavily redacted and incomplete and the unredacted document was confidential, the Department opposed including it in the record on appeal.

In addition, RAF sought to have the Acquisition Orders removed from the SICRA. The Department opposed RAF's request because the Acquisition Orders are consistent with the Bulletin's provisions that the Holding Company Act encompasses reciprocal exchanges. The Acquisition Orders, including the CURE/RMC Order, specifically and without opposition included reciprocal exchanges within the purview of the Holding Company Act.

The Department also supplemented the record with CURE's and NJPURE's respective Annual Statements for 2021 and NJPURE's original Certificate of Authority. It filed an Amended SICRA simultaneously with its brief in opposition to RAF's motion.

The court denied RAF's motion to supplement in its entirety. Nevertheless, RAF has included in its brief hyperlinks and references to the documents that the court has excluded. The court should disregard those documents and the arguments they purport to support.

ARGUMENT

POINT I

THE HOLDING COMPANY ACT APPLIES TO RECIPROCAL EXCHANGES

New Jersey's statute governing insurance holding company systems, the Holding Company Act, was enacted in 1970, 25 years after the Reciprocal Exchange Act. L.1970, c. 22 (N.J.S.A. 17:27A-1 to -14). Its plain language leaves no doubt that reciprocal exchanges fall within its scope.

The Holding Company Act defines "insurer" as "any person or persons, corporation, partnership or company authorized by the laws of this State to transact the business of insurance . . . in this State." N.J.S.A. 17:27A-1(e). The fact that the definition does not enumerate "reciprocal exchanges" does not signify an intent to omit those entities. The definition does not enumerate any specific type of insurance carrier. The definition is broad, but its plain language is clear. "The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). It is beyond dispute that NJPURE, by virtue of its having been issued a certificate of authority under N.J.S.A. 17:50-11, is authorized to transact the business of insurance and is therefore an "insurer" within the Act's scope.

To eliminate any doubt, the Holding Company Act defines "person" as "an individual, a corporation, a limited liability company, partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert." N.J.S.A. 17:27A-1(f). NJPURE certainly falls within that definition.

RAF contends that because the Holding Company Act's definition of "insurer" does not expressly mention reciprocal exchanges, they are exempted from the definition of "insurer." (Ab23). That simplistic formulation ignores the fact that the statutory definition does not enumerate <u>any</u> specific types of entities that come within the term "insurer." Rather, it is a broad definition, which includes any person or type of entity authorized to transact the business of insurance in New Jersey. It cannot be denied that NJPURE, as well as other reciprocal exchanges, are authorized to (and do) transact the business of insurance in this State; therefore, they are included in the Holding Company Act's definition of "insurer." Following RAF's logic would lead to the absurd conclusion that because the definition of "insurer" does not refer to any specific type of entity licensed to transact insurance in the State, no such entities fall within the statutory definition. That does not reflect a legislative decision to "exempt" reciprocal exchanges from the Holding Company Act, as RAF

contends. (Ab10). It reflects a legislative decision to define "insurer" in a manner that is broad and flexible.

RAF contends that if reciprocal exchanges were subject to the Holding Company Act, they would be obligated to file an Insurance Holding Company System Annual Registration Statement (Form B) pursuant to N.J.S.A. 17:27A-3(b), including Summary of Changes to Registration Statement (Form C), and a Form D "to provide advance notice of significant affiliate transactions or modification to existing affiliate agreements," pursuant to N.J.S.A. 17:27A-4. (Ab12-13). They are correct. But if NJPURE (or any other reciprocal exchange) has not made those filings, or any others required by the Holding Company Act, it does not signify that they are not obligated to do so; it merely means that the Exchange is out of compliance with the statute.

Although the Reciprocal Exchange Act states that "[s]uch contracts and the exchange thereof and such subscribers, their attorneys in fact and representatives shall be regulated by this act, and by no other statute of this State relating to insurance, except as herein otherwise provided," N.J.S.A. 17:50-1, the Holding Company Act contains a similar provision. "All laws and parts of laws of this State inconsistent with this chapter are hereby superseded with respect to matters covered by this chapter." N.J.S.A. 17:27A-13.

The two provisions are not mutually exclusive. " 'When interpreting different statutory provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict.' " Saint Peter's University Hosp. v. Lacy, 185 N.J. 1, 14 (2005) (quoting In re Gray-Sadler, 164 N.J. 468, 485 (2000)). Furthermore, " 'when legislative intents of two apparently conflicting statutes dealing with the same subject are at issue, courts are enjoined to reconcile conflicts and read the laws as consistent to give effect to both expressions of the Legislature's purpose.' " Chicago Title Ins. Co. v. Bryan, 388 N.J. Super. 550, 557 (App. Div. 2006) (quoting N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 310 N.J. Super. 224, 234 (App. Div. 1998), aff'd, 158 N.J. 211 (1999)).

Chicago Title provides guidance on how to reconcile two seemingly contradictory statutory provisions in a manner that gives effect to both. In that case, the statutes regulating the title-insurance industry (the "Title Insurance Act" or "TIA") were in apparent conflict with N.J.S.A. 17:33A-8(g), a provision of the Insurance Fraud Prevention Act (the "Fraud Act") that addressed the annual assessment (the "Fraud Assessment") designed to fund enforcement activity under the Fraud Act.

The TIA purported to narrow the scope of the Department's jurisdiction over title insurers by specifying in three separate provisions the provisions that applied to them. The first provision provided:

> All laws and parts of laws in conflict with the provisions of this act are hereby repealed insofar as they may be or have been applicable to the business of title insurance, title insurance companies, title insurance agents, or title insurance rating organizations; and, in case conflict should develop, the provisions of this act shall control and be effective.
>
> [N.J.S.A. 17:46B-61 (quoted in Chicago Title, 388 N.J. Super. at 555).]
>
> The TIA further provided:
>
> No provision of the insurance laws of this State, except as contained or referred to in this act, shall be applicable to title insurance companies, title insurance agents, title insurance rating organizations or the business of title insurance, and no law hereafter enacted shall apply to title insurance companies, title insurance agents, title insurance rating organizations or the business of title insurance unless specified to be or become so applicable.
>
> [N.J.S.A. 17:46B–62 (quoted in Chicago Title, 388 N.J. Super. at 556).]

Finally, the TIA set forth a list of provisions, stating that "only the following provisions of the laws governing insurance companies . . . as presently enacted and hereinafter amended, except as they are inconsistent with the provisions of this act, shall apply to the business of title insurance to title

insurance companies [sic] . . . ." Chicago Title, 388 N.J. Super. at 555. The list did not include the Fraud Act.

On the other hand, the Fraud Act broadly defined the class of insurers liable for the Fraud Assessment: "all of the companies writing the class or classes of insurance described in Subtitle 3 of Title 17 of the Revised Statutes (R.S.17:17-1 et seq)., and Subtitle 3 of Title 17B of the New Jersey Statutes (N.J.S.17B:17-1 et seq)." N.J.S.A. 17:33A-8(g). Title insurance falls within Subtitle 3 of Title 17. Thus, the Fraud Act's plain language includes title insurers in the Fraud Assessment. Starting with the Fraud Act's 1983 enactment, the Fraud Assessment was imposed on title insurers, and they paid it. 388 N.J. Super. at 553.

The apparent tension between both statutes came before the court when a trade organization representing title insurers objected to paying the Fraud Assessment, based on the TIA's provisions narrowing its scope. This court examined the legislative intent behind both statutes and was "convinced that including title insurers in the [Fraud Act] assessments gives effect to the legislative intent underlying the [Fraud Act] without disturbing the legislative intent underlying the TIA." Id. at 557 The court reasoned, " 'Statutes are to be read sensibly rather than literally and the controlling legislative intent is to be

presumed as "consonant to reason and good discretion." ' " Ibid. (quoting N.J. State League of Municipalities, 310 N.J. Super. at 234).

The principles set forth in Chicago Title apply equally to the exclusivity provisions of the Reciprocal Exchange Act and the Holding Company Act, and each can be given effect without frustrating the legislative intent underlying the other. N.J.S.A. 17:50-1 specifies that, "Such contracts and the exchange thereof and such subscribers, their attorneys in fact and representatives shall be regulated by this act, and by no other statute of this State relating to insurance, except as herein otherwise provided." The Reciprocal Exchange Act's exclusivity provision "pertains only to other statutory provisions to the extent that they regulate '[such] [reciprocal] contracts and the exchange thereof' and relate 'to insurance.' " Aftab v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 386 N.J. Super. 41, 56 (App. Div. 2006). "The provision thus pertains to the internal operations of reciprocals. The provision does not insulate reciprocals from requirements of general applicability in insurance regulation and that are outside the insuring transactions undertaken by reciprocals." Ibid. (emphasis added). See also In re Reorganization of the Med. Inter-Ins. Exch. of N.J., 328 N.J. Super. 344, 357 (App. Div. 2000) (holding that notwithstanding the exclusivity provision, reciprocal insurers remain subject to the Commissioner of Banking and Insurance's "general regulatory powers").

The Holding Company Act does not regulate the exchange among subscribers, attorneys-in-fact, and the exchanges of contracts of insurance. The Holding Company Act monitors mergers and acquisitions and regulates the resultant insurance holding company systems. It does not infringe on the regulation of the exchange of contracts that is the purview of the Reciprocal Exchange Act.

Therefore, the Holding Company Act's exclusivity provision does not conflict with that of the Reciprocal Exchange Act because there is no overlap between the two. The Holding Company Act provides, "All laws and parts of laws of this State inconsistent with this chapter are hereby superseded with respect to matters covered by this chapter." N.J.S.A. 17:27A-13. Because the Holding Company Act does not regulate the exchange of contracts of insurance among subscribers, exchanges, and attorneys-in-fact, it does not affect the Department's regulation of reciprocal exchanges under the Reciprocal Exchange Act.

RAF contends that reciprocal exchanges "are legally held to more stringent financial guidelines than traditional insurance companies." (Ab5). RAF cites the example of liquidity ratio requirements for reciprocal insurers as an example of the law being stringent and asserts that no similar requirements exist for other insurance entities, contending that the Reciprocal

Exchange Act imposes "intentionally arduous and demanding standards to ensure the financial health of the reciprocal and its subscribers." (Ab6). However, RAF cites no support (other than the entirety of Title 17 of the New Jersey Code) for its assertion that the standards are either an intentional act by the Legislature or more arduous or demanding than the standards imposed on other insurers. Ibid.

In fact, all insurers are subject to liquidity standards under N.J.A.C. 11:2-27.3 and the National Association of Insurance Commissioners ("NAIC")'s Insurance Regulatory Information System ("IRIS"), pursuant to which specific ratios and qualitative analysis are considered in determining whether an insurer is operating in a hazardous financial condition. If the Commissioner determines the insurer is operating in a hazardous financial condition, the insurer may be placed under administrative supervision, N.J.S.A. 17:51A-1 to -10 and N.J.A.C. 11:2-27.4, and an order may be issued requiring the insurer to take such actions as the Commissioner deems necessary to abate such determination. Ultimately, such an insurer is subject to liquidation if it fails to meet certain designated benchmarks. This is true of any insurer, not just reciprocal exchanges.

The applicability of the Holding Company Act to reciprocal exchanges is consistent with the Department's past and current practice. For instance, in 2014

the then-Commissioner issued Order No. A14-112 (the "2014 Order"), approving the acquisition of New Jersey Skylands Management, LLC, Attorney-in-Fact of New Jersey Skylands Insurance Association ("NJSIA") and New Jersey Skylands Insurance ("NJSIC"). The Commissioner concurred with the Hearing Officer's Report and approved the acquisition under N.J.S.A. 17:27A-2, the provision of the Holding Company Act that regulates acquisition of, control of or merger with a domestic insurer. (Ja3). As explained in greater detail in the Hearing Officer's Report, NJSIA was (and still is) a New Jersey-domiciled inter-insurance reciprocal exchange, and NJSIC a New Jersey-domiciled stock-insurance company and NJSIA's wholly owned subsidiary. (Ja4).

The acquisition followed the Holding Company Act. A public hearing was held on the Form A filing, as required by N.J.S.A. 17:27A-2(d). (Ja5). The hearing panel and the Department staff found that the documents filed in connection with the proposed acquisition complied with N.J.S.A. 17:27A-2(b). (Ja25). The Department also analyzed the acquisition and supporting documents for compliance with N.J.S.A. 17:27A-2(d)(1), which provides that "the Commissioner shall approve any merger or other acquisition of control . . . unless, after a public departmental hearing thereon he [or she] finds that" any one of seven disqualifying conditions exists. (Ja8). The hearing officer found

that none of those conditions was present, (Ja9), and analyzed each of them thoroughly with reference to relevant provisions of the Holding Company Act. (Ja9-13). Both the Order and the Hearing Officer's Report demonstrate the inaccuracy of RAF's contention that the Commissioner has never applied the Holding Company Act to reciprocal exchanges. Given that there was a public hearing held for anyone to comment on the transaction, it is relevant to note that no comments, by RAF nor any other party, were received that expressed the Department was improperly applying the Holding Company Act. (Ja5).

The 2014 Order was not an isolated incident. Six years later, the Department issued Order No. A20-10 in In re Acquisition of Control of New Jersey Skylands Insurance Association and New Jersey Skylands Management, LLC by the Allstate Corporation and Allstate Insurance Holdings, LLC (the "2020 Order"), approving the acquisition of NJSIA and its attorney-in-fact, New Jersey Skylands Management, LLC by The Allstate Corporation and Allstate Insurance Holdings, LLC. (Ja16-21). As with the earlier acquisition, this one was governed by N.J.S.A. 17:17A-2. (Ja16). The 2020 Order required NJSIA to comply with the Reciprocal Exchange Act and the Holding Company Act, along with regulations promulgated thereunder. Ibid. A public hearing was held on the Form A filing under N.J.S.A. 17:27A-2(d), (Ja23), and the hearing panel and Department staff found that the documents submitted in connection with the

proposed acquisition complied with N.J.S.A. 17:27A-2(b). Ibid. And, as with the 2014 Order and the accompanying Hearing Officer Report, the hearing officer conducted an analysis of the seven disqualifying factors in N.J.S.A. 17:27A-2(d)(1). (Ja25-29). Finding that none of those factors existed, the hearing officer recommended that the proposed transaction be approved. (Ja29). Again, the Department did not receive public comments objecting to the application of the Holding Company Act in this transaction. (Ja23).

