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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of:

Docket No. 16-0050

The Form A Application for the Proposed
Acquisition of Control of:

GROUP HEALTH COOPERATIVE and
GROUP HEALTH OPTIONS, INC.,

**KAISER BRIEF IN OPPOSITION TO
CONSOLIDATION OF FORM A AND
POTENTIAL FORM E HEARING**

By

KAISER FOUNDATION HEALTH PLAN
OF WASHINGTON

10 Kaiser Foundation Health Plan of Washington ("Kaiser") submits this briefing pursuant
11 to the order of the Special Master on April 4, 2016.

12 **I. INTRODUCTION**

13 The Insurer Holding Company Act (RCW 48.31B) (the "Act"), pursuant to which the
14 Form A that is the subject of this proceeding was filed, was revised effective January 1, 2016.¹
15 Among the significant changes was the "splitting out" of a substantial portion of the review of
16 the potential anticompetitive effects of the proposed acquisition of a domestic insurer, which
17 previously occurred in the context of the Form A review pursuant to RCW 48.31B.015 (the
18 "Form A statute"). Under the revised Act, an applicant proposing to acquire or merge with a
19 domestic insurer ("Applicant") must submit a pre-acquisition notification (Form E) that is
20 separate and distinct from the Form A. *See generally* RCW 48.31B.020 (the "Form E statute.")
21 Thus, effective January 1, 2016, the process for review of the Form A and new Form E filings
22 were separate and distinct. As such, and for the reasons outlined below, the Form A and Form E

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¹ Prior to January 1, 2016, there were two separate yet substantially similar Acts: the Insurer Holding Company Act (RCW 48.31B) and the Health Care Services Contractor Holding Company Act (RCW 48.31C). The revisions effective January 1, 2016 combined the two into the current Insurer Holding Company Act.

1 should not be consolidated into a single adjudicative proceeding. Rather, this proceeding should
2 continue to hearing solely on the issue of the Form A, as currently captioned.

3 II. ARGUMENT

4 A. The Form A and Form E Statutes Are Materially Different.

5 The Form A and Form E statutes materially differ in several ways, each of which
6 provides an independent reason for proceeding separately to hearing on the Form A.

7 Most significantly, **only** the Form A statute requires that the Commissioner hold a public
8 hearing. RCW 48.31B.015(4)(a) and (b). Such hearing is required regardless of whether the
9 Commissioner intends to approve or deny the proposed transaction. *Id.*; *see also* RCW
10 48.31B.015(4)(a) & (b). Conversely, a hearing is not universally required for a Form E review.
11 A hearing is only required on the Form E in the event the Commissioner intends to deny the
12 application. In such a case, a hearing must be held prior to such denial. RCW
13 48.31B.020(5)(a)(ii). Thus, it is possible that no hearing will be required on the Form E in
14 regards to this transaction. And, therefore, revising the caption to combine the Form E
15 proceeding with the Form A proceeding at this stage would be, at best, premature and, perhaps,
16 create confusion in the process.

17 In addition, even if a hearing is ultimately required for the Form E, the Form A statute
18 requires that interested persons must be provided opportunities to intervene, and allows for
19 discovery by all parties, including interveners. RCW 48.31B.015(4)(b). Conversely, neither the
20 opportunity for interested persons to intervene nor discovery by interveners is explicitly
21 authorized by the Form E statute and, in fact, the confidential nature of the filing would dictate
22 against allowing either. *See* RCW 48.31B.020(3) (requiring the Commissioner to afford
23 confidential treatment to the Form E).

24 Furthermore, the Form A and E statutes differ in their allocation of the burden of proof.
25 Specifically, unlike the Form A statute, the Form E statute provides that “the burden of showing
26 prima facie evidence of violation of the competitive standard rests upon the [c]ommissioner”.

1 RCW 48.31B.020(4)(b)(iii)(C). The Form E statute also provides an opportunity for *the*
2 *Commissioner*, absent a prima facie violation, to offer other substantial evidence to establish the
3 requisite anticompetitive effect. RCW 48.31B.020(4)(b)(iv). The Form A statute, in contrast,
4 does not explicitly shift the burden of proof to the Commissioner. Rather, the Applicant must
5 demonstrate, through the submission of information prescribed by statute and rule and/or
6 requested by the Commissioner, that the Transaction will satisfy the applicable statutory criteria.
7 RCW 48.31B.015(4)(a). The distinctly different burdens of proof - Form E on the
8 Commissioner, and Form A on the applicant - would complicate the Presiding Officer's hearing
9 and evaluation of the evidence.

