

1 **BEFORE THE STATE OF WASHINGTON**
2 **OFFICE OF INSURANCE COMMISSIONER**

FILED

2016 DEC 20 A 8:19

3 In the Matter of:

Docket No. 16-0050

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

4 The Form A and Form E Applications for
5 the Proposed Acquisition of Control of:

**KAISER'S PREHEARING BRIEF IN
SUPPORT OF THE TRANSACTION**

6 **GROUP HEALTH COOPERATIVE and**
7 **GROUP HEALTH OPTIONS, INC.,**

8 By

9 **KAISER FOUNDATION HEALTH PLAN
OF WASHINGTON**

10 **I. INTRODUCTION**

11 Kaiser Foundation Health Plan of Washington ("Kaiser") proposes to acquire Group
12 Health Cooperative ("GHC") and its subsidiaries (collectively, "Group Health")¹ pursuant to an
13 Acquisition Agreement dated December 2, 2015 (the "Transaction"). This Transaction will
14 further the charitable missions of both Group Health and Kaiser to provide high-quality,
15 affordable health care services to the public and improve the health of their enrollees. Kaiser and
16 Group Health are highly compatible organizations from both an operations and cultural
17 perspective, and their combination will ensure that the integrated delivery model that Group
18 Health offers today will not only remain available in Washington, but that it will have the
19 resources to expand and thrive into the future. In short, the addition of Kaiser's scale,
20 capabilities, and resources to Group Health's nationally recognized delivery system makes this
21 Transaction, as the former governor put it, "a good thing for all consumers in the state." See
22 Exhibit 5 on OIC's Exhibit List.

23
24 ¹ GHC is the controlling person within the GHC holding company system. As used herein, the terms
25 "GHC" or "Group Health" shall refer collectively to Group Health Cooperative and each of its
26 subsidiaries (except Group Health Foundation, which will be separated from the GHC holding company
system prior to closing of the proposed Transaction). When referred to individually, Group Health
Options, Inc. shall be referred to as "GHO."

**KAISER'S PREHEARING BRIEF IN
SUPPORT OF THE TRANSACTION - 1**

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

1 Recognizing that the Transaction must receive approval from the Washington State
2 Office of the Insurance Commissioner ("OIC"), Kaiser filed Form A and Form E statements each
3 dated February 26, 2016 with the OIC and has updated the OIC as information in those filings
4 has changed. The Transaction has already received the final approval from the California
5 Department of Managed Health Care and has been cleared by the U.S. Department of Justice and
6 Federal Trade Commission under the federal Hart-Scott-Rodino Act. The testimony at the public
7 hearing by representatives of both Kaiser and Group Health will demonstrate that there are
8 similarly no grounds for the Commissioner to disapprove the Transaction under either RCW
9 48.31B.015 or 48.31B.020. Specifically, the documentary evidence and Kaiser's witness,
10 uncontroverted and supported also by witnesses for OIC and for Group Health, will demonstrate
11 that:

- 12 • After the Transaction, Group Health will continue to satisfy all applicable license
13 requirements in the state of Washington;
- 14 • The Transaction will not substantially lessen competition or tend to create a monopoly in
15 the health coverage business in Washington (satisfying the provisions of the Washington
16 Revised Code governing the Form E submission as well as the Form A submission);
- 17 • The financial condition of Kaiser is such that it does not jeopardize the financial stability
18 of Group Health or prejudice the interests of its subscribers. In fact, the financial
19 condition and resources of Kaiser will materially strengthen the financial stability of
20 Group Health, thereby enhancing the interests of subscribers or members;
- 21 • There is no plan to make any material change to Group Health's operation that would be
22 unfair and unreasonable to its subscribers and not be in the public interest. On the
23 contrary, because of Kaiser's financial and managerial resources, Group Health's
24 operation for its subscribers will be enhanced;
- 25 • The competence, experience, and integrity of those persons who will control the
26 operation of Group Health are in the interest of its subscribers and of the public; and
- The Transaction will not be hazardous or prejudicial to the insurance-buying public;
indeed, the Transaction will benefit Group Health's future members and the insurance
consumers of Washington.