Most recently, the Department issued Order No. A22-13 (the "2022 Order" or the "CURE/RMC Order"), In the Matter of the Acquisition of Control of Citizens United Reciprocal Exchange and Reciprocal Management Corporation, Inc., by MGG RMC SPV LLC, MGG Structured Solutions and LP, MGG Structured Solutions Master Fund (Cayman) LP, MGG Investment Group GP LLC, MGG Investment Group GP III LLC, MGG Investment Group LP, Kevin F. Griffin and Eric Poe, approving the acquisition of CURE, a reciprocal exchange, and RMC, its attorney-in-fact. (Ja31-35).

The 2022 Order, issued under N.J.S.A. 17:27A-2, required, among other provisions, that the applicants comply with the Reciprocal Exchange Act and the Holding Company Act, along with regulations promulgated thereunder. (Ja31-32). It also required the applicants to comply with all relevant SSAPs,

including but not limited to SSAP No. 25. (Ja32). Importantly, none of the parties to the acquisition objected to or challenged the 2022 Order.

The Hearing Officer's Report noted that the 2022 Order was preceded by a public hearing conducted under N.J.S.A. 17:27A-2(d), (Ja37), and the hearing panel and Department staff found that the filed documents satisfied the requirements of N.J.S.A. 17:27A-2(b). And as with the previous Orders and Hearing Officer Reports, the hearing officer in this matter analyzed the seven disqualifying factors in N.J.S.A. 17:27A-2(d)(1). (Ja41-45). Finding that none of them existed, the hearing officer recommended that the proposed transaction be approved. (Ja45). As with the previous two orders, the Department did not receive public comments objecting to the application of the Holding Company Act in this transaction, something RAF or any other company or member of the public could have done. (Ja37)

Of note regarding the CURE/RMC Order is the fact that RAF and RMC had the same owners, Eric Poe and Audrey Poe Knox, when the Bulletin was issued.[4] The management of CURE and NJPURE are the same, as demonstrated by their respective annual statements. The Directors/Trustees of both companies are the same, the CFO for each company is the same person, and the two entities

[4] Eric Poe remains an owner of RAF and RMC. Audrey Poe Knox remains an owner of RAF but is no longer an owner of RMC after the change of control approved by the CURE/RMC Order was consummated.

share office space. (Compare Ja66 with Ja67). They even use the same email address. (Ja72). CURE and NJPURE allocate administrative and operating expenses. (Ra33, § A, 2nd paragraph). Therefore, the CURE/RMC Order and hearing officer report demonstrate that RAF was more than likely aware of the proceedings leading up to and the issuance of the CURE/RMC Order, which includes reciprocal exchanges within the purview of the Holding Company Act.

RAF contends that CURE disagreed with the Department's requirement that CURE "agree to submit" to the Holding Company Act. (Ab13 n.8). That is further proof that the Department interpreted the Holding Company Act as applying to reciprocal exchanges before it issued the Bulletin and that the Bulletin therefore does not constitute a change by the Department.

RAF's contention that the Department's "demand" that CURE "agree to submit" to the Holding Company Act would not have been necessary if CURE had already been subject to the Act, Ibid., is both inaccurate and illogical. Rather, the Department required that CURE comply with the Holding Company Act, notwithstanding the fact it is a reciprocal exchange, just as it had previously required of NJSIA in the 2014 Order and again in the 2020 Order.

Based on the Holding Company Act's plain language, and the Department's application of it over time, the court should confirm a well-established regulatory scheme and rule that the Holding Company Act applies

to reciprocal exchanges. To rule otherwise would upend a settled area of law and the Department's long-standing and consistent application of law squarely within its area of regulatory responsibility.

POINT II

SSAP NO. 25 APPLIES TO TRANSFERS OF FUNDS BETWEEN THE ATTORNEY-IN-FACT AND THE EXCHANGE.

SSAP No. 25 is an accounting document that governs transactions between and among related parties and is a foundational principle to protect the insurance-buying public. It was drafted, and is monitored and updated, by a working group of State regulators under the auspices of the NAIC. The opening paragraph of SSAP No. 25 provides, "Related party transactions are subject to abuse because reporting entities may be induced to enter transactions that may not reflect economic realities or may not be fair and reasonable to the reporting entity or its policyholders. As such, related party transactions require specialized accounting rules and increased regulatory scrutiny." (Ra4, ¶ 1 (emphasis added)).[5] Accordingly, Paragraph 20 of SSAP No. 25 requires that

[5] The document that RAF identifies in its appendix as SSAP No. 25 is actually "Statutory Issue Paper No. 25," (Ja48-65), a different document from SSAP No. 25. As the NAIC Accounting Practices and Procedures Manual explains,

> This Manual consists primarily of Statements of Statutory Accounting Principles (SSAPs). SSAPs are the primary

transactions between related parties must be conducted at arm's length. Paragraph 21 requires that such transactions must be fair and reasonable. (Ra 10).

RAF seeks to avoid compliance with this principle and potentially overcharge the Exchange – regardless of the cost of the actual services performed by RAF – by arguing that the individual subscriber, not NJPURE, pays a fee to RAF for providing services to NJPURE. This is nonsensical since the fees paid by NJPURE to RAF are for services provided to NJPURE and are clearly disclosed as expenses in NJPURE's financial statement filings with the Department. (Ra32, footnote (a), and 33, § B, 1st paragraph.) The individual subscriber simply authorizes up to 12.5% of the premiums, paid by subscribers to NJPURE, as a limitation of expenses to be paid by NJPURE to RAF for services provided by the AIF.

Accounting Practices and Procedures promulgated by the NAIC. These statements are the result of issue papers that have been exposed for public comment and finalized. Finalized issue papers are in Appendix E. <u>While it is not intended that there be any significant differences between an underlying issue paper and the resultant SSAP, if differences exist, the SSAP prevails and shall be considered definitive</u>." NAIC Accounting Practices and Procedures Manual, Vol. 1, ¶ 45, at P-9 (as of March 2023) (emphasis added).

Clearly, SSAP No. 25 applies to a reciprocal exchange and its AIF. In fact, RAF even concedes as much: "According to SSAP No. 25, the AIF for a reciprocal exchange is considered a related party to the exchange, and therefore transactions between the exchange itself and the AIF may be subject to SSAP No. 25. Thus, a transaction between the exchange . . . and the AIF may implicate SSAP No. 25 and its accounting principles." (Ab14 and n.9).

SSAP No. 25, Section 4, defines related parties as "entities that have common interests as a result of ownership, control, affiliation or by contract." (Ra5 (emphasis added)). Section 4 sets forth a list of the types of entities considered to be "related parties." "Related parties shall include but are not limited to the following: . . . *l.* Attorney-in-fact of a reciprocal reporting entity or any affiliate of the attorney-in-fact." (Ra5-6 (emphasis added)). The "reciprocal reporting entity" is NJPURE, demonstrating that RAF and NJPURE are related parties subject to SSAP No. 25.[6]

[6] The attorney-in-fact and the subscribers are also related parties, notwithstanding RAF's repeated protestations to the contrary. They "have common interests . . . by contract." SSAP No. 25, ¶ 4. (Ra5). Each subscriber executes a POA as part of the application process. (See Ra13). The POA is a contractual document that allocates rights and obligations among subscribers, NJPURE, and the Attorney-in-Fact. However, the relaticonship at issue here is the one between RAF (the attorney-in-fact) and NJPURE.

The POA specifies, at Paragraph 8,

> Subscriber authorizes payment of an amount not exceeding 12.5% of total annual gross written premiums as compensation to RAF to be the Attorney-in-Fact for the subscribers of the Exchange and to perform the overall management functions necessary to effect the exchange of reciprocal insurance contracts among subscribers including the provision, at the attorney's sole cost, of officers and senior managers of the attorney, to act on behalf of the subscribers of the Exchange for functions such as marketing and solicitation, underwriting, claims handling, internal legal and financial accounting, and regulatory compliance.
>
> [Ra13 (emphasis added).]

The fee for attorney-in-fact services is paid by the exchange from premiums paid to it by subscribers. The exchange is not merely a "clearinghouse," as RAF asserts. (Ab7). Subscribers pay premiums to the exchange the same way a policyholder pays an insurer. It is NJPURE, not the subscribers, that pays "an amount not exceeding 12.5% of total annual gross written premiums" as set forth in the POA, and because the exchange and the attorney-in-fact are related parties, they are required to follow the dictates of SSAP No. 25. Furthermore, if NJPURE truly were a "clearinghouse," then NJPURE would have misrepresented the reporting of its payments of expenses to the attorney-in-fact in its annual financial statements, which are public documents under N.J.S.A. 17:23-1.

NJPURE and RAF do not have carte blanche to transfer the 12.5%; the transfer must be an arm's-length transaction that is fair and reasonable. SSAP No. 25 ¶¶ 20, 21 (Ra10). Furthermore, SSAP No. 25 contemplates supervision of such a transfer: "Regulatory scrutiny of related party transactions where amounts charged for services do not meet the fair and reasonable standard . . . may result in (a) amounts charged being recharacterized as dividends or capital contributions, (b) transactions being reversed, (c) receivable balances being nonadmitted, or (d) other regulatory action." SSAP No. 25 ¶ 21 (Ra10). In addition, the language of the POA that specifies that the transfer may not exceed 12.5% of total annual gross written premiums makes clear that the transfer amount is not a given but must be tied to actual costs incurred by the attorney-in-fact.

Premium income received from subscribers and expenses for AIF fees are separately reported on NJPURE's financial statements as revenue and expense, respectively. (Ra31, line 35, col. 1 (revenue); Ra32, footnote (a), and 33, § B, 1st paragraph (expenses)). As an expense charged to NJPURE, the cost of AIF fees must be reasonably related to the services and value provided to the exchange. RAF's claim that AIF fees need not be fair and reasonable pursuant to SSAP No. 25, (Ab48-49), is precisely the type of abuse that the principle was established to prevent and for the Department to regulate. It is

difficult to understand why an attorney-in-fact would oppose a rule that requires it to engage in financial transactions that are arm's-length and fair and reasonable, unless it seeks to avoid compliance with this principle and potentially overcharge the Exchange regardless of the cost of the actual services performed by RAF.

The Department's authority to supervise the transfer is not new. N.J.S.A. 17:23-1 requires every insurer authorized to transact business in New Jersey to file an annual financial statement. "The annual statement shall be prepared in accordance with the annual statement instructions and the Accounting Practices and Procedures Manual ["APPM"] adopted by the National Association of Insurance Commissioners, and all applicable provisions of law." The APPM has included SSAP No. 25 since its inception in 2001 and is reflected in versions of the APPM maintained by the Department as far back as 2005. (Ra23-30 (2005), 4-12 (2023)). Like the current version, the 2005 version of SSAP No. 25 includes attorneys-in-fact as related parties, SSAP No. 25 ¶ 2(i) (Ra23) and requires that transactions between related parties be at arm's-length, SSAP No. 25 ¶ 15 (Ra27) and fair and reasonable, SSAP No. 25 ¶ 16 (Ra27).

SSAP No. 25's plain language makes clear that it applies to RAF and NJPURE. RAF concedes that fact. But at the same time, RAF asserts that the individual subscriber, not NJPURE, pays the AIF Fee, believing that RAF and

NJPURE can avoid compliance with SSAP No. 25. RAF uses its appeal of the Bulletin to further its hidden agenda of charging for fees that are not subject to a fair-and-reasonable standard. Therefore, the court should hold that the Bulletin correctly reminds the industry that SSAP No. 25 applies to reciprocal exchanges. More importantly, the court should hold that the fees paid by NJPURE to RAF to perform the overall management functions necessary to effect the exchange of reciprocal insurance contracts among subscribers are subject to SSAP No. 25 and the "amount not exceeding 12.5% of total annual gross written premiums" as set forth in the POA is simply a limitation and not an entitlement.

POINT III

THE BULLETIN IS NOT A DE FACTO RULE.

The Bulletin is not a de facto rule because it: (1) prescribes a legal standard that is clearly inferable from statutory authorization; (2) reflects an administrative policy that has previously been expressed in an official and explicit agency determination, adjudication or rule; and (3) does not constitute a material and significant change from a clear past agency position on the identical subject matter. See Metromedia, Inc., v. Director, Division of Taxation, 97 N.J. 313, 331-32 (1984).

In Metromedia, our Supreme Court developed a six-factor balancing test for determining whether agency action constitutes de facto rulemaking:

> [Whether the action] (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.
>
> [Ibid. (emphasis added).]

Although not all factors need be present to support a finding that an agency action is de facto rulemaking, the converse is also true: Depending on the weight of each factor, the absence of one factor can be a sufficient basis for a finding that the agency action does not constitute a de factor rule. For instance, formal rulemaking "is not necessary when the agency prescribes a legal standard or directive that is clearly or obviously inferable from the enabling act." Greer v. N.J. Bureau of Sec., 251 N.J. Super. 365, 373 (App. Div. 1994). In Airwork

Service Division v. Director, Division of Taxation, decided the same day as Metromedia, the Court found that an assessment did not constitute de facto rulemaking because the taxability of the services at issue was "sufficiently clearly and directly inferable from the statute itself." 97 N.J. 290, 301 (1984). The Court also found that "it has not been demonstrated that the determination represents a material and significant change in administrative policy, even though the taxing authority did not impose the tax." Ibid.

More recently, this court has continued to hold that when those two Metromedia factors are not present in agency action, the action does not constitute de facto rulemaking. In 2009, it held that the agency action at issue was not a de facto rule because it "prescribes a directive that is expressly within the delegated statutory authority." And the court found it "most significant" that the action "neither modified long-established administrative practice nor effected a material change thereof." Deborah Heart & Lung Ctr. v Howard, 404 N.J. Super. 491, 506 (App. Div. 2009).