10 The Form A and E statutes also differ with respect to the confidentiality of the materials
11 submitted by the parties in support of the Forms A and E. As noted above, and as acknowledged
12 by the Special Master at the April 4, 2016 Status Conference, the Form E statute requires that the
13 Form E and materials submitted in support thereof be afforded confidential treatment. RCW
14 48.31B.020(3). The Form A statute includes no such provision. Rather, a Form A filing is
15 presumptively subject to public disclosure, although the parties have an opportunity to seek
16 confidential treatment of certain materials under specific provisions of the Insurance Code,
17 Public Records Act and other statutes. *See, e.g.*, RCW 48.02.065; 42.56.070. As a practical
18 matter, this distinction means that the Form A proceedings will necessarily include a deliberative
19 process by which the parties may request confidentiality of certain documents and, as necessary,
20 engage in advocacy to ensure proper treatment for those materials found to be confidential. No
21 such process is required in the context of the Form E because materials related to the Form E are
22 simply regarded to be confidential.

23 Finally, the nature of the review is fundamentally different. The Form A review is
24 comprehensive, addressing issues of solvency, governance and organizational structure,
25 management competence and integrity, anticipated market impact, post-closing plans, and other
26 matters. RCW 48.31B.015(2) (a) – (n). The Form E review, on the other hand, focuses much

1 more narrowly on the potential for the Transaction to have an anti-competitive effect and the
2 extent to which such effect is mitigated. RCW 48.31B.020(3)(a). Furthermore, whereas the
3 Form E filing and review is largely data-driven, the Form A filing encompasses a broad spectrum
4 of information and arguably requires a more holistic approach to the review. For that reason,
5 combining the two proceedings will not ensure efficiency and, in fact, may actually render the
6 proceedings more cumbersome.

7 **B. Combining the Proceedings Would be Inefficient and Logistically Challenging.**

8 As noted above, a hearing for the Form E is only required in the event the Commissioner
9 intends to deny the filing. Even assuming a hearing will ultimately be required, it would be
10 inefficient, costly and logistically challenging to combine the two proceedings. For example, the
11 combination of the Form A and Form E proceedings would extend the overall length of the
12 hearing, causing all participants to incur additional costs (actual cost and time away from other
13 work). Such increased costs include additional expert costs potentially incurred by the parties.
14 Even if the experts' testimony was necessary only in relation to one of the Forms, if there are
15 combined proceedings, the experts would likely be required to attend a much greater portion of
16 the hearing than they otherwise might, or to stand ready to immediately appear in the event a
17 topic within the scope of his or her engagement arose. This would appreciably increase costs
18 without adding additional value.

19 Moreover, in light of the different confidentiality considerations related to the Forms A
20 and E, combining the proceedings would significantly complicate the conduct of both discovery
21 and the hearing. For example, because discovery is allowed for the Form A and not the Form E,
22 it would be important to institute some mechanism to ensure that confidential information related
23 to the Form E was shielded from the reach of all discovery requests and disclosures. This would
24 likely not be an infallible process, and could result in the erosion of the statutory confidentiality
25 protections for the Form E. Additionally, it would be necessary to excuse members of the public
26 from parts but not all of the proceedings, and to prohibit or restrict their access to certain but not

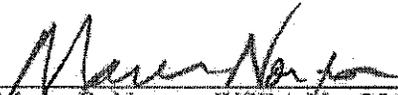
1 all materials produced by the parties for the hearing. Again, this would be an imperfect and
2 logistically difficult process.

3 **III. CONCLUSION**

4 For the reasons outlined above, the Form A proceeding should not be combined with a
5 hypothetically necessary Form E. In the event that circumstances change, the decision to forgo
6 combining the proceedings is not irreversible. In the event that a hearing is ultimately required
7 for the Form E, or if other circumstances warrant, the decision may be revisited.

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CERTIFICATE OF SERVICE

I, Shannon Liberio, certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

On April 12, 2016, I caused a true and correct copy of the foregoing document to be served upon the following parties in the manner indicated below:

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