Toolkit for Creating Consumer Participation in Policy Decisions:

Sustaining Health Advocacy and Improving Outcomes

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Consumers Union of U.S., Inc.

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Introduction

Each day, policymakers take actions and reach decisions which directly affect consumers. Health care related policy decisions such as emergency room closure reviews, health plan ownership changes, regulations governing medical error reports and health insurance rate reviews, for example, have an especially widespread impact. For this reason, it is important that these policymakers take the consumer perspective into consideration when they act. The laws that govern these proceedings achieve the most positive policy outcomes for consumers when they encourage and facilitate the participation of consumer groups. Advocacy for systemic change often takes many years to achieve success, but the improved consumer features that result make it worthwhile for advocates to pursue this work. Statutes that compensate advocates for their contribution to sound policy development, foster consumer involvement and ensure that the important work of protecting consumers and the marketplace can continue.

Consumer groups have been successful in getting such laws enacted in California and other states. You too can create a program within your state code that provides a framework for individuals or consumer groups to participate formally in administrative proceedings and be funded for their contributions. There are a number of California laws that have established successful programs which have greatly benefited the public[1]. This paper begins with a brief overview of these programs[2] and is followed by a Workbook that will help you draft a program tailored to your state.

[1] Though this report focuses on California programs, there are similar programs around the country that provide for genuine consumer participation in administrative proceedings. In fact, federal law requires all state utility agencies to provide for consumer intervention with compensation in rate related proceedings. 16 USC §2631. Examples of two state programs adopted pursuant to this federal law are Idaho Code §61-617A and Me. Rev. Stat. Ann. tit 35-A, §1310. For hospital and health plan conversion and merger proceedings, states like Washington: RCW 48.31C.030(4) and Colorado: C.R.S. §24-4-105(2)(c) have programs that allow groups to intervene with full party status. Appendix D includes sample petitions for intervenor status, which were filed according to these state laws.

[2] The programs that are presented in this paper grant access and funding to consumer groups to participate in administrative proceedings. It is important to note that federal and state constitutions guarantee every person the right to petition government for the redress of their grievances. In other words, individuals and organizations have the right to initiate administrative proceedings. The consumer participation programs being discussed here, add additional rights to participate beyond petitioning rights inherently granted in the constitution. See generally Harry Snyder et al., Consumers Union, Getting Action: How to Petition Government and Get Results, 2nd Edition, (2002), available at http://www.consumersunion.org/other/g-action1.htm.

Overview

The two foundational elements of a successful consumer participation program are "standing" (the rules that make a person or group eligible to participate in a proceeding) and providing compensation (to foster participation). Broad standing and funding provisions make it possible for nonprofit groups with few resources to represent the consumer interest. This can be especially important because healthcare industry resources far exceed those of consumer groups. If your state law provides some funding for nonprofit participation, it will ensure that industry interests are not the only ones capable of influencing governmental decision-making. Adding consumer expertise and viewpoint to the administrative process ensures an adequate record that fairly reflects the positions of all affected parties. This helps guarantee higher quality, and more fully informed, decision-making.

Consumer participation programs come in different forms. You can implement them for a range of proceedings such as agency rulemaking, applications for conversion of nonprofit to for-profit health plans and hospitals, review of hospital closings and mergers, negotiating prescription drug prices for public programs and health insurance rate-setting. The rights that your program grants to organizations under a consumer participation program can also vary. For instance, some programs grant full "intervenor status" to groups that meet the standing requirements under the law. This generally means that the intervenor becomes a "party" to the proceeding and can conduct discovery, present testimony and examine and cross-examine witnesses. Other programs are more limited and only grant participants the right to submit written comments or make a short statement at a public hearing. Most programs require a showing that the intervenor "substantially contributed" to the agency's deliberative process in order to be eligible for compensation.[1]

For over two decades, the state of California has had successful consumer participation programs through a number of administrative agencies. We describe three of these models here to show the breadth of issues covered and how these programs have been utilized.