Notwithstanding RAF's repetitive and conclusory statements to the contrary, and as demonstrated in greater detail above, the plain language of both the Holding Company Act and SSAP No. 25 leaves no doubt that they both apply to reciprocal exchanges and their attorneys-in-fact. That is "clearly inferable" from the Holding Company Act and SSAP No. 25. Furthermore, the Bulletin

does not change past agency practice. The Holding Company Act and SSAP No. 25 have both been "previously expressed in [an] official and explicit agency determination, adjudication or rule," and do not "constitute[] a material and significant change from a clear, past agency position on the identical subject matter" Metromedia, 97 N.J. at 331-32. The Bulletin's failure to satisfy those Metromedia factors means that it is not a de facto rule, and the Department appropriately issued the Bulletin to remind reciprocal exchanges that they are required to follow the Holding Company Act and SSAP No. 25. The Bulletin should be upheld.

POINT IV

PENDING LEGISLATION IS NOT AN INDICATOR OF LEGISLATIVE INTENT.

RAF's oft-repeated insistence that the introduction of legislation constitutes evidence of legislative intent is without merit. Senate Bill No. 3636 (Ra14-15), introduced on February 23, 2023, and the identical Assembly Bill No. 5317 (Ra17-18), introduced on March 30, 2023 (shortly after the filing of this appeal) address the applicability of the Holding Company Act to reciprocal exchanges. They also exempt fees arising out of contracts between subscribers and AIFs from being considered related party transactions (SSAP No. 25). To date, neither bill has progressed past the point of introduction. (Ra16 (S-3636) and Ra19 (A-5317)).

Unless and until the bills are enacted, they reflect nothing more than the intent of their respective sponsors to introduce such a bill. In considering a challenge to regulations adopted by the Department of Banking and Insurance, this court observed, "The Legislature has taken no formal action to override the regulations, as it could have done, although certain individual legislators have expressed dissatisfaction with the regulations." Coal. of Health Care Professionals v. N.J. Dep't of Banking & Ins., 323 N.J. Super. 207, 230 (App. Div. 1999).

No conclusion adverse to the Department's position can be drawn from the mere introduction of those pieces of legislation. Each bill has one sponsor. To say that the views of two legislators represent those of 120 legislators turns the concept of legislative intent on its head. RAF's reliance on the proposed legislation begs the question of why legislation to amend the Holding Company Act and codify RAF's position on the application of SSAP No. 25 would even need to be introduced and signed into law if, as RAF argues, the Holding Company Act and application of SSAP No. 25 already do not apply. RAF's claim about the mere introduction of the bills therefore lacks merit.

POINT V

THE BULLETIN DOES NOT WORK AN IMPAIRMENT OF CONTRACT UNDER EITHER THE FEDERAL OR STATE CONSTITUTION.

The Bulletin does not impair any right to contract, retroactively or otherwise. RAF contends that the Bulletin impairs the subscribers' contractual agreement with the attorney-in-fact as set forth in the POA – specifically, the provision governing the AIF fees. That contention is inaccurate for two reasons. First, although the subscribers are parties to the POA, they are not making any payments; payments under Section 8 of the POA are made by NJPURE. Second, Section 8 of the POA provides, "Subscriber authorizes payment of an amount not exceeding 12.5% of total annual gross written premiums as compensation to RAF to be the Attorney-in-Fact for the subscribers of the Exchange . . .." (Ra13 (emphasis added)).

The Bulletin does not impair the provision authorizing payment of "an amount not exceeding 12.5%" to RAF. RAF correctly noted that in determining whether an unconstitutional impairment of contract has occurred, the courts must answer the following three inquiries: "(1) whether a contractual right exists in the first instance; (2) whether a change in the law impairs that right; and (3) whether the defined impairment is substantial." Berg v. Christie, 225 N.J. 245, 259 (2016). However, RAF's flawed analysis leads it to the wrong

conclusion because applying SSAP No. 25 to the payments made to an AIF by NJPURE does not impair any contract.

SSAP No. 25, ¶¶ 20 and 21, require that transactions between related parties, such as an attorney-in-fact and any party with whom it contracts, be conducted at arm's length and be fair and reasonable. It is not consistent with RAF's apparent position that the attorney-in-fact is automatically entitled to take 12.5% of annual premiums without documenting the appropriateness of that amount. To the contrary, the language "not exceeding 12.5%" is consistent with that standard. Application of SSAP No. 25 to the attorney-in-fact does not impair any contract; it actually enforces the language of the POA.

Therefore, the Department is not "trying to usurp the free will of RAF and the individual subscribers." (Ab51), SSAP No. 25 merely creates additional safeguards for related-party transactions while still giving effect to the subscribers' intent that RAF receive up to, but not necessarily exactly, 12.5% of the premiums collected by NJPURE. In fact, although the subscribers sign the POA, NJPURE, not the subscribers, pays the 12.5% to the attorney-in-fact. The language "an amount not exceeding 12.5%" does not entitle RAF to the entire 12.5% of premiums paid by subscribers to NJPURE. RAF contends that by reminding reciprocal exchanges and attorneys-in-fact that SSAP No. 25 requires that transactions involving services between related parties must be on an arm's-

length basis and meet fair-and-reasonable standards, the Bulletin impairs the contract, but in fact it reinforces it by noting that the payment is not automatically 12.5%, and instead is an amount not to exceed 12.5%. Therefore, there is no impairment of contract.

CONCLUSION

For these reasons, the court should affirm the Department's issuance of Bulletin No. 22-11.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION

IN THE MATTER OF BULLETIN NO. 22-11	APPELLATE DIVISION DOCKET NO: A-001626-22

RECIPROCAL ATTORNEY-IN-FACT, INC.'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Department of Banking and Insurance's (the "Department") opposition brief is more notable for what it omits rather than what it actually addresses. The Department completely ignores its years of conduct and admissions that confirm new legislation was required in order for it to apply the requirements of the Holding Company Act, N.J.S.A. 17:27A-1 to -14 (the "Holding Act") to reciprocal insurers such as NJ PURE and its attorney-in-fact, Reciprocal Attorney In Fact ("RAF") or to apply Statement of Statutory Accounting Principle No. 25 ("SSAP No. 25") to the fees that the individual subscribers agree to pay to RAF ("AIF Fees"). Bulletin 22-11 (the "Bulletin") is directly contrary to these past practices and statements, and leaves no doubt that the Department has acted arbitrarily and capriciously in unilaterally seeking to change the law when its prior attempts to do so through legislation had failed.

Rather than address its past conduct and admissions in any respect, the Department instead relies on three prior transactions as proof that it has always considered reciprocals and their Attorneys in Fact ("AIFs") to be subject to the Holding Act. Unfortunately for the Department, these three transactions only serve to support RAF's position. That the Department previously applied the Holding Act to transactions involving actual insurance holding companies and reciprocals (like Skylands) is irrelevant and misleading, at best. Indeed, *every single entity*

involved in the Skylands transactions was already part of a holding company system – of course the Holding Act applied. The Skylands Orders have nothing to do with the applicability of the Holding Act to stand-alone reciprocal insurers and their private, non-insurance AIFs.

Similarly, the Department's insistence on applying the Holding Act to the CURE acquisition last year is not evidence of the Department's past practice; it is evidence of the Department's ultra vires actions that RAF seeks to halt with its appeal. CURE is not part of a holding company system to which the Holding Act applies, as the Department acknowledged in its submission to Congress (via the NAIC) in 2010. Indeed, the Department knows, CURE repeatedly objected to the Department's improper actions and never agreed that it was subject to the Holding Act or that its AIF Fees were subject to SSAP No. 25. The Department's implication in its Opposition Brief that "none of the parties [to the CURE/RMC Order] objected to or challenged" the CURE/RMC Order is unconscionable and completely ignores the history of that transaction.

Just as with the Holding Act, the Department's veiled attempt to use SSAP No. 25 to regulate AIF Fees in a new and novel manner is contrary to more than a decade of past practice and audits. Through the Bulletin, under the guise of SSAP No. 25, the Department attempts to substitute its judgment in place of the contractual agreement between RAF and NJ PURE's individual subscribers - two

willing and unaffiliated parties, who lack common interests, control or ownership. Even more telling, the "judgment" the Department is seeking to impose is not bound by any standards or guidelines; it is utterly divorced from the due process protections to which RAF is entitled.

In short, the Department's actions in issuing the Bulletin are by definition arbitrary and capricious. The Bulletin constitutes improper rulemaking that violates procedural due process as well as a gross overreach that violates substantive due process and impairs RAF's constitutional right to contract. The Bulletin is not rooted in the existing laws or regulations or any interpretation of same. Rather, it is simply an attempt by the Department to improperly and unilaterally expand the scope of its authority without any basis in law or fact and without any of the constitutional protections due and owing to RAF and other reciprocals.

Accordingly, the Court should vacate the Bulletin because it violates RAF's procedural and substantive due process rights and improperly interferes with its rights to contract with the individual subscribers of NJ PURE.

ARGUMENT

I. THE DEPARTMENT IGNORES ITS OWN COURSE OF CONDUCT AND ADMISSIONS RELATED TO THE HOLDING ACT. (JA1-2)

The Department argues that the Holding Act's "flexible definition" of insurer applies and has always applied to reciprocal insurers like RAF. This

argument willfully omits the Department's own extensive course of dealing and record of admissions to the contrary. It also relies on a misstatement of Chicago Title Ins. Co. v. Bryan, 388 N.J. Super. 550 (App. Div. 2006).

In Chicago Title, the appellant argued that application of the Insurance Fraud Protection Act ("IFPA") to title insurers was barred by the Title Insurance Act ("TIA"). This Court found that the IFPA did not regulate "the internal operations and financial responsibility matters akin to the subject matter in the TIA" and therefore no conflict existed. Id. at 559. Moreover, the Department had been charging and title insurers had been paying the IPFA assessments for ten years before the appeal. Id. at 553 and 560. In other words, there existed an established course of conduct supporting enforcement of the IFPA assessments. Furthermore, the Legislature was aware of and approved the past course of conduct because it did not intervene. Based on the totality of the circumstances, the Court did not find a conflict.[1]

In contrast to the circumstances in Chicago Title, the provisions of the Holding Act relate directly the "internal operations and financial responsibilities" of the companies within its scope, which do not include reciprocals, whose

[1] When there is a conflict between a general and specific statute, the more specific statute controls. New Jersey Transit v. Somerville, 139 N.J. 582 (1995); Gannon v. Saddle Brook Twp., 56 N.J. Super. 76, 81 (App. Div. 1959). Obviously, the REA is more specific than the Holding Act and should prevail.

operations are governed exclusively by the Reciprocal Exchange Act ("REA") unless otherwise stated. Despite the Department's contention that the Holding Act only monitors mergers and acquisitions of the resulting holding company systems,. (Rb18), the Department is actually attempting to regulate the operations and relationships of reciprocals regardless of any merger or acquisition. That is the only explanation for the Department's insistence on applying the Holding Act and SSAP No. 25 criteria as part of every examination and communication. And, in fact, the Bulletin expressly states that the Holding Act applies to the "operations of insurance holding company systems which include a New Jersey domestic insurer." (JA1) The Department is expressly and repeatedly arguing that it can apply the Holding Act to reciprocals and regulate the relationship between RAF and the individual subscribers regardless of the existence of a merger/acquisition or an insurance holding company system.

The Department is using the Bulletin to impose the Holding Act and SSAP No. 25 on the operations of reciprocals, their subscribers, their AIFs and Powers of Attorney ("POAs") in ways that the Department has never before applied and that are prohibited by the REA.[2] (JA1-2)

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[2] The Department's citation to N.J.A.C. 11:2:27-3 is unavailing and deceptive as that code section relates to N.J.S.A. 17:30C-1 <u>et</u> <u>seq</u>, which is one of the code sections that expressly includes reciprocals. <u>See</u> Ab9. The Department fails to cite any relevant code section that does not expressly already apply to reciprocals.

This is why the Department's citation to Chicago Title fails.[3] The Bulletin is in direct contravention to the Department's past practices and admissions. The Department repeatedly admitted during examinations that legislation was required in order to allow it to apply the Holding Act to reciprocals or to apply SSAP No. 25 to the AIF Fees.

That was exactly the reason the Department objected to the inclusion of its examinations of CURE in the record in this matter—not the "heavy redaction" of irrelevant information. The Department is trying to cover up its historic interpretations, and it is using this Court in that process. The Department's objection to RAF's supplementing the record while the Department continues to add is an abuse of the Department's authority and a misuse of this Court.

Regardless, the NAIC confirmed in 2010 that NJ PURE (and by extension RAF) was not and had never been subject to the Holding Act. It cannot be overstated that the NAIC submitted this information to Congress based on information provided by the Department. Notably, the Department does not deny

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[3] The Department's citation to Aftab v. N.J. Prop. Liab. Ins. Guar. Ass'n, 386 N.J. Super. 41 (App. Div. 2006) fares no better. The reciprocal in question did not have a certificate of authority to operate, so the REA's exclusivity provisions did not apply and the statute in question did not pertain to the internal operation of reciprocals. Similarly, In re Reorganization of the Med Inter-Ins. Exch. Of N.J., 328 N.J. Super. 344 (App. Div. 2000) involved the transformation of a reciprocal to a stock company that would fall squarely within the Holding Act's parameters according to the Department, but which is utterly absent here.

this; it just ignores this. The Department's new interpretation of the Holding Act cannot change these facts.

The Department similarly ignores the undisputed fact that NJ PURE has never previously filed any of the Forms required by the Holding Act and the Department knows this. Does the Department truly expect this Court (or the Legislature or Governor) to believe that it simply allowed NJ PURE and other reciprocals to remain out of compliance with past practice and interpretation for the past fifteen years without penalty? Of course not. The reality is that this Department's current leadership has changed the historic course of conduct and interpretation of the Holding Act and SSAP No. 25 in a manner that is completely inconsistent with past practices and interpretation of the Holding Act and the REA.