1 that, taken together with the Form A and Form E statements and Kaiser's later supplemental
2 submissions, amply supports approval of the Transaction upon conclusion of the hearing.

3 **III. ARGUMENT**

4 As an initial matter, Kaiser properly filed its Form A and Form E and the exhibits and
5 subsequent supplemental materials containing the information required and requested by the OIC
6 in satisfaction of the informational requirements of RCW 48.31B.015 and RCW 48.31B.020.
7 The Form A and Form E identified the parties and fully described the Transaction. The OIC
8 carefully reviewed both filings and determined that each is complete within the meaning of all
9 applicable statutes and regulations. The Notice of Hearing provided also constituted reasonable
10 notice of a public hearing and complied with the requirements of RCW 48.31B.015(4)(b).
11 Accordingly, all of the form and manner requirements associated with the application for
12 approval of the Transaction have been met.

13 **A. Kaiser Has Satisfied the Form A Criteria Under RCW 48.31B.015**

14 The Form A review is comprehensive, addressing issues of solvency, governance and
15 organizational structure, management competence and integrity, anticipated market impact, post-
16 closing plans, and other matters. RCW 48.31B.015(2)(a)-(n). Under RCW 48.31B.015(4)(a),
17 the Commissioner *must* approve the Form A, unless after the hearing, the Commissioner
18 concludes:

19 (i) After the change of control, the domestic insurer referred to in
20 subsection (1) of this section would not be able to satisfy the requirements for
21 the issuance of a license to write the line or lines of insurance for which it is
presently licensed;

22 (ii) The effect of the merger or other acquisition of control would be
23 substantially to lessen competition in insurance in this state or tend to create a
24 monopoly therein. In applying the competitive standard in this subsection
(4)(a)(ii):

25 (A) The informational requirements of RCW 48.31B.020(3)(a) and the
26 standards of RCW 48.31B.020(4)(b) apply;

1 (B) The merger or other acquisition may not be disapproved if the
2 commissioner finds that any of the situations meeting the criteria provided by
3 RCW 48.31B.020(4)(c) exist; and

4 (C) The commissioner may condition the approval of the merger or
5 other acquisition on the removal of the basis of disapproval within a specified
6 period of time;

7 (iii) The financial condition of any acquiring party is such as might
8 jeopardize the financial stability of the insurer, or prejudice the interest of its
9 policyholders;

10 (iv) The plans or proposals which the acquiring party has to liquidate the
11 insurer, sell its assets, consolidate or merge it with any person, or to make any
12 other material change in its business or corporate structure or management, are
13 unfair and unreasonable to policyholders of the insurer and not in the public
14 interest;

15 (v) The competence, experience, and integrity of those persons who
16 would control the operation of the insurer are such that it would not be in the
17 interest of policyholders of the insurer and of the public to permit the merger
18 or other acquisition of control; or

19 (vi) The acquisition is likely to be hazardous or prejudicial to the
20 insurance-buying public.

21 As explained below, evidence will be presented at the public hearing in this action
22 satisfying each of the six statutory considerations set forth above.

23 **1. Group Health Will Continue to Satisfy Applicable License Requirements.**
24 **RCW 48.31B.015(4)(a)(i).**

25 There is no question that Group Health will continue to satisfy all applicable license
26 requirements in the state of Washington. GHC is currently registered by the OIC as a health
maintenance organization (HMO) and GHO is currently registered as a health care service
contractor (HCSC). As demonstrated through their respective Certificates of Registration, both
satisfy the minimum requirements for licensure. *See* RCW 48.44.010, *et seq.* As indicated in the
Form A, Kaiser does not plan to effect any change in Group Health's business, corporate
structure, management, or general plan of operations that would have any adverse impact on the

1 ability of Group Health to continue to satisfy the requirements of the Washington Revised Code
2 for the issuance of a license. Further, Group Health is well capitalized and will take no steps that
3 would impair its ability to meet all of its obligations.

4 **2. The Transaction Will Not Substantially Lessen Competition or Create a**
5 **Monopoly in Insurance in Washington. RCW 48.31B.015(4)(a)(ii).**

6 Because the review standards in this section are nearly identical to those applicable to the
7 Form E, this requirement is addressed in connection with discussion of the Form E requirements
8 below.