In 1984, the legislature enacted the California Public Utilities Commission (PUC) Intervenor Funding Program (Cal. Pub. Util. Code §1801-1812, Appendix B hereto.) This often utilized statute allows individuals or organizations to be granted the right to intervene in, and be reimbursed for their participation in formal proceedings before the PUC. Consumers are eligible to participate in all formal proceedings held by the Commission such as investigations of regulated entities or rulemaking proceedings. In order to receive compensation under this law, the intervenor must

[1] See page 16 under "Eligibility to Collect," for a discussion of the substantial contribution standard.

meet two criteria. First, the intervenor must "substantially contribute" to the decision in the proceedings. Secondly, the intervenor must show that without compensation such participation would create a financial hardship for the intervenor. In 2002, this program awarded intervenor fees to 21 different organizations/individuals which the PUC determined substantially contributed to the decision-making process in 54 different proceedings.[2]

In 1988 Ballot Initiative, Proposition 103, created the Department of Insurance (DOI) Intervenor Program (Cal. Ins. Code §1861.10, Appendix C here to.) This proposition, a massive re-write of automobile insurance companies' rate setting procedures, also authorizes individual consumers and nonprofits to go before the Department of Insurance or the courts if an insurance company fails to comply with its responsibilities under the proposition. It also encourages non-profit consumer advocacy groups, through reimbursement of attorney's fees and expert witness costs, to intervene in the regulatory process to protect the interests of the public. Similar to the standards set forth in the PUC program, the DOI program reimburses attorney's fees and expert witness expenses to citizen groups that make a "substantial contribution" to the hearing. As a result, this intervention program has allowed consumer groups to engage professional, skilled representation, including experts. This has helped level the playing field with insurance companies that engage experienced counsel and experts at policyholder expense. In one recent instance, consumer groups, including Consumers Union, petitioned the Department of Insurance regarding auto insurance rating factors based on residential zip code. This proceeding resulted in rate reductions that have saved California consumers $1.1 billion to date.[3]

The most recently adopted California consumer participation program is in the health arena. In 2001, the Consumer Participation Program (Cal. Health & Safety Code §1348.9) was enacted within the Department of Managed Healthcare (DMHC). The role of the DMHC is to ensure that health care service plans provide enrollees with access to quality health care services and to protect and promote the interests of enrollees. Under the Consumer Participation Program, the DMHC may award advocacy and witness fees to a person or organization that represents the interests of consumers and has made a substantial contribution on their behalf, to the adoption of a regulation or decision affecting a significant number of consumers. These proceedings, like those at the PUC or DOI, can be lengthy and complex. Experienced advocates and relevant

[2] California Public Utilities Commission, Bibliography of CPUC Intervenor Compensation Decisions from 2002, (2002), at http://www.cpuc.ca.gov/PUBLISHED/Report/34768.htm.
[3] See Consumers Union of the United States, Inc., Petition for Rulemaking before the Insurance Commissioner of the State of California, (May 2003), available at http://www.consumersunion.org/pdf/zip-petition03.pdf.

experts can make a significant difference in protecting consumer interest in managed care, but also may be prohibitively expensive. One example of a beneficial use of this consumer protection program involved a 2002 law passed to clarify the authority of the DMHC to ensure access to medically necessary medications for consumers whose health plans cover prescription drugs. 2002 Cal. Stat. 791. This law requires that health plans request approval from the DMHC before making certain changes to their prescription drug benefits to ensure medically necessary drugs are not excluded. Health plans naturally have the incentive and resources to fully participate in the DMHC process to adopt regulations pursuant to this law. Funding by the Consumer Participation Program made it possible for one California health advocacy group to engage in five public comment periods during which the DMHC accepted eleven of the group's suggested changes to the proposed regulations. Their input ensured that definitions were clear and important evidentiary requirements were retained.

The DMHC Consumer Participation Program statute serves as an example that you can draw upon in developing a consumer participation program in your state. We've annotated this statute as part of the following Workbook, with an in-depth discussion of the statutory language and other key policy issues that you should keep in mind in order to develop an effective program. The Workbook includes a Worksheet which contains a list of questions to consider when drafting a consumer participation statute. These types of funded consumer participation programs can take different forms and there are many decisions that you must make, both practical and political, when developing a program that will benefit consumers and enhance the public policy process.

Five appendices supplement the Workbook, and together provide nuts and bolts materials that will aid you in creating a tailored consumer participation program. Appendix A contains the regulations, adopted by the California DMHC, detailing the Consumer Participation Program. The statutory language for the California PUC and DOI programs described above, are attached as Appendices B and C. Appendix D, contains sample petitions for intervenor status submitted in Washington and Colorado and Appendix E is Consumers Union's Model Nonprofit Conversion Act which includes a section on intervenor funding.