This is true notwithstanding the Department's reliance on orders relating to other acquisitions, which other than the CURE transaction, expressly involved insurance companies undisputedly regulated by the Holding Act. The Skylands Orders all involved traditional insurance companies and their national infrastructures, i.e. holding companies, which are clearly within the Holding Act as the 2010 NAIC testimony confirmed. Indeed, just as NAIC's submission to Congress unequivocally stated that NJ PURE (and CURE) were not subject to the Holding Act, it also clearly showed that the entities involved in the Skylands Orders were subject to the Holding Act.

https://www.govinfo.gov/content/pkg/CHRG-111hhrg56778/pdf/CHRG-111hhrg56778.pdf.[4]

The 2022 CURE Order is admittedly different, but it demonstrates the beginning of the Department's abuse of power. The Department coerced CURE into agreeing to comply with the Department's new mandates regarding the Holding Act and SSAP No. 25 as a condition of approving a transaction that would benefit CURE's subscribers. The Department did so even though CURE had been crystal clear that it did not agree with the Department's position. The Department then issued the Bulletin immediately prior to the 2022 CURE Order in an attempt to legitimize its efforts. Contrary to the Department's narrative, this is evidence of its overreach and abuse, not its consistent and appropriate regulation. The same is true of Mr. Wolf's personal attack on Eric Poe and Audrey Poe Knox. He claims they commonly own RAF and RMC, which he knows is false. Although the ownership details are irrelevant, Mr. Wolf knows Mr. Poe owns 25% of RMC and that Ms. Poe Knox no longer has any ownership.

As the Court noted in Chicago Title, "an agency's construction of a statute over a period of years without legislative interference will under appropriate circumstances be granted great weight as conformity with legislative intent."

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[4] The Skyland Orders were all entered after notice and a public hearing, the very thing the Department refused to do with the respect to the Bulletin.

(internal quotations omitted). Here, until 2022, the Department's construction of the Holding Act and REA was consistent, and that interpretation did not spark any "legislative interference." In contrast, the Department changed its interpretation in 2022—most noticeably in issuing the Bulletin—and thereafter, the Legislature introduced two bills to address the Department's actions, indicating that the new interpretation and enforcement were not "business as usual".

The Department's abrupt reversal of its past course of dealing—upon which RAF and NJ PURE have always relied--is exactly the type of arbitrary and capricious conduct that comprises improper rulemaking as confirmed by the Department's reliance on <u>Chicago Title.</u>

II. SSAP NO. 25 HAS NEVER BEEN APPLIED TO THE AIF FEE PAID BY THE INDIVIDUAL SUBCIBERS TO RAF. (JA1-2).

Because the Department's arguments on the application of SSAP No. 25 are substantively devoid, the Department is reduced to disparaging RAF, accusing it of "potentially overcharg[ing] the Exchange." Not only is this unfounded, it is silly as there is no dispute that transactions between RAF and the Exchange as a whole are related party transactions subject to SSAP No. 25. The transactions between RAF and the individual subscribers as detailed in their agreed to POA are not related party transactions and are not subject to SSAP No. 25.

This is clear from the POA, in which the subscriber authorizes that 12.5% of his or her premiums be paid to RAF. (R013a) That is not a transaction with the

Exchange; it is a payment on behalf of the individual subscriber—not the Exchange as a whole. Unlike some other reciprocals, RAF does not enter into a "subscriber agreement" or an "AIF agreement" in addition to the POA. Thus, the only agreement between RAF and each individual subscriber is that subscriber's POA to which the Exchange is not a party.

NJ PURE's financial statements confirm that RAF does not actually charge the Exchange any fees. Rather, the individual subscribers are responsible for the AIF Fees, which refutes the Department's "overcharging theory". (R033a) Moreover, NJ PURE's financial statements do not contain any representation about the AIF Fees complying with SSAP No. 25 because NJ PURE's auditor has never reviewed the AIF Fees for such compliance, which the Department knows.

The Department does not deny that historically it admitted that SSAP No. 25 could not be applied to the AIF Fees absent legislation. Even the Department auditor's July 6, 2022 request admits that the request "to gather information to review the POA services fees for compliance with SSAP No. 25" is a "**new request**". (JA69) (emphasis added). Thus, contrary to the Department's claim, its supervision of the payment of the AIF Fees was non-existent until last year.

Despite the Department's repetition of SSAP No. 25's terms, it cannot transform the individual subscriber's payment of the AIF Fee into a related party transaction. The Department concedes by its silence that RAF does not control the

individual subscribers, who can terminate or seek coverage elsewhere. Thus, by definition the AIF fees are not a related party transaction subject to SSAP No. 25.

Moreover, the Department admittedly knows the amount of those fees regardless of SSAP No. 25's application. (Rb26) It knows the terms of the POA. By its own admission the fees are disclosed in NJ PURE's financial statements. Nothing is or ever has been hidden from the Department, but that does not confer authority on the Department to control the AIF Fees through its unilateral imposition of the accounting principle SSAP No. 25 as declared in the Bulletin.

This is particularly true in this case where the Department seeks to impose its "discretion" on the AIF fees without any articulation of any governing standards and principles that are routed in the facts of the situation. Where those are lacking, the agency's action is arbitrary and capricious. In re Galloway Tp. and City of Bridgeton, 418 N.J. Super. 94, 104-05 (App. Div. 2011).

After years of contrary conduct and statements, the Department is trying to impose its unfettered discretion on the amount of fees that the individual subscribers should pay RAF. This is by definition arbitrary and capricious.

III. THE BULLETIN IS NOT INFERABLE FROM STATUTORY AUTHORIZATION, HAS NEVER BEEN PREVIOUSLY EXPRESSED AND ABSOLUTELY REPRESENTS A MATERIAL CHANGE IN POSITION. (JA1-2)

The Department cites, but then effectively ignores, the Metromedia factors regarding improper rulemaking. Metromedia, Inc. v. Director, Division of

Taxation, 97 N.J. 313, 331-332 (1984). The Department's passage of the Bulletin contains all of the hallmarks of improper rulemaking and none of the characteristic of proper agency action.

First, the Bulletin's pronouncements are not clearly inferable from the Holding Act or SSAP No. 25 and cannot be. As stated above and not denied by the Department, the Department repeatedly admitted during examinations that it could not apply the Holding Act or SSAP No. 25 absent the passage of new legislation, which never occurred. Additionally, in 2010, the NAIC noted that NJ PURE (just like CURE) was not subject to the Holding Act. Its own auditors admit that SSAP No. 25 compliance as to the AIF fees was a "**new request**." The Department simply ignores these uncontested facts.[5]

Second, noticeably absent from the Department's brief is any citation to a determination, adjudication or rule applying the Holding Act to reciprocals who are not part of an actual insurance holding company system and involved in an acquisition or merger or applying SSAP No. 25 to the AIF fees of reciprocal. This includes the 2022 CURE Order, which is not evidence of the Department's past practice; it is evidence of the beginning of the Department's ultra vires actions.

---

[5] Moreover, SSAP No. 25 is an accounting principle, not an agency determination, adjudication or rule. The Department's reliance on it is particularly misplaced.

The Bulletin is a complete rejection and reversal of the Department's past interpretation as evidenced by its historic course of conduct and its admissions—which the Department has utterly failed to address in its opposition. Although RAF contends that the Department's new interpretation of the Holding Act and SSAP No. 25 is simply wrong, and the Bulletin must be vacated, at the very least, the Department was required to give RAF and other affected entities notice and an opportunity to be heard before imposing such a monumental and unilateral change. This is crucial to the integrity of the entire regulatory process, and the Defendant is not entitled to use the Bulletin to circumvent due process.

IV. THE DEPARTMENT IS INTERFERING WITH RAF'S CONSTITUTIONAL RIGHT TO CONTRACT. (JA1-2)

The Department's argument that it is not interfering with RAF's constitutional right to contract boils down to this: Although the POA does not reserve any discretion to the Department to set the amount of the AIF Fee, the Department is granting to itself exactly that authority by virtue of the Bulletin. The Department certainly is seeking to use the Bulletin to regulate the amount of the AIF Fees. It is applying this "new authority" to: (1) regulate the POAs to which the subscribers and RAF previously agreed; and (2) impair the parties' rights under the POA because the Department gets to decide retroactively what is reasonable, not the parties. This impairment is substantial because the Department has placed no limits on the scope of its discretion. It could theoretically decide that

the subscribers should pay no fees to RAF or any other amount up to 12.5% regardless of what the subscribers or RAF thought was appropriate. In short, the Department wants to substitute its unfettered discretion for the agreement of RAF and the subscribers. That is the definition of a contractual impairment.

The Department attempts to excuse its power grab by arguing that NJ PURE actually pays the fees, not the subscribers. But this is not correct. Each individual subscriber agreed that 12.5% of his/her premium should be directed to RAF – not NJ PURE. All NJ PURE does is turn the fees over to RAF on behalf of each individual subscriber consistent with his or her instructions and the POA. NJ PURE has no control over the AIF Fee, and RAF has no control over the individual subscriber's decision to pay the AIF Fee. There is no element of common control. Thus, the POA is not subject to SSAP No. 25 and neither are the fees paid pursuant to it. The Department's attempt to nevertheless control those fees under the guise of SSAP No. 25 and the Bulletin is a direct impairment of RAF's right to contract with the subscribers to which the Department is not a party.

V. THE DEPARTMENT MISAPPREHENDS THE CITATIONS TO THE PENDING LEGISLATION. (JA1-2)

The Department leans heaving into the unremarkable concept that seeking to determine legislative intent behind an existing statute from pending legislation is problematic. In re Galloway Tp. and City of Bridgeton, 418 N.J. Super. 94, 104-05 (App. Div. 2011). However, pending legislation can be an indication that an

agency has changed course as is the case with S3636 and A317. Notably, despite the fact that the Department admitted for over a decade that new legislation needed to be passed to allow it to apply the Holding Act to reciprocals and to apply SSAP No. 25 to the AIF Fees, the only bills introduced on the subject directly contradict the Department's current position and support RAF's.

In short, the Department's insistence on imposing the Holding Act on reciprocals who are unaffiliated with insurance holding companies and SSAP No. 25 on reciprocals' AIF Fees is a gross overreach by the Department that violates this State's substantive and procedural requirements and those of the contracts clause of United States' Constitution. For all of these reasons, this Court should vacate the Bulletin as arbitrary, capricious and improper Department action.

CONCLUSION

For the foregoing reasons, RAF respectfully requests that this Court vacate the Bulletin.

Respectfully Submitted,

EPSTEIN BECKER & GREEN, P.C.

By: */s/ Anthony Argiropoulos*
Anthony Argiropoulos
Sheila Woolson

O'TOOLE SCRIVO, LLC

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Dated: December 4, 2023

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Re: In re Bulletin No. 22-11
Docket No. A-001626-22

Letter Brief of Respondent New Jersey Department of Banking and Insurance in Response to Amicus Curiae African-American Chamber of Commerce of New Jersey's Brief

Dear Mr. Orlando:

We represent Respondent, New Jersey Department of Banking and Insurance, in this appeal from the Department's issuance of Bulletin No. 22-11 (the "Bulletin"). The Department has simultaneously filed a motion for leave to reply to amicus curiae African-American Chamber of Commerce of New Jersey ("AACCNJ" or "Amicus")'s brief. Kindly accept this letter brief as the Department's response should this court grant its motion to file a reply.

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PROCEDURAL HISTORY

The Department filed its merits brief on November 6, 2023. On November 20, 2023, AACCNJ filed a motion to appear as amicus curiae, along with its proposed brief. The court granted AACCNJ's motion on December 4, 2023. The Department now moves to reply to AACCNJ's brief.

COUNTERSTATEMENT OF FACTS

AACCNJ states it "adopts the relevant facts from Appellant's Brief as if fully set forth herein and, for the sake of brevity, will not repeat them." Further, AACCNJ states it "submits this brief in full support for Appellant Reciprocal Attorney-in-Fact, Inc. ("RAF"), as attorney-in-fact for New Jersey Physicians United Reciprocal Exchange ("NJ PURE")'s appeal, which seeks to invalidate Bulletin No. 22-11 (the "Bulletin"), issued by the Department." The AACCNJ simply repeats the Appellant's arguments.

The AACCNJ describes its non-profit association and points out that it serves more than 800 active members, including NJ PURE. NJ PURE is a direct writer of medical malpractice insurance. The AACCNJ's members also include many in the healthcare community who directly and/or indirectly rely upon medical malpractice insurance coverage provided by NJ PURE. The ultimate effect of the Bulletin, and the Department's goal in issuing it, is consumer protection, including the AACCNJ consumer subscribers to NJ PURE. To this end, the Bulletin reminds reciprocal

insurance exchanges of the requirements in place to protect the insurance buying public, including the policyholders/subscribers of NJ PURE, and to ensure the financial stability of the industry, especially where medical malpractice liabilities could extend for many years. AACCNJ's uncritical support of RAF, and in particular its right to make undisclosed profits at the expense of its consumer subscribers, is misplaced.

AACCNJ's partisan support of RAF at the potential overall expense of its own consumer members leads to a blurring and distortion of the factual record. Appellant RAF's Statement of Facts, which the AACCNJ supports, included arguments concerning the Insurance Holding Company Act State's Insurance Holding Company Systems Act, L. 1970, c. 22 (N.J.S.A. 17:27A-1 to -14) (the "Holding Company Act") and Statutory Statement of Accounting Principles No. 25 ("SSAP No. 25") that are simply not correct and are counter to consumer protection and regulatory oversight of insurers. The Department addresses those "facts" in Argument Points I.A (the Holding Company Act) and II (SSAP No. 25).

ARGUMENT

POINT I

THE BULLETIN IS NOT A DE FACTO RULE UNDER THE METROMEDIA ANALYSIS.

Amicus implies its support of the Appellant's argument that a reciprocal insurance exchange is subject only to the Reciprocal Exchange Act, N.J.S.A. 17:50-1 to -19, enacted in 1945. Over the past 78 years since the Reciprocal Exchange Act was enacted, the regulatory oversight of the insurance industry has evolved to enhance consumer protection and financial stability of the industry. As an example, the Holding Company Act, enacted in 1970 and amended several times since then, is a comprehensive law that regulates an insurance company system to help ensure financial stability and solvency. The Holding Company Act states, "All laws and parts of laws of this State inconsistent with this chapter are hereby superseded with respect to matters covered by this chapter." N.J.S.A. 17:27A-13.

