Testimony of New Jersey Appleseed Public Interest Law Center
with respect to A-3972 (M/L Ratio Calculation)
Before the Assembly Health Committee
(March 14, 2024)

Chairman Conaway, Vice-Chair Lampitt and members of the Committee:

My name is Renée Steinhagen. I am the Executive Director of New Jersey Appleseed Public Interest Law Center ("NJA"), a nonprofit, nonpartisan legal advocacy center based in Newark that has been active in health care reform issues since its inception in 1998. We are one of the founding members of the New Jersey for Healthcare Coalition, which has been working to bring guaranteed, high-quality, affordable health care to all New Jersey residents. As part of this coalition, NJA assists members primarily with respect to strategy, policy and legal analysis, and we were active during the early years after 2010, when New Jersey was busy implementing the Affordable Care Act ("ACA") in this state.

This bill woke me from my 13-year slumber and brought me back into the legal policy debate as to whether ACA medical loss ratio ("MLR") requirements for health insurers offering coverage in the group and individual health insurance markets preempted New Jersey's existing MLR requirements. I pulled out "The Affordable Care Act and Medical Loss Ratios: Federal and State Methodologies," written by Tara Adams Ragone (Rutgers Center for State Health Policy/Seton Hall Law Center for Health & Pharmaceutical Law & Policy, May 2012) https://law.shu.edu/documents/affordable-care-act-9340.pdf, refreshed my memory about the debate at the time and again came to the conclusion, like NJ policymakers, that they were not preempted by the federal law.

We know that Congress established MLR requirements "hoping to increase the value consumers receive for their premiums and to improve transparency." Ragone at 1. We also know that the Supremacy Clause in the Federal Constitution invalidates laws that interfere with, or are contrary to federal law. However, because Section 1321(d) of the ACA explicitly provides that "[n]othing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title;" and HHS, in its preamble to the Interim Final Regulation ("IFR"), recognized that "States may continue to apply State law requirements except to the extent that such requirements prevent the application of the [ACA] requirements that are the subject of this rulemaking," 75 Fed. Reg. at 74,920 (Dec. 1, 2010), we all concluded that New Jersey could continue to calculate the MLR as it did prior to the enactment of the ACA. It should also be remembered, that the IFR preamble additionally asserted HHS' view that "[s]tate

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insurance laws that are more stringent than the Federal requirements are unlikely to 'prevent the application' of the [ACA] and be preempted," and "[s]tates have significant latitude to impose requirements on health with respect to health insurance issuers that are more restrictive than the Federal law." Id. at 74,865, 74,920.

Accordingly, following enactment of the ACA, New Jersey did not change the method of calculating its MLR requirements because it determined that such requirements were more stringent/restrictive than Federal law, did not prevent the application of the ACA, were not inconsistent with Federal law, as the Insurance Plans now assert, and simply were more protective of consumers.

So, why now, after so many years, are the Insurers/Carriers seeking allegedly to conform our statute to ACA MLR requirements, and to do so with little debate and, for sure, no input from consumer advocates? It is clear from rebate records over the past decade that rebates (which are retrospective adjustments or corrections to premiums) to New Jersey consumers under state law are larger than those under the Federal methodology. Accordingly, if New Jersey were now to follow Federal law, New Jersey consumers would receive smaller, if any, rebates, the effective MLR would be lower and the Plans' profits would be higher.

And let me be clear that is the reason NJA is opposed to A-3972.

Nonetheless, should the Committee decide to advance this bill, we would be remiss if we did not mention that there are some technical concerns that would make this legislation problematic to enact and possibly inconsistent with federal law.

First, section 8e.(2) provides that the MLR "for the previous year shall be based on a three-year rolling average." Now, the loss ratio for the previous year is determined retrospectively, on an annual basis, and only looks at that one year. Although Section 158.220 of the Federal Final Rule includes a 3-year period in calculating the MLR (i.e., the data for the MLR reporting year whose MLR is being calculated and the data for the two prior MLR reporting years), it is clear from comments made by the Department in the IFR that it does not approve of a three-year rolling average. The IFR reads, in part,

> Sections 158.220 and 158.221 of this interim final regulation contain the instructions for calculating an issuer's MLR for each MLR reporting year for purposes of determining whether any rebate is owed and, if so, in what amount . . .. Numerous commenters strongly support the use of a three year, rolling average MLR calculation in determining rebates, ... One commenter questioned whether the three-year MLR was based on averaging three different one-year MLR values or based on accumulating experiences over the three-year period and calculating an MLR for that three-year period. **The Department adopts the recommendation that the data should consist of the accumulated experience, rather than the average three MLRs.** (Emphasis added.) 75 Fed. Reg. at 74,880.

Accordingly, we question whether the change proposed is in fact consistent with federal law. And, although we do not know whether the Department has changed its position in the past 13 years, this issue needs to be further investigated before it is enacted.

Second, the proposed bill contemplates that premium rates should be formulated so that the anticipated minimum loss ratio for a contract or policy form shall not be less than 80% of the premium "calculated based on a three-year rolling average." Secs. 8e.(1), 8g.(1). Now, premiums are based on anticipated claims, costs and revenues and are calculated prospectively. In addition to the inconsistency with Federal regulation raised above, this looking back to calculate premiums simply conflates rates with rebates, and in a State that does not have a rate review process where premiums must first be approved by DOBI, this change is simply unacceptable.

Finally, we have several concerns regarding the language used or omitted with respect to what is included in the MLR calculation:

Sec. 8e.(2)(c) employs the language "carrier's expenditures for activities that improve health quality." Such activities are undefined in contrast to the federal law's use of the phrase "quality improvement expenditures." It is my understanding that DOBI has one actuary to cover all DOBI business. The Department's ability to truly regulate is thus gutted. Allowing the Plans to include "health quality improvement" activities in an unchecked realm is thus a terrible idea. We need to keep a tight definition of what is included in the MLR and so at minimum, the terms should be defined;

Sec. 8e.(2)(d) requires adjustments to be either included in or deducted from incurred claims receipts. It would be best to state whether such inclusion or deduction impacts the numerator or the denominator of the MLR; and

Sec. 8e.(2)(e) provides that "any new or increased State and federal taxes or assessment initiated after the enactment" of this bill shall be excluded from premiums, which is the denominator of the MLR. If a tax increases from 2% to 2.5% is only .5% deducted from the denominator or the entire 2.5%?

For all of the above reasons, we urge this Committee to reject this bill; and instead of diluting New Jersey's MLR requirements, consider adopting a rate review scheme requiring prior approval and cost containment, which has the potential for delivering real, long-term meaningful relief to New Jersey consumers whose premiums are simply increasing year after year. Moreover, should this bill be enacted, it no doubt would lower New Jersey's effective MLR. Accordingly, in order to properly protect consumers and avoid the negative impact these changes would render, we demand that the nominal MLR be raised 5% to maintain the status quo if the proposed changes are adopted.

Thank you for this opportunity to submit written testimony to the Committee on this ill-advised bill that unfortunately lacked any input from the consumer advocates.

Respectfully submitted,
/s/Renée Steinhagen