9 **3. Kaiser's Financial Condition Will Not Jeopardize the Financial Stability of**
10 **Group Health or Prejudice the Interests of Its Policyholders. RCW**
11 **48.31B.015(4)(a)(iii).**

12 Kaiser's financial condition will not jeopardize the financial stability of Group Health or
13 prejudice the interest of its policyholders. Kaiser Permanente has consistent, stable, and
14 sustainable financial performance.² In 2015, Kaiser Permanente generated \$60.749 billion in
15 operating revenue, \$3.319 billion in operating income, and \$1.868 billion in net income. The
16 financial statements provided with the Form A, which include the most recent combined
17 financial statements for the nine (9) month period ending September 30, 2016, also reflect the
18 strong financial condition of Kaiser.

19 With its financial strength, Kaiser believes that the Transaction will not jeopardize the
20 financial stability of Group Health or prejudice the interest of its subscribers, and will actually
21 substantially strengthen Group Health's financial stability and ability to serve its subscribers with
22 Kaiser as its parent corporation.

23 **4. The Transaction Is Fair and Reasonable to Group Health's Policyholders**
24 **and Is in the Interest of the Public. RCW 48.31B.015(4)(a)(iv).**

25 As stated in the Form A, Kaiser has no current plans to declare any extraordinary
26 dividends, to liquidate Group Health, sell Group Health's assets outside the ordinary course of

² As used herein, the term "Kaiser Permanente" shall refer collectively to Kaiser Foundation Health Plan, Inc. together with Kaiser Foundation Hospitals and each of its subsidiaries.

1 business, or merge Group Health with any third party. Kaiser also has no current intention to
2 make material changes in the business operations, corporate structure, or management of Group
3 Health, including in GHC's subsidiary health plan GHO, except as specifically discussed in
4 Form A or may arise in the ordinary course of business. Kaiser has also provided to the OIC
5 confidential financial projections for GHC for a period of time after closing and has indicated
6 that the expertise of Group Health physicians and employees will be integral to the continued
7 delivery of excellent care. As such, the Transaction is not anticipated to result in significant job
8 loss, although certain limited leadership changes have been identified in the Form A.

9 The corporate governance structure resulting from the Transaction, as described in the
10 Form A, is fair and reasonable to Group Health's policyholders. Kaiser will at closing appoint a
11 board of directors for GHC that contains no less than one-third GHC-enrolled participants or
12 consumers who are substantially representative of the enrolled population of GHC. Kaiser will
13 also adopt corporate bylaws at closing that require the creation of a Consumer Advisory
14 Committee of at least 25 people to provide GHC's members with an opportunity to participate in
15 matters of policy and operation, to promote the effective use of health care services within the
16 organization, and to suggest ways that the organization can better serve its members and the
17 community as a whole. Kaiser will continue to recognize and engage with special interest
18 groups formed by GHC members, including the group known as the "GHC Senior Caucus."

19 The Transaction will also yield significant benefits for Group Health and its members.
20 As the parties' proposed witnesses will explain, the Transaction is designed to facilitate strategic
21 investments in technology, facilities, and providers that will, in turn, enhance Group Health's
22 ability to deliver high-quality, affordable health care and coverage through its integrated delivery
23 system. The Transaction will also preserve the charitable non-profit mission of Group Health
24 and separately endow a new community foundation, Group Health Community Foundation
25 ("GHCF"), with \$1.8 billion in assets. GHCF will be a non-profit entirely independent of Kaiser
26 and will exist solely to serve the community.

KAISER'S PREHEARING BRIEF
IN SUPPORT OF THE TRANSACTION - 7

1 And, in addition to the Transaction consideration used to endow GHCF, Kaiser has made
2 other substantial financial commitments to the benefit of Group Health's members. These
3 include a commitment to spend \$1 billion in aggregate in GHC during the first 10 years
4 following closing for capital improvements and key investments in infrastructure and other
5 improvements to help ensure the success of GHC's charitable mission and continued provision
6 of high-quality health care. Kaiser has also committed to continue operating GHC as a charitable
7 organization, and related to that expects to make \$800 million in community benefit investments
8 for the communities GHC serves over the same 10-year period.