As noted in the Department's brief filed on November 6, 2023, the Bulletin is not a de facto rule because it: (1) prescribes a legal standard that is clearly inferable from statutory authorization; (2) reflects an administrative policy that has previously been expressed in an official and explicit agency determination, adjudication or rule; and (3) does not constitute a material and

significant change from a clear past agency position on the identical subject matter. See Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 331-32 (1984); accord Airwork Serv. Div. v. Director, Div. of Taxation, 97 N.J. 290, 301 (1984) (holding that an assessment did not constitute de facto rulemaking because the taxability of the services at issue was "sufficiently clearly and directly inferable from the statute itself"). In Airwork, the Court also found that, as is the case here, "it has not been demonstrated that the determination represents a material and significant change in administrative policy, even though the taxing authority did not impose the tax." Ibid.

The AACCNJ's repeated mention of the fact that the Bulletin was issued more than fifty years after the Holding Company Act's 1970 enactment is of no moment. AACCNJ asks why the Department "wait[ed] more than half a century to issue the Bulletin and why issue it now?" (AACCNJb4).[1] The answer to that question is short and simple, as stated right in the Bulletin – the inquiries that the Department received regarding the laws and requirements governing reciprocal exchanges including in connection with the 2022 acquisition of Citizens United Reciprocal Exchange ("CURE") and Reciprocal Management

[1] "AACCNJb" refers to the brief of amicus curiae. "Ra" refers to the Department's brief, filed November 6, 2023. "Ra" refers to the Appendix to the Department's brief. "Ab" refers to the RAF's brief, filed August 2, 2023. "Ja" refers to the Appendix to RAF's brief.

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Corporation ("RMC"), CURE's attorney-in-fact, by MGG.[2] RAF acknowledges those inquiries in its brief. (Ab13 n.8) ("The Department demanded that CURE agree to submit to the Holding Act as a condition of its acquisition, despite knowing that CURE disagreed.").

From time to time, the Department chooses to remind the regulated industry of applicable laws, particularly in light of the evolving State regulatory environment for reciprocal exchanges. See, e.g., Lim v. Farmers Grp., Inc., No. 2:23-cv-03419-ODW (SKx), 2023 U.S. Dist. LEXIS 203739 (C.D. Cal. Nov. 13, 2023) (Plaintiff subscribers alleged that the Defendant attorney-in-fact could not collect the agreed-upon rates because to do so would bankrupt the Exchange). Given the direct questions received about the RMC/CURE acquisition, the Department decided – reasonably – to do so then.

In the case of MGG's acquisition of RMC/CURE, however, MGG, who was advised by counsel,[3] and by extension RMC and CURE, specifically

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[2] Applicants were MGG RMC SPV LLC, MGG Structured Solutions Fund LP, MGG Structured Solutions Master Fund (Cayman) LP, MGG Investment Group GP LLC, MGG Investment Group GP III LLC, MGG Investment Group LP, Kevin F. Griffin and Eric S. Poe.

[3] Counsel representing MMG relating to the acquisition included Sidley Austin LLP and Bressler Amery & Ross, P.C. Other counsel representing the parties during the acquisition included Epstein, Becker and Green, McCormick & Priore, P.C., and Lowenstein Sandler.

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acknowledged that the Holding Company Act applied to the acquisition of RMC/CURE. Despite Eric Poe's[4] personal disagreement, he proceeded with the sale and acquisition of RMC/CURE by signing the Form A Acquisition Statement. The acquisition therefore proceeded in accord with the near-decade-long precedent that the Department had established in applying the Holding Company Act to the acquisition of the attorney-in-fact of a reciprocal exchange in addition to, and notwithstanding, the Reciprocal Exchange Act. The Department did not issue the Bulletin to coerce the applicants', and by extension RMC's and CURE's, compliance, but rather to remind the regulated community that its precedent would be adhered to notwithstanding Mr. Poe's opposition. In fact, Mr. Poe's opposition is an outlier and the Bulletin simply confirms the Department's near-decade-long precedent.

Amicus AACCNJ adopts Mr. Poe's position uncritically, and thus repeats RAF's arguments on the incorrect assumption that the Bulletin constituted de facto rulemaking without providing a thorough analysis supporting that assumption. The Court in Metromedia set forth six factors to be considered when determining whether an agency action constitutes rulemaking, but

[4] Eric S. Poe (through the Eric Poe 2007 Irrevocable Trust) sold his 50% ownership stake in RMC and obtained a 25% effective ownership stake in RMC as an Applicant and continues to be RMC's CEO. Mr. Poe is also a 50% owner in RAF – the Appellant.

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AACCNJ considered only some of them. (AACCNJb9). Although not all factors need be present to support a finding that an agency action is de facto rulemaking, the converse is also true: Depending on the weight of each factor, the absence of one Metromedia factor can be sufficient for a finding that the agency action does not constitute a de facto rule. For instance, formal rulemaking "is not necessary when the agency prescribes a legal standard or directive that is clearly or obviously inferable from the enabling act." Greer v. N.J. Bureau of Sec., 251 N.J. Super. 365, 373 (App. Div. 1994) (emphasis added).

In Airwork, decided the same day as Metromedia, the Court found that a determination of the Division of Taxation did not constitute de facto rulemaking, based on the Court's finding that the determination was clearly inferable from the controlling statute. 97 N.J. at 301. For the reasons set forth in sub-points A, B, and C below, an analysis of three Metromedia factors leads to the conclusion that the Bulletin did not constitute rulemaking because the applicability of the Holding Company Act to reciprocal insurance exchanges is clearly inferable from the statute itself.

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A. NJ PURE Is Not Entitled to a Due Process Hearing under the APA Because the Bulletin Prescribes a Legal Standard – That the Holding Company Act Applies to Reciprocal Insurance Exchanges – Clearly Inferable from Statutory Authorization.

The applicability of the Holding Company Act to reciprocal insurance exchanges is "clearly inferable" from the plain language of the statute. See Airwork, 97 N.J. at 301 (finding that an assessment did not constitute de facto rulemaking because the taxability of the services at issue was "sufficiently clearly and directly inferable from the statute itself"). Because the applicability of the Holding Company Act to reciprocal exchanges is clearly inferable from the statute, the Bulletin is not a de facto rule, and the Department is therefore not required to engage in notice-and-comment "rulemaking" in accord with the due process procedures included in the APA before applying the statute.

The Holding Company Act is an important law that supports the financial stability and solvency of insurers, including reciprocal insurance exchanges. N.J.S.A. 17:27A-2 is entitled "Acquisition of control of or merger with domestic insurer" (emphasis added). As such, the law authorizes the Department to thoroughly review the acquisition by applying a seven-part test to help ensure the financial stability and solvency of the insurer and that the acquisition is not hazardous or prejudicial to the insurance-buying public.

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The term "insurer" includes reciprocal insurance exchanges. The Holding Company Act defines "insurer" as "any person or persons, corporation, partnership or company authorized by the laws of this State to transact the business of insurance . . . in this State." N.J.S.A. 17:27A-1(e). The definition is broad, and its plain language is clear. "The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). It is beyond dispute that NJ PURE, by virtue of its having been issued a certificate of authority under N.J.S.A. 17:50-11, is authorized to transact the business of insurance and is therefore an "insurer" within the Act's scope. Thus, it fits into the Holding Company Act's definition of "insurer," and the Holding Company Act's applicability to reciprocal insurance exchanges is "clearly inferable" from the statute's plain language.

AACCNJ's contention that the Bulletin is inconsistent with procedural due process is without merit. In Metromedia, the Court's reasoning did not include an analysis under either the Federal or State due process provisions. Moreover, many of the cases cited in AACCNJ's brief that discuss procedural due process do not allege a violation resulting from rulemaking. Here, again, AACCNJ provides uncritical support for RAF's ability to earn undisclosed profits at the expense of its consumer subscribers.

As AACCNJ acknowledges, due process scrutiny applies when government deprives a person of "life, liberty, or property." (AACCNJb10). Yet in support of that proposition it cites to Myers v. County of Somerset, 515 F. Supp. 2d 492 (D.N.J. 2007), which involves alleged violations of the First, Fourth, Fifth, and Fourteenth Amendments of the Federal Constitution arising from the termination of his employment and does not involve regulatory rulemaking. The Department's consistent application of the Holding Company Act to the acquisition of attorney-in-fact results, in and of itself, only in additional regulatory disclosures from the attorney-in-fact, and does not result in the deprivation of life, liberty, or property. Compare In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 343 (2011) (BPU's establishment of a "rule" which would govern pass-through of costs in future rate-setting required compliance with the Administrative Procedure Act (APA)).

AACCNJ's reliance on Lower Main Street Associates v. New Jersey Housing and Mortgage Finance Agency, 114 N.J. 226 (1989), is likewise misplaced. (See AACCNJb12). The Court in Lower Main Street found that the failure of due process in that matter stemmed from a failure to "provide standards to guide both the regulator and the regulated," as quoted in AACCNJ's brief. Ibid.; 114 N.J. at 236. The Court invalidated the rule at issue "because

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of its omission of adequate standards." Ibid. Most importantly, the Court found that rule was invalid because it was not authorized by the enabling legislation. 114 N.J. at 230.

The Bulletin does not lack standards or statutory authorization. In fact, it is very precise in setting forth the statutes, rules, and Statutory Standards of Accounting Practices that apply to reciprocal exchanges, including the Holding Company Act. For that reason, and because the Bulletin is not a de facto rule, it fully comports with due process.

B. The Bulletin Reflects an Administrative Policy Regarding the Holding Company Act That Has Previously Been Expressed in an Official and Explicit Agency Determination, Adjudication or Rule.

The Department has a near-decade-long history of applying the Holding Company Act to reciprocal insurance exchanges in official and explicit agency determinations, dating back to 2014. Indeed, the Department has provided three examples of official Department Orders that apply the Holding Company Act to the acquisition of an exchange. The Amicus would have this court ignore these orders and cynically suggests that it is not the last ten years of the Department practice that counts, but rather the 45 years that preceded the last ten. (AACCNJb4).

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In 2014 the Department issued Order No. A14-112 (the "2014 Order"), approving the acquisition of New Jersey Skylands Management, LLC, Attorney-in-Fact of New Jersey Skylands Insurance Association ("NJSIA") and New Jersey Skylands Insurance Company ("NJSIC"). The Commissioner concurred with the Hearing Officer's Report and approved the acquisition "pursuant to N.J.S.A. 17:27A-2," the provision of the Holding Company Act that regulates acquisition of, control of, or merger with a domestic insurer. (Ja3). As explained in greater detail in the Hearing Officer's Report, NJSIA was (and still is) a New Jersey-domiciled inter-insurance reciprocal insurance exchange. (Ja4).

The Hearing Officer's Report includes numerous citations to specific subsections of N.J.S.A. 17:27A-2. (Ja4-13). That includes N.J.S.A. 17:27A-2(d)(1), which provides that the Commissioner shall approve an acquisition of control of a domestic insurer unless he or she finds that one of more of seven disqualifying factors set forth therein exist. (Ja8). The Hearing Officer conducted a detailed analysis of each of those seven factors (Ja8-12) and based on that analysis, recommended that the proposed acquisition be approved. (Ja13).

The same is true of two subsequent Orders and Hearing Officer Reports, leaving no doubt that for at least the past nine years, the Commissioner and the

Department have interpreted the Holding Company Act as applying to reciprocal insurance exchanges. The three orders are just a few examples and constitute evidence of an administrative policy that has previously been expressed in an official and explicit agency determination, adjudication or rule. Metromedia, 97 N.J. at 331.

C. The Bulletin Does Not Constitute a Material and Significant Change from a Clear Past Agency Position on the Identical Subject Matter.

The Bulletin's reminder that the Holding Company Act applies to reciprocal insurance exchanges is consistent with the Department's position as set forth in the Orders and Hearing Officer Reports described above and in the Department's brief submitted to the court on November 6, 2023. Airwork, 97 N.J. at 301 ("it has not been demonstrated that the determination represents a material and significant change in administrative policy, even though the taxing authority did not impose the tax"). All of those documents are posted on the Department's website. AACCNJ's statement that "The contention that reciprocal exchanges had an obligation to read reports issued by a Hearing Officer to glean whether the Holding Company Act applies to them is a bridge too far" (AACCNJb7) is both mystifying and irrelevant – mystifying because it advances the notion that members of the highly regulated insurance market have no obligation to stay up-to-date on current law, and irrelevant because whether

or not the other reciprocal insurance exchanges stay current with the law, the orders and hearing officer reports document the Department's unwavering interpretation of the Holding Company Act as applying to reciprocal insurance exchanges.

POINT II

SSAP No. 25 APPLIES TO RECIPROCAL INSURANCE EXCHANGES AND THEIR ATTORNEYS-IN-FACT.

While the AACCNJ "adopts the relevant facts from Appellant's Brief", it is noticeably silent on the application of SSAP No. 25 to insurers and their related parties. SSAP No. 25 is important in its protection of the insurance buying public, including the policyholders/subscribers of NJ PURE, and in ensuring the financial stability of the industry, especially where insurance liabilities could extend for many years. AACCNJ thus provides uncritical support for RAF's ability to earn undisclosed profits at the expense of its consumer subscribers. Indeed, the AACCNJ should be more concerned with the due process property rights of its individual members rather than the alleged right of the attorney-in-fact to avoid full transparency to its subscriber members in violation of its fiduciary duty to them.

For the reasons explained in greater detail in the Department's brief, filed November 6, 2023, based on the SSAP No. 25's plain language and New Jersey

statute, SSAP No. 25 applies to transactions between reciprocal insurance exchanges and attorneys-in-fact. (Rb25-31). The reciprocal insurance exchange receives premium income from its policyholders/subscribers. The reciprocal insurance exchange pays fees to the attorney-in-fact for the services it performs in managing the reciprocal insurance exchange. The reciprocal insurance exchange reports those fees on its annual financial statement as expenses. (Rb28). In the case of RAF, the fees are not to exceed 12.5% of annual premiums paid by the policyholder/subscriber. (Ra13, ¶ 8).

SSAP No. 25 requires that payments between related parties, such as the attorney-in-fact and the reciprocal insurance exchange, be made on an arm's-length basis and be fair and reasonable. (See Ra10, ¶¶ 20-21). Under SSAP 25 the attorney-in-fact fees are intended to pay the attorney-in-fact for services rendered, not to provide it with excessive profits from a related party. RAF argues, and AACCNJ implicitly joins in its argument, that RAF need not account for how this 12.5 % of annual premiums is spent, or in any way justify that the services provided to the exchange in return for these payments are fair and reasonable. RAF's argument that the premiums it receives are immune from scrutiny by the Department cannot be justified simply because the policyholder/subscriber has signed a power of attorney. A simple hypothetical will demonstrate the inequity of that position.

Each policyholder/subscriber signs a power of attorney that authorizes that up to 12.5 % of premiums paid for its insurance coverage can be used to pay the attorney-in-fact for management services provided to the reciprocal insurance exchange. If there are $20 million in premiums, the attorney in fact could charge up to $2.5 million (12.5% x $20 million) for providing management services to the reciprocal insurance exchange. The hypothetical further assumes the reciprocal insurance exchange has reported a $2.5 million loss in overall income during the year and is deemed to be in a hazardous financial condition. If the attorney-in-fact has provided only $500,000 in services to manage the reciprocal insurance exchange, it would not be fair and reasonable for the attorney-in-fact to reap $2 million in profits while the reciprocal insurance exchange is burdened with $2.5 million in expenses. Such a result could jeopardize claim payments and disadvantage subscribers who could be entitled to savings realized by the reciprocal insurance exchange, if any.

SSAP No. 25 provides the important regulatory protection that the insurance-buying public relies on to ensure that related party transactions are fair and reasonable. Yet, RAF's position (and by extension, that of the AACCNJ) would eliminate the requirement for the attorney-in-fact to justify the payments it receives as fair and reasonable for the services it provides to the

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exchange. Ironically, AACCNJ's position could also have an adverse effect on its members who directly or indirectly rely on medical-malpractice insurance coverage from NJ PURE.

CONCLUSION

For these reasons and those set forth in the Department's November 6, 2023 brief, the court should affirm the Department's issuance of the Bulletin.

Respectfully submitted,

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<td>APPELLATE DIVISION
DOCKET NO. A-001626-22

ON APPEAL FROM THE AGENCY DECISION ENTERED ON DECEMBER 20, 2022, BY THE STATE OF NEW JERSEY, DEPARTMENT OF BANKING AND INSURANCE

Submitted: November 20, 2023</td>
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BRIEF OF *AMICUS CURIAE* THE AFRICAN AMERICAN CHAMBER OF COMMERCE OF NEW JERSEY IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS*

People of color have long fought for – and highly value – the rights which fall under the broad category of "due process." New Jersey's Administrative Procedure Act (the "APA") protects certain of those rights and it prevents state agencies from unilateral rulemaking without input from impacted parties. One of the most effective tools used by the African American Chamber of Commerce of New Jersey, Inc. (hereinafter "AACCNJ" or "*Amicus*") to advance its objectives is to comment on rules proposed by state agencies ***before*** they are adopted. Protection of the right to be heard in the rulemaking process is the reason why the AACCNJ is participating in this matter.

The AACCNJ is a nonprofit association that seeks to economically empower and sustain African American communities by facilitating entrepreneurship and free enterprise activity within the state. The AACCNJ is the first chamber in the State of New Jersey and the first African-American chamber in the country to be accredited by the U.S. Chamber of Commerce. Serving more than 800 active members,[1] the AACCNJ has become a central beacon for minority and non-minority advocacy building, community and

1. New Jersey Physicians United Reciprocal Exchange ("NJ PURE") is a member of the AACCNJ.

government relations, business development, job retention, and education attainment.

The AACCNJ serves as a mechanism for communication, program creation, and strategic implementation of initiatives and resolutions that help build New Jersey's economic landscape, for the 1.2 million African Americans in New Jersey and over 80,000 African American owned businesses in the state, many of which are small businesses. While providing a collective voice for New Jersey's African American business leaders, the AACCNJ promotes economic diversity and fosters a climate of growth through major initiatives on educational and public policy levels. One of the AACCNJ's primary goals is to develop a public policy advocacy strategy that aligns with government at the municipal, county, and state levels while producing sustained value for its constituency and the AACCNJ regularly engages with State legislators and agencies to ensure that New Jersey's 1.2 million African American residents and 80,000 businesses have the required access so their voices are heard.

Amicus submits this brief in full support for Appellant Reciprocal Attorney-in-Fact, Inc. ("RAF"), as attorney-in-fact for New Jersey Physicians United Reciprocal Exchange ("NJ PURE")'s appeal, which seeks to invalidate Bulletin No. 22-11 (the "Bulletin"), issued by the New Jersey Department of

Banking and Insurance (the "Department") on December 20, 2022, as improper rulemaking. Specifically, the ACCCNJ seeks to participate in this matter in order to highlight the lack of procedural due process caused by the Department's failure to adhere to the APA when it issued the Bulletin. Because the Department deprived RFA of the opportunity to be heard on the issues addressed by the Bulletin, it should be invalidated as improper rulemaking. Thus, *Amicus's* position is that, prior to the implementation of a rule, due process is required so as to "assure that all recesses of the problem will be earnestly explored." *See Whelan v. N.J. Power & Light Co.*, 45 N.J. 237, 244 (1965).

For the reasons set forth above, *Amicus*'s "participation will assist in the resolution of an issue of public importance." R. 1:13-9. *Amicus* respectfully submits this brief pursuant to New Jersey Court Rule 1:13-9.

STATEMENT OF RELEVANT FACTS

Amicus adopts the relevant facts from Appellant's Brief as if fully set forth herein and, for the sake of brevity, will not repeat them.

ARGUMENT

I. PRIOR ORDERS OF THE DEPARTMENT AND THE HEARING OFFICERS' REPORTS DO NOT SUPPORT THE DEPARTMENT'S CONTENTION THAT THE BULLETIN IS CONSISTENT WITH PAST AND CURRENT PRACTICE

The Bulletin was issued in December 2022, more than fifty years after the passage of the New Jersey Insurance Holding Company Systems Act, N.J.S.A. 17:27A-1 to -14 (the "Holding Company Act"). According to the Department, the Bulletin merely clarified what had always been the law: reciprocal exchanges are covered by the Holding Company Act. Assuming that this is true, it raises a simple question: why did the Department wait more than half a century to issue the Bulletin and why issue it now?

Anticipating that there might be a question about a delay of more than fifty years in issuing the Bulletin, the Department claims that the Bulletin is "consistent with the Department's past and current practice." *See* Department's Opposition Brief, at p. 19. As support for that statement, the Department points to three orders that it contends put NJ PURE and other reciprocal exchanges on notice that they are subject to the provisions of the Holding Company Act. Those orders are: (i) Order No. A14-112 (dated September 12, 2014), (ii) Order its Order No. A20-10 (dated December 29, 2020), and (iii) Order No. A22-13

(dated December 22, 2022). A close review of these orders reveals the defects in the Department's argument.

The first order, Order No. A14-112, was issued forty-four years after the passage of the Holding Company Act and it is hardly a clear statement that reciprocal exchanges fall within the purview of the Holding Company Act. Instead, the two sentence long order merely approves the acquisition of Skylands Management, LLC pursuant to the provisions of the Holding Company Act. This order falls far short of being a clear statement of the law. Order No. A-14-112 is attached hereto as **Exhibit A**.

The second order, Order No. A20-10, was issued six years after the first order and is no more illuminating than its predecessor. The second order pertains to a subsequent acquisition of the same entity so a reader of this order (assuming that reciprocal exchanges had an obligation to review an order approving an acquisition) and the first order could easily infer that the statements therein are limited to that entity. Nothing in it indicates that it applies to all reciprocal exchanges.[2] Once again, it is unreasonable to contend that this

2. In fact, the words "reciprocal exchange" do not appear in either Order No. A14-112 or Order No. A20-10.

order clearly notifies reciprocal exchanges that they fall within the purview of the Holding Company Act. Order No. A20-10 is attached hereto as Exhibit B.

The timing of the third order, Order No. A22-13 and the timing of the issuance of the Bulletin is remarkable: the Bulletin appeared two days before the order was issued. This was not a coincidence and what happened is obvious: the Department issued the Bulletin in preparation for issuing Order No. A22-13 which was waiting in the wings. The Bulletin changed the rules and, and for the first time, established that reciprocal exchanges are subject to the Holding Company Act. Order No. A22-13 is attached hereto as **Exhibit C**.[3]

Two days after the Bulletin was issued and implementing the rule set forth in it, the Department took the position in Order No. 22-13 that the reciprocal exchange "shall ensure compliance with all relevant laws and requirements" including the Holding Company Act. *See* **Exhibit C**, at pp. 1-2. This language does not appear in either of the first two orders. The fact that this language appears for the first time in Order No. 22-13 – issued ***after*** the Bulletin – is proof

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3. The Bulletin disingenuously begins by asserting the Department "has received inquiries regarding the laws and requirements relevant to" reciprocal exchanges. Assuming that there actually were inquiries, they show that the Department failed for more than fifty years to provide notice that the Holding Company Act applies to reciprocal exchanges.

that the Bulletin changed the legal landscape. This was improper rulemaking, done more than fifty years after the passage of the Holding Company Act, that must be invalidated.

Recognizing that the three orders are flimsy support for the proposition that the Department had clearly enunciated that reciprocal exchanges are covered by the Holding Company Act, the Department makes the argument that the Hearing Officer's Reports filed in each case applied the Holding Company Act to reciprocal exchanges thereby providing them with notice of the Department's position. The contention that reciprocal exchanges had an obligation to read reports issued by a Hearing Officer to glean whether the Holding Company Act applies to them is a bridge too far.

This is particularly so when NJ PURE has always conducted itself as if the Holding Company Act did not apply to reciprocal exchanges and the Department never contradicted it.[4] The bottom line is that, for more than fifty

4. The Department states that if "NJPURE (or any other reciprocal exchange)" has not made the filings required by the Holding Company Act, it merely shows it was "out of compliance with the statute." See Department's Opposition Brief, at p. 13. This statement seems to imply that none of the reciprocal exchanges made these filings which, if true, indicates a remarkable lack of enforcement by the Department. Conversely, if NJPURE was the only reciprocal exchange that failed to make these filings, presumably it would have stood out from the others and received attention from the Department. In either

years, the Department produced no guidance concerning the applicability of the Holding Company Act to reciprocal exchanges. Then, without any notice or due process, abruptly changed the rules by issuing the Bulletin and used it as the basis for Order No. 22-13.

II. THE DEPARTMENT'S BULLETIN CONSTITUTES IMPROPER RULEMAKING AND IS NOT ENTITLED TO DEFERENCE BECAUSE IT IS NOT PROCEDURALLY REGULAR

The Department's issuance of the Bulletin was far from "procedurally regular," and, for that reason, it is not entitled to deference. In *Matter of Repeal N.J.A.C. 6:28*, 204 N.J. Super. 158, 160 (App. Div. 1985), the Appellate Division stated that: "A regulation adopted by a state agency is presumed to be reasonable and valid. If ***procedurally regular***, it may be set aside only if it is proved to be arbitrary and capricious or if it plainly transgresses the statute it purports to effectuate, or if it alters, the terms of the statute or frustrates the policy embodied in it." (Internal citations omitted) (emphasis added).

With respect to the rulemaking process, "[i]f an agency determination or action constitutes an administrative rule, then its validity requires compliance with the specific procedures of the APA that control the promulgation of rules."

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event, the Department's conduct failed to provide notice of the supposed reach of the Holding Company Act.

Estate of Skorski v. New Jersey Economic Development Authority, No. A-3314-17T2, 2019 WL 1304010, at *6 (N.J. Super. Ct. App. Div. Mar. 20, 2019) (internal citations and quotations omitted). The Court in *Skorski* stated:

> These procedures require agencies to, among other things, publish notice of the proposed rule in the New Jersey Register, N.J.S.A. 52:14B-4(a)(1), 'afford all interested persons a reasonable opportunity to submit data, views, comments, or arguments, orally or in writing,' N.J.S.A. 52:14B-4(a)(3), and '[p]repare for public distribution…a report listing all parties offering written or oral submissions concerning the rule, summarizing the content of the submissions and providing the agency's response to the data, views, comments, and arguments contained in the submissions,' N.J.S.A. 52:14B-4(a)(4).

Estate of Skorski v. New Jersey Economic Development Authority, No. A-3314-17T2, 2019 WL 1304010, at *6 (N.J. Super. Ct. App. Div. Mar. 20, 2019) (internal citations and quotations omitted). The Bulletin was a substantial departure from fifty years of regulation, constituted de facto rulemaking and should not be given deference because due process was ignored.

The Supreme Court of New Jersey has stated, "Where the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rule-making procedures should be invoked." *Metromedia, Inc. v. Dir., Div. of Tax'n*, 97 N.J. 313, 330-31 (1984) (internal citations omitted). Furthermore, "[t]he procedural

requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that should surround the ultimate agency determination." *Id*. at 331 (internal citations omitted). "These procedures call for public notice of the anticipated action, broad participation of interested persons, presentation of the views of the public, the receipt of general relevant information…and the opportunity for continuing comment on the proposed agency action before a final determination." *Id*. at 331 (citing N.J.S.A. 52:14B-4).

"When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as procedural due process." *Myers v. County of Somerset*, 515 F. Supp. 2d 492, 505 (D.N.J. 2007). By failing to adhere to the rulemaking policies set forth in the APA when it issued the Bulletin, the Department violated the procedural due process rights of reciprocal exchanges, their AIFs, and other similarly situated institutions.