9 The basis for and terms of the Transaction, including the nature and amount of
10 consideration, are also fair and reasonable. Kaiser's board determined the consideration to be
11 offered by evaluating certain criteria including amounts paid in recent and comparable
12 transactions, the then current and historical financial position and performance of GHC, and
13 anticipated synergies as between GHC and Kaiser that would result from the Transaction. The
14 Transaction's terms were also negotiated at arm's-length between the respective management
15 and representatives of Kaiser and GHC.

16 **5. The Competence, Experience, and Integrity of Those Who Will Control**
17 **Group Health Following the Closing of the Transaction Indicate That the**
18 **Transaction Is in the Best Interests of Group Health's Policyholders and in**
the Public Interest. RCW 48.31B.015(4)(a)(v).

19 The competence, experience, and integrity of those persons who will control Group
20 Health are such that it would be in the interest of subscribers of Group Health and of the public
21 to permit the Transaction. Kaiser submitted detailed, confidential biographical materials for each
22 of the post-acquisition officers and directors in connection with the Form A, none of which
23 indicate a lack of trustworthiness, competence, experience or integrity on the part of the officers
24 and directors. In addition, witnesses will testify that Group Health's future leaders all have the
25 requisite competence and expertise to successfully operate and control the operations of Group
26 Health in a manner that is consistent with the interests of the policyholders and the public.

1 **6. The Transaction Is Not Likely to Be Hazardous or Prejudicial to the**
2 **Insurance-Buying Public. RCW 48.31B.015(4)(a)(vi).**

3 The evidence submitted will demonstrate that the Transaction will be beneficial to Group
4 Health's current and future members and thus to the wider Washington insurance-buying public.
5 Group Health and its members will benefit from Kaiser's resources and systems, including
6 provider network, and members will be ensured of continuity and stability in the services and
7 benefits available to them. As a result, the Transaction will benefit Group Health's policyholders
8 specifically and the insurance-buying public in general.

9 **B. Kaiser Has Satisfied the Form E Criteria Under RCW 48.31B.020**

10 The Form E review has a narrow focus on the potential for the Transaction to have an
11 anti-competitive effect and the extent to which such effect is mitigated. RCW 48.31B.020(3)(a).
12 The Form E standards in this regard are nearly identical to the standards applicable to the Form
13 A. Both the Form E standards and the Form A standards begin with an effective presumption
14 that the Commissioner will approve the Transaction, absent the existence of specific
15 circumstances or factors that warrant disapproval. RCW 48.31B.015(4)(a)(ii) provides in
16 relevant part that the Commissioner *shall approve* a merger or other acquisition of control
17 unless, after a public hearing thereon, he or she finds that "[t]he effect of the merger or other
18 acquisition of control would be substantially to lessen competition in insurance in this state or tend to
19 create a monopoly therein." Similarly, RCW 48.31B.020(4)(a) provides that the Commissioner
20 may enter an order blocking the Transaction only "if there is substantial evidence that the effect
21 of the acquisition may be substantially to lessen competition in a line of insurance in this state or
22 tend to create a monopoly therein or if the insurer fails to file adequate information in
23 compliance with subsection (3) of this section."

24 In undertaking this examination, the Form E statute provides that "[t]he burden of
25 showing prima facie evidence of violation of the competitive standard rests upon the
26 commissioner." RCW 48.31B.020(4)(b)(iii)(C). Finally, and significantly, RCW

1 48.31B.020(4)(c) provides that, even if substantial evidence existed that the effect of the
2 acquisition may be substantially to lessen competition or tend to create a monopoly, the
3 Commissioner may *not* enter an order under RCW 48.31B.020(5)(a) if:

4 (i) The acquisition will yield substantial economies of scale or economies in
5 resource use that cannot be feasibly achieved in any other way, and the public
6 benefits that would arise from the economies exceed the public benefits that
would arise from not lessening competition; or

7 (ii) The acquisition will substantially increase the availability of insurance, and
8 the public benefits of the increase exceed the public benefits that would arise from
not lessening competition.