On this point, the Supreme Court of New Jersey has held that, "administrative agency action, and an agency's discretionary choice of the procedural mode of action, are valid only when there is compliance with the provisions of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to-

15, and due process requirements." *In re Provision of Basic Generation Service Period Beginning June 1 2008*, 205 N.J. 339, 347 (N.J. 2011) (internal citations omitted).

Generally speaking, "[d]ue process requires notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Wright v. Owens Corning*, 679 F.3d 101, 108 (3d Cir. 2012) (internal citations and quotations omitted). Furthermore, even "where…an administrative agency must make a decision that is not subject to the requirements for rulemaking or contested cases imposed by the APA, principles of administrative due process apply to protect against arbitrary action." *In re Consider Distribution of Casino Simulcasting Special Fund (Accumulated in 2005)*, 398 N.J. Super 7, 21 (App. Div. 2008) (internal citations and quotations omitted). The Court continued that, "[i]n such cases, the agency must select an informal or hybrid procedure that satisfies the fundamental requirements of procedural due process and administrative fairness by providing adequate notice, a chance to know opposing evidence, and to present evidence and argument in response." *Id*. (Internal citations and quotations omitted).

It is the role of this Court to ensure that agencies within the State of New Jersey conform to the basic tenets of due process. *See In re N.J.A.C. 7:1B-1.1 Et Seq.*, 431 N.J. Super. 100, 129 (App. Div. 2013) (internal citations omitted); *see also Main St. Assocs. v. N.J. Hous. & Mortg. Fin. Agency*, 114 N.J. 226, 236 (1989) (rulemaking that does not "conform[] with basic tenets of due process and provide[] standards to guide both the regulator and the regulated," will be set aside).

By issuing the Bulletin fifty years after the passage of the Holding Company Act and without providing any notice, a hearing, or an opportunity for the public to comment on the substance and implications of the Bulletin, the Department engaged in improper de facto rulemaking in violation of the APA.

CONCLUSION

For the foregoing reasons, *Amicus* AACCNJ respectfully submits that this Court should invalidate the Bulletin issued by the New Jersey Department of Banking and Insurance so that reciprocal exchanges in the State of New Jersey, like NJ PURE, can be afforded proper notice, a hearing, and an opportunity to comment on the substance of the Bulletin, prior to any material change in the implications of the Holding Company Act, in accordance with the APA and in preservation of their procedural due process rights.

Respectfully submitted,

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IN THE MATTER OF BULLETIN NO. 22-11	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISON Docket No. A-001626-22 CIVIL ACTION ON APPEAL FROM THE AGENCY DECISION ENTERED ON DECEMBER 20, 2022 BY THE STATE OF NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE

BRIEF & APPENDIX OF RECIPROCAL MANAGEMENT CORP. IN SUPPORT OF MOTION TO INTERVENE

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PRELIMINARY STATEMENT

Reciprocal Management Corporation ("RMC"), the attorney-in-fact ("AIF") for Citizens United Reciprocal Exchange ("CURE" or "Exchange"), respectfully files this motion to intervene so that it may protect its interests. The heart of this appeal concerns whether the New Jersey Department of Banking and Insurance (the "Department") engaged in *de facto* rulemaking through its issuance of Bulletin No. 22-11 (the "Bulletin") (Ra. 001). The Department contends that the Bulletin is merely a guidance document meant to clarify the state of *existing* law governing its regulation of reciprocal exchanges and their AIFs. In fact, in its papers, the Department relies on interactions *with RMC* as proof of its assertions yet omits any reference to decades of course-of-conduct evidence *with RMC* to the contrary. Most importantly, this vital evidence is not in the record solely due to the Department's unilateral decision to issue a Bulletin, rather than engage in the rulemaking process outlined in the Administrative Procedure Act ("APA").

Under the APA, a rule change requires at least 30 days' notice, comment opportunity, and a hearing. N.J.S.A. 52:14B-4(a)(1). Had that occurred, RMC would have received a "reasonable opportunity to submit data, views, comments, or arguments, orally or in writing." N.J.S.A. 52:14B-4(a)(3). Such evidence–submitted by RMC, RAF, or any other reciprocal exchange or AIF in the state–would have become part of the record in a subsequent appeal of the Department's rulemaking

authority. To be sure, R. 2:2-3 allows for immediate appellate review of rules promulgated by an administrative agency because the APA's notice-and-comment procedure results in a fair opportunity for all interested parties to be heard and a complete record to be developed.

Here, there was no such proceeding below because the Department characterized its actions as "guidance" rather than rulemaking. Whether right or wrong, the Department circumvented the notice-and-comment process altogether, resulting in a severely limited record comprised of: (1) documents concerning acquisitions involving reciprocal exchanges and their AIFs (*including RMC*), which the Department alleges prove its course-of-conduct, and (2) correspondence between the Department and RAF. The Bulletin is *not*, however, an agency determination applicable only to RAF regarding a discrete issue. Rather, it is reflective of a general standard with widespread coverage and continuing effect as to all reciprocal exchanges and their AIFs, representing the exact type of *de facto* rulemaking prohibited by the New Jersey Supreme Court in Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984), when the APA's due process requirements are violated. The Department's issuance of the Bulletin has left RMC–and every other reciprocal exchange/AIF in this state–with no recourse but to seek intervention to ensure a full and accurate record on this important issue of general applicability.

Indeed, in the Department's November 6, 2023, opposition brief, and again in its January 16, 2024 opposition to RMC's Motion for Leave to appear as Amicus Curiae, the Department squarely placed non-party *RMC's* history of dealings with the Department at issue when opposing *RAF's* legal challenge to the Bulletin, with no meaningful way for any party to rebut the Department's factual assertions absent a supplementation of the record. In fact, at footnote 3 of its November 6, 2023 brief, the Department observed that RMC and CURE "are not parties to this appeal," but nevertheless relied upon its Order approving an acquisition *of RMC*, which provided, "among other provisions, that the applicants comply with the Reciprocal Exchange Act and the Holding Company Act, along with regulations promulgated thereunder." (Db. 22) The Department then implied that overlapping ownership between *RMC* and RAF imputed tacit acceptance of its position *by RAF*. (Db. 22-23)

As there was no proceeding below in which RMC could have intervened, RMC is acting promptly on review of the Department's recent submissions to this Court. RMC is concerned that it may well be bound by this Court's decision in future, separate proceedings, without having been heard in this matter, and without the benefit of a full and accurate record. Accordingly, RMC respectfully requests that this Court grant its motion to intervene, as the failure to do so would set a dangerous precedent incentivizing governmental agencies to bypass the APA's due process requirements in future proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Relevant to this motion, this is an appeal between RAF and the Department regarding the issuance of Bulletin 22-11. (Ia. 7) RMC is not a party to this appeal, although the Department nevertheless relies on its transaction history with RMC as evidence in support of its position *vis-à-vis* RAF.

The invocation of RMC by the Department stems from a transaction involving CURE, RMC and MGG Investment Group, LP ("MGG") to secure capital to fund an expansion into a new market. During that process, beginning in August 2021, the Department officially indicated, for the first time, that RMC and CURE fell into the definition of an insurer within New Jersey Insurance Holding Company Systems Act, N.J.S.A. 17:27A-1 to -14 (the "Holding Act"), and that a Form A was required before it could approve the transaction. (Ia.1-2).[2] Indeed, to the contrary, the Department had previously acknowledged to RMC and CURE that legislation was required to resolve the issue of whether the Holding Act applied, noting in a 2007 Management Letter that the Department was "in the process of recommending legislation similar to the NAIC model law governing Attorney-in-Fact Reciprocal

[1]The Procedural History and Statement of Facts are so intertwined in the present matter that they have been combined for clarity and the convenience of the court.

[2] "Ia." refers to the putative Intervenor's appendix, included with this brief.

Exchanges, that will address the issue regarding the relations between an Attorney-in-Fact and its affiliates. To date, the decision has not been resolved and the Department is still waiting for legislative approval." (Aa.365-66) [3] Not only has no such legislation ever passed but, even more telling, the Department never sought to apply the Holding Act to RMC or CURE in the course of five subsequent financial examinations, which are required by statute to assess compliance with existing statutes and regulations, as well as statutory accounting principles. CURE also submitted nearly eighty (80) quarterly and annual financial statement filings during this time with no opposition from the Department regarding the application of the Holding Act until its reversal of course in August 2021, as noted above.

In July 2022, the Department then indicated its new position that RMC had to treat transactions involving attorney-in-fact fees between unrelated *individual subscribers* and RMC as "related party" transactions, which would then allow such fees to be regulated within the definition of Statement of Statutory Accounting Principle No. 25 ("SSAP No. 25"). RMC always conformed to the legitimate

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[3] "Aa." refers to the December 4, 2023 Appendix submitted by RMC in connection with its Motion for Leave to Appear as Amicus Curiae. That motion was denied on January 23, 2024. (Ia.10). RMC recognizes that such documents are not part of the existing record on this appeal in this Court, and, indeed, the crux of its entitlement to intervention is to be permitted to move to supplement/settle the record with additional documentation responsive to the Department's assertions regarding RMC. R. 2:5-5.

requirements of SSAP No. 25, which governs accounting and disclosures for transactions between affiliates and related parties, defined as "entities that have common interest as a result of ownership, control, affiliation or by contract." Such a requirement on attorney-in-fact fees paid by individual subscribers to RMC had never been previously suggested by the Department to RMC, much less imposed on RMC.

In fact, in September 2022, *before* the Bulletin was issued, RMC submitted an unambiguous letter to the Department disputing its new application of the Holding Act and SSAP No. 25. to its attorney-in-fact fees. (Ia.2-6) To be clear, RMC does *not* dispute that SSAP No. 25 applies to reciprocal insurance exchanges, and has always complied with the requirements duly imposed thereunder. RMC did not and does *not* agree with the Department's ***new*** position; *i.e.*, that SSAP No. 25 generally applies to the power-of-attorney executed between individual previously unknown, unrelated subscribers and the AIF such that transactions between the AIF and individual subscribers are "related party" transactions, as contemplated by SSAP No. 25. See N.J.S.A.17:50-7.[4]

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[4] RMC respectfully maintains that any such transactions are regulated by virtue of the contractual and statutory duties flowing from the power-of-attorney agreement, not SSAP No. 25. See generally N.J.S.A.. § 17:50-3. Indeed, the AIF's authority, itself, derives from the subscribers. See Michael A. Haskel, Esq., The Legal Relationship Among A Reciprocal Insurer's Subscribers, Advisory Committee and Attorney-in-Fact, 6 N.Y. CITY L. REV. 35, 47 (2003) ("The source of the attorney-

On December 20, 2022, the Department published Bulletin No. 22-11, indicating its position that the Holding Act and SSAP No. 25 applied to reciprocal exchanges and their AIFs. (Ra. 001)[5] On December 21, 2022, the Department approved the RMC/CURE/MGG transaction, and on December 22, 2022, the Department entered an Order approving the transaction while requiring that RMC, CURE, and MGG to comply with the provisions of the Holding Act and SSAP No. 25. (Ra. 031). Specifically, the order states:

> COMPLIANCE WITH RELEVANT LAWS AND REQUIREMENTS. The Applicants shall ensure compliance with all relevant laws and requirements, including, but not limited to, N.J.S.A. 17:50-1 to -19, N.J.S.A. 17:27A-1 to -14; N.J.A.C. 11:1-35.1 to -35.14; and N.J.A.C. 11:2-39.1 to -39.14; all relevant Statements of Statutory Accounting Principles ("SSAP"), including but not limited to, SSAP NO. 25; submission of all required filings, including but not limited to, financial statements and Risk-Based Capital Reporting; and, consents to the application of proceedings pursuant to N.J.S.A. 17:30C-1 to -31 if the financial condition warrants institution of delinquency proceedings in this State.

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in-fact's powers is the subscribers, who ordinarily appoint the attorney-in-fact through a power of attorney which may be contained in the subscriber agreement.") (citation omitted).

The existence of this debate underscores the point that the APA was required to be followed when imposing new requirements on reciprocal exchanges and their AIFs despite the absence of a statutory or regulatory mandate.

[5] "Ra." refers to the Joint Appendix previously submitted by the parties to this appeal.

(Ra. 031-32).

To be clear, RMC is ***not*** appealing that order, nor does it seek to collaterally attack the December 2022 order via this intervention motion. From RMC's perspective, the obligations imposed under the order are simply a re-statement that SSAP No. 25 must be followed, a proposition which RMC does not dispute. RMC *does*, however, dispute the Department's interpretation of SSAP No. 25, as expressed through Bulletin 22-11, that it has the prospective ability to regulate individual AIF fee transactions as "related party" transactions. (Ia. 2-6)

During the briefing on this appeal, the Department interjected RMC into this matter in support of its position. The Department's November 6, 2023 brief states: "Importantly, none of the parties to the acquisition objected to or challenged the 2022 Order." (Db. 22-23). Thus, the Department has placed this before the Court as an "important" consideration on this appeal, although RMC respectfully submits that it is not accurate and, further, to the extent any decision is rendered adopting or incorporating that assertion, RMC faces the prospect of being estopped or otherwise limited in future matters, without having had any opportunity to respond to the Department's November 6, 2023 submission on this score.

Secondary to the Department's brief, on December 4, 2023, RMC sought leave to appear as amicus in this matter. In connection with its application, RMC appended numerous exhibits to its application. Those exhibits included extensive

pre-Bulletin documents reflecting the Department's course of conduct (See Filing I.D. 1600341), all of which would have been available for submission in connection with a proper notice-and-comment period under the APA had such a procedure been followed.

RMC also included certain documents created post-Bulletin, including a November 2023 certification from the former Chief Insurance Examiner of the Office of Solvency Regulation with the Department, confirming that he had not previously encountered a situation "where the Department insisted on applying SSAP No. 25 to the AIF Fees paid by the individual subscribers to the AIF."[6]

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[6] In its January 23, 2024 order denying RMC's Motion for Leave to Appear as Amicus Curie, this Court held: "We have already denied a motion to supplement the record with documents it has included in its nearly 500 page appendix, none of which are part of this record. See Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 89-90 (2014) (explaining an amicus must accept the case as it finds it). Its participation will not sufficiently assist in the resolution of an issue of public importance." (Ia. 8)

RMC acknowledges that such documents are not, at this juncture, part of this record on appeal *from the Bulletin*. However, for purposes of any further potential appeal as to the determination as to whether additional evidence and information exist which render intervention appropriate and mandate adherence to the APA, RMC respectfully submits that such filings are a component of the record. R. 2:5-4 ("The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies [].").

(Aa.490-494). While such a certification from 2023 cannot be part of the administrative determination record for a 2022 Bulletin, this underscores the point that a notice-and-comment period to allow for the submission of such evidence to the Department was necessary in this case.

Those exhibits were in response to certain assertions made by the Department in its papers.[7] The Department opposed that application; at page seven (7) of the Department's opposition filing, it observed that there is "overlapping ownership" between RAF and RMC such that the two entities are "operating together in this appeal []."

RMC's application for leave to appeal as amicus was denied by order of January 23, 2024. (Ia. 10) Thus, RMC is in a position where its interactions with the Department and relationship to RAF have been invoked by the Department against RAF's position on appeal, without the ability to be represented in its own right with regard to the assertions specifically directed to RMC. RMC accordingly seeks leave to intervene for this limited purpose.

[7] RAF previously sought to supplement the record to include additional documentation. That motion was denied by order of May 30, 2023. (Ia. 9)

LEGAL ARGUMENT

I. PUBLIC POLICY REQUIRES THAT RMC SHOULD BE PERMITTED TO INTERVENE AS AN INTERESTED PARTY TO THIS PROCEEDING.

A. The absence of the procedural safeguards provided by the Administrative Procedures Act has prevented the creation of a complete and proper record for determination of the merits of the issue.

As noted, the procedural history of this case is unusual in that there was no notice-and-comment period, nor was there a proceeding before an administrative agency or trial court. See R. 4:33-3; N.J.A.C. § 1:1-16.1. The challenged Bulletin has already been issued by the Department and the matter is pending before this Court. Thus, the supervision and control of these proceedings rests with this Court. R. 2:9-1 (a).

RMC acknowledges that this Court may *ultimately* hold the Department's issuance of the Bulletin was appropriate and that its actions did not violate the APA.

RMC contends, however, that such a conclusion would be inequitable without consideration of a full and accurate record of the Department's actions and course-of-conduct leading up to the issuance of the Bulletin. In this regard, the Department's submissions to this Court have squarely placed these issues in contention. The Department is affirmatively relying on Order No. A22-13, approving the acquisition of non-party RMC, as proof of the Department's past

conduct and interpretation of the Holding Act and SSAP No. 25. The Department's past conduct is at the fundamental core of what the Court needs to decide to determine whether the Department has engaged in de facto rule making.[8] At the same time, the Department has opposed the introduction of evidence contrary to its position on the basis that it is not properly in the record. This contradiction only serves to magnify the untenable procedural posture that interested parties, such as RMC, face when challenging an administrative agency's action on the grounds that the agency engaged in *de facto* rulemaking.

Indeed, R. 2:5-4 controls what comprises the record on appeal. It states:

> **Contents of Record.** The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court. The portions of the record that must be included in the appendix filed by appellant are set forth in Rule 2:6-1(a).

R. 2:5-4 (a). Similarly, R. 2:2-3, under which this appeal is pending, allows for immediate appellate review as of right, "to review final decisions or actions of any

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[8] See Metromedia, 97 N.J. at 331-32 (noting that one factor to be considered when determining whether an agency has engaged in *de facto* rulemaking is whether the decision "(5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter . . . .").

state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer . . . ." R. 2:2-3(a)(2). Both of these rules assume that an agency has followed the APA in issuing a decision, action, or in promulgating a rule, thus ensuring an appeal of those actions will have the benefit of a full record. When a party alleges that an agency has violated the APA, such as in this case, the rules do not have an adequate safeguard to ensure, as a matter of public policy, that all evidence relevant to the agency's actions become part of the record on appeal.

Assuming, for purposes of this motion, that the Department did engage in *de facto* rulemaking through the issuance of the Bulletin and this Court remands the matter back to the Department to proceed under the APA's rulemaking process, the Department would then be required to publish a proposed rule and provide 30 days' notice, comment opportunity, and a public hearing. N.J.S.A. 52:14B-4(a)(1). Interested parties would receive a "reasonable opportunity to submit data, views, comments, or arguments, orally or in writing," and a public hearing would be held. N.J.S.A. 52:14B-4(a)(3). During that process, RMC, RAF, or any other reciprocal exchange or AIF in the state could submit documents in opposition to the Department's proposed rule, or otherwise challenge the Department's rulemaking authority. These submissions would then appropriately become part of the record on any subsequent appeal.

At present, however, there was no such proceeding below in which an appropriate record could have been developed. Whether right or wrong, the Department circumvented the notice-and-comment process altogether, resulting in a severely limited record comprised of: (1) documents concerning acquisitions involving reciprocal exchanges and their AIFs (*including RMC*), which the Department alleges prove its course-of-conduct, and (2) correspondence between the Department and RAF. The Bulletin is *not*, however, an agency determination applicable only to RAF regarding a discrete issue. Rather, it is reflective of a general standard with widespread coverage and continuing effect as to all reciprocal exchanges and their AIFs, representing the exact type of *de facto* rulemaking prohibited by the New Jersey Supreme Court in Metromedia, Inc., 97 N.J. at 313, when the APA's due process requirements are violated. Thus, the only recourse left for RMC – or indeed for any other reciprocal exchange or AIF in this state – is to join in the appeal to provide context to its prior interactions with the Department, including the circumstances surrounding Order No. A22-13 regarding the acquisition of RMC.

Unless RMC is granted leave to intervene, this Court will be left with no choice but to decide this important matter without the benefit of a full record, thus depriving reciprocal exchanges, their AIFs, and the insurance consuming public the due process required by the APA, as well as the New Jersey and U.S. Constitution,

when an administrative agency engages in *de facto* rulemaking. Public policy and fairness dictate that the Department cannot be permitted to benefit from a process that essentially prohibits this Court from reviewing evidence relevant to the substance of this appeal, simply because the Department chose to characterize its actions as "guidance" rather than rulemaking.

B. Intervention by RMC in this Court is procedurally appropriate and substantively warranted.

Intervention post-judgment is permissible under certain circumstances. See Warner Co. v. Sutton, 270 N.J. Super. 658, 662 (App. Div. 1994) ("Generally, intervention after judgment is allowed if necessary 'to preserve some right which cannot otherwise be protected.'") (quoting Chesterbrooke Ltd. P'ship v. Planning Bd. of Twp. of Chester, 237 N.J. Super. 118, 123 (App. Div. 1989)).

In Warner, non-profit corporations dedicated to the preservation of open spaces sought to appeal a consent order regarding the zoning for the property at issue, and in response to a motion to dismiss the appeal, cross-moved seeking intervention in the Appellate Division. Warner, 270 N.J. at 662. The Appellate Division remanded the matter to the trial court to consider the request for intervention, and, after the trial court denied the request, the Appellate Division reversed, ordering intervention for the sole purpose of pursuing an appeal of the consent order. Id. at

668. See also Coal. for Quality Health Care v. New Jersey Dep't of Banking & Ins., 348 N.J. Super. 272, 281 (App. Div. 2002) (noting that the National Association of Independent Insurers, American Insurance Association, Insurance Council of New Jersey, and Alliance of American Insurers intervened in this Court after health care providers and attorneys appealed the Department of Banking and Insurance's approval of pre-certification plans and policy forms of various insurers).[9]

As this matter involves an agency action, the relevant standard is found at N.J.A.C. 1:1-16.1, which permits intervention to a person or entity "who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene." See also Gill v. N.J. Dep't of Banking & Ins., 404 N.J. Super. 1, 9 (App. Div. 2008) ("Because, however, the complaint was instituted with the agency, the court rules bearing on the right to intervene are not applicable, and the decision to grant intervenor status in an agency proceeding lies in the agency's discretion.").

As part of this assessment, the judge "shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the

[9] Although the Rules Governing Practice in this Court do not have a specific rule on the issue of intervention, this Court's guidelines contemplate moving the Appellate Division, in the first instance, for intervention. See APPELLATE DIVISION GUIDELINES FOR CAPTIONS AND ATTORNEY APPEARANCE SECTIONS IN MEMOS AND OPINIONS, at page 26 (Sept. 2022) (available at https://www.njcourts.gov/sites/default/files/captionsguidelinescorrectedmay08.pdf)

movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters." N.J.A.C. 1:1-16.3. A motion for leave to intervene "may be filed at any time after a case is initiated." N.J.A.C. 1:1-16.2(a).

Analogously, under the Court rules, to show a right to intervention, a party must show: (1) that it an interest in the subject matter of a case; (2) that the disposition of the case could impede its ability to protect that interest; (3) that its interest is not adequately represented by an existing party; and (4) that its application for intervention is timely. R. 4:33-1; Chesterbrooke Ltd. Partnership, 237 N.J. Super. at 124. Alternatively, a court may permit a party to intervene where: (1) its application is made in a timely matter; (2) it has a defense or claim that has a question of law or fact in common with the litigation; and (3) its intervention shall not cause undue delay or prejudice to the existing parties. R. 4:33-2. The rule on permissive intervention is meant "to be liberally construed" by courts. Zirger v. General Acc. Ins. Co., 144 N.J. 327, 341 (1996). The question is whether "intervention will unduly delay or prejudice the adjudication of the rights of the original parties" and whether it will "eliminate the need for subsequent litigation." Id.

II. RMC'S APPLICATION FOR INTERVENTION IS TIMELY AND NON-PREJUDICIAL.

This is an appeal from an administrative action. R. 2:2-3(a)(2). RMC is a non-party to the appeal and its interests were not implicated until the matter was pending on appeal and its conduct was placed at issue by the Department as purported support for the Department's position. This was done via submissions of November 2023 and January 2024.

RMC had no practical opportunity to intervene at administrative agency level. See N.J.A.C. § 1:1-16.1 to -16.6. That is, there was no notice-and-comment period. N.J.S.A. 52:14B-4. As extensively discussed above, a threshold dispute between the existing parties to the appeal is whether the Bulletin is a "regulatory guidance document" that does not require a notice-and-comment period. See N.J.S.A. 52:14B-3a(d.).

RMC maintains that the impact of the Bulletin is such that following the Administrative Procedures Act was required. See In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 349-59 (2011) ("Agencies should act through rulemaking procedures when the action is intended to have a 'widespread, continuing, and prospective effect,' deals with policy issues, materially changes existing laws, or when the action will benefit from rulemaking's flexible fact-finding procedures.") (citation omitted). When evaluating whether an

agency's action is rule-making or an informal agency action, the Court considers whether the action

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) **is intended to be applied generally and uniformly to all similarly situated persons**; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise **expressly provided by or clearly and obviously inferable from the enabling statutory authorization**; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) **constitutes a material and significant change from a clear, past agency position on the identical subject matter**; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Coal. for Quality Health Care, 348 N.J. Super. at 296 (quoting Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331-32 (1984)) (emphasis added).

Had those procedures been followed and the corresponding opportunity for notice, comment, and fact-finding been provided, RMC would not be in a position of having no recourse short of seeking intervention with this Court in connection with what it respectfully submits was a rule change with widespread prospective implications that materially change the existing dynamics between AIFs and the Department. Indeed, RMC would have been given the opportunity to submit evidence and argument as to the "material and significant change from a clear, past

agency position" on this very subject for consideration at the administrative agency level, and a fuller record could have been created at that time.

Given the factual background and unusual procedural posture of this case, RMC is a party with an interest in the substance and outcome of this appeal. RMC's interests are poised to be affected, depending on the disposition of this matter, and it has had no prior opportunity to submit comment and argument. See N.J.S.A. 52:14B-4(a). RMC has had a decades-long relationship with the Department, and the disposition of this case may drastically change how the Department is allowed, prospectively, to scrutinize RMC (and all other AIFs). More fundamentally, allowing this type of change to be imposed on all AIFs *outside* of the rulemaking process required by the Administrative Procedure Act sets a precedent of allowing substantive and dramatic changes to Department position without the safeguards contemplated by the APA.

As to promptness and the lack of prejudice, RMC has acted as promptly as possible in reaction to the November 2023 and January 2024 filings, particularly given the limited and discrete purpose for which it seeks intervention. That is, "[o]n the issue of timeliness, the court must consider the purpose for which intervention is sought." Chesterbrooke Ltd. Partnership at 125.

RMC respectfully submits that the Department would not be prejudiced by RMC's intervention for the limited purpose of rebutting the factual contention that

RMC had no objections or resistance to the Department's position prior to the December 2022 adoption of Bulletin 22-11. The Department itself has filed two separate requests for 30-day extensions for reply briefs before this Court. Indeed, as recently as January 31, 2024, the Department was granted permission to submit a reply brief in response to a separate amicus brief. RMC does not seek a new or extended briefing schedule.

For the reasons above, this Court should allow RMC to intervene herein for the limited purpose of supplementing/settling the record *in specific response* to the factual assertions and implications that RMC willingly and without protest or misgiving accepted the Department's new position *prior* to the adoption of Bulletin 22-11. R. 2:5-5. In the alternative, the matter can be remanded so that the head of the Department can determine if RMC should be permitted to intervene. N.J.A.C. 1:1-16.2(b); see also Warner, 270 N.J. Super. at 668 (remanding the request to intervene to the trial court for determination).

Given the procedural history of this case and the Department's recent invocation of its course of conduct *with RMC* as factual evidence in support of its position, RMC's interests in this regard are not adequately represented before this Court. Only RMC can speak to its actions and position in response to the Department's specific discussion *of RMC's conduct* as it bears on the issues in this

case. Likewise, given that the decision on this case has the potential to affect RMC's future interactions with the Department.

CONCLUSION

For the foregoing reasons, this Court should allow RMC to intervene in this matter for the limited and discrete purpose of supplementing/settling the record in response to the Department's contentions regarding RMC's position in response to the Department's requirements prior to the adoption of Bulletin 22-11.

Respectfully submitted,

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