9 Kaiser's economic expert, Dr. Noether, evaluated and opined upon the potential
10 anticompetitive effects of the proposed acquisition in accordance with the above standards. She
11 concluded, among other things, that "[t]he proposed acquisition will not lead to a substantial
12 reduction in competition, but rather, will bring substantial economies of scale or economies in
13 resource use that cannot feasibly be achieved in any other way." Exhibit 3 (Noether Report)
14 (CONFIDENTIAL). She further concluded that "the proposed acquisition is in the best interests
15 of Washington consumers. The combined organization will increase the availability of insurance
16 and provide vigorous competition by guaranteeing access for Washington consumers to cost-
17 effective innovative products." *Id.* Neither RRC nor the OIC questioned any of the
18 methodologies or conclusions in her report, and the Transaction has cleared review under the
19 Hart-Scott-Rodino Act. Accordingly, the Commissioner should conclude that Kaiser satisfied
20 the Form E criteria and approve the Transaction.

21 IV. CONCLUSION

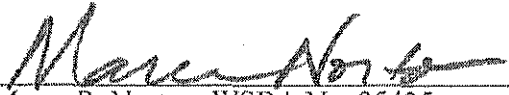
22 For the reasons outlined above, the Commissioner should find that the statutory criteria
23 for approval of the Transaction have been met and that there are no sufficient bases for denial of
24 approval of Kaiser's proposed acquisition of control of Group Health, and therefore, Kaiser's
25 application, including the Form A and Form E, should be approved in accordance with the
26 Proposed Order that will be submitted at the hearing.

KAISER'S PREHEARING BRIEF
IN SUPPORT OF THE TRANSACTION - 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DATED: December 20, 2016.

STOEL RIVES LLP


Maren R. Norton, WSBA No. 35435
Robin L. Larmer, WSBA No. 46289
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, Washington 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
maren.norton@stoel.com
*Attorneys for Kaiser Foundation Health Plan
of Washington*

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 December 20, 2016, I caused a true and correct copy of the foregoing document to be served upon the following parties in the manner indicated below:

James T. Odiome, Douglas A. Hartz, Steve Drutz, Ronald Pastuch, AnnaLisa Gellerman, Darryl Colman, Jen Kraft, Candice Myrum, Renee Molnes, Office of the Insurance Commissioner, P.O. Box 40255, Olympia, WA 98504. Mailing options: Hand delivery via legal messenger, Mailing with postage prepaid, Electronic service to [DarrylC@oic.wa.gov; JimO@oic.wa.gov; JenK@oic.wa.gov; SteveD@oic.wa.gov; DougH@oic.wa.gov; AnnaLisaG@oic.wa.gov; CandiceM@oic.wa.gov; ReneeM@oic.wa.gov; RonP@oic.wa.gov]

Frank C. Miller, Senior Counsel, Kaiser Permanente, One Kaiser Plaza, 19th Fl., Oakland, CA 94612. Mailing options: Hand delivery via legal messenger, Mailing with postage prepaid, Electronic service to frank.c.miller@kp.org

Shawna M. Sweeney, VP and Deputy General Counsel, Group Health Cooperative, 320 Westlake Ave. N #100, Seattle, WA 98109. Mailing options: Hand delivery via legal messenger, Mailing with postage prepaid, Electronic service to sweeney.st@ghc.org

Marta DeLeon, Assistant AAG, Isaac Williamson, Assistant AAG, Attorney General's Office, 1125 Washington Street SE, P.O. Box 40100, Olympia, WA 98504. Mailing options: Hand delivery via legal messenger, Mailing with postage prepaid, Electronic service to [MartaD@atg.wa.gov; IsaacW@atg.wa.gov]

Michael McCormack, Bullivant Houser Bailey PC, 1700 7th Avenue, Suite 1810, Seattle, WA 98101. Mailing options: Hand delivery via legal messenger, Mailing with postage prepaid, Electronic service to michael.mccormack@bullivant.com

[Signature of Shannon Liberio]
Shannon Liberio, Practice Assistant
Stoel Rives LLP