Consumer participation in agency decision-making is essential in order to balance the influence that private economic interests can have on administrative agencies. Programs in California and other states, that grant consumer groups the right to participate in agency proceedings, and provide compensation for their participation, have led to a more robust administrative record that supports sound decision-making and better policy results. Extending these programs to other health-related issues could bring about a consumer revolution in health care policymaking.

Workbook for Building a Health Consumer Participation Program

The following Workbook has two parts that when used together will help you work through the factors that must be considered when crafting a consumer participation program. The first part is a Worksheet with a list of questions to consider when drafting statutory language for your program. This can be used in conjunction with the annotated statute that follows. These annotations contain an in-depth discussion of the statutory language creating the Consumer Participation Program administered by the California Department of Managed Health Care.

The annotations are written in the order listed below, and you can reference the statute to see how they are placed within this specific law. When read together, this Workbook will highlight the key policy issues that you should keep in mind in order to develop an effective consumer participation program in your state.

These include:

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Consumer Participation Program Worksheet

1. My state has the following public participation (or intervenor) programs in statute.

Health Related	Other	Provide Funding? Yes or No

2. In my state, the following health care issues would most benefit from public participation. (List in order of importance.)

   1) _____

   2) _____

   3) _____

3. List the regulating agency and the relevant statute that governs the issues listed in #2.

   1) _____

   2) _____

   3) _____

Developing the Program – Key Questions to Answer:

1. In what statute should the program be placed? (eg: Health & Safety Code, Nonprofit Code, Administrative Code, Corporate Code)

2. Within the chosen statute, where should the program be placed?

3. Who will make decisions regarding eligibility for participation and funding? (eg: Agency Director, Attorney General, Judge, Panel)

4. What are the requirements for eligibility to participate?

5. What are the procedures by which a group can apply to participate? Should the procedures be laid out in statute or should the agency be required to adopt regulations detailing the procedures?

6. What are the rights of the participant once deemed eligible? (Ex: full intervenor status pursuant to your state's code of civil procedure, submit written comments, testify at a public hearing, present evidence from an expert)

7. What are the standards to receive participant compensation? (Ex: substantial contribution, financial need, aggrieved party)

8. How will the compensation program be funded? (Ex: assessment on the industry, agency or state budget, industry applicant fee)

9. When during the proceeding, will compensation be made available to participants? (Ex: pre- hearing, interim or post-hearing)

10. Must there be a cap on the amount of compensation paid out by the program?

11. Should procedures be laid out in statute or be left for the agency to develop in regulations?

California Health and Safety Code § 1348.9 (2007)[1]

Adoption of regulations establishing Consumer Participation Program; Award of advocacy and witness fees

(a) On or before July 1, 2003, the director shall adopt regulations to establish the Consumer Participation Program, which shall allow for the director[2] to award reasonable advocacy and witness fees[3] to any person or organization that demonstrates that the person or organization represents the interests of consumers[4] and has made a substantial contribution on behalf of consumers[5] to the adoption of any regulation or to an order or decision made by the director if the order or decision has the potential to impact a significant number of enrollees.[6]

(b) The regulations adopted by the director shall include specifications for eligibility of participation[7], rates of compensation[8], and procedures for seeking compensation.[9] The regulations shall require that the person or organization demonstrate a record of advocacy on behalf of health care consumers in administrative or legislative proceedings[10] in order to determine whether the person or organization represents the interests of consumers. [11]

(c) This section shall apply to all proceedings of the department, but shall not apply to resolution of individual grievances, complaints, or cases.[12]

(d) Fees awarded pursuant to this section may not exceed three hundred fifty thousand dollars ($350,000) each fiscal year.

(e) The fees awarded pursuant to this section shall be considered costs and expenses pursuant to Section 1356 and shall be paid from the assessment made under that section. Notwithstanding the provisions of this subdivision, the amount of the assessment shall not be increased to pay the fees awarded under this section.[13]

(f) The department shall report to the appropriate policy and fiscal committees of the Legislature before March 1, 2004, and annually thereafter, the following information:

(1) The amount of reasonable advocacy and witness fees awarded each fiscal year.

(2) The individuals or organization to whom advocacy and witness fees were awarded pursuant to this section.

(3) The orders, decisions, and regulations pursuant to which the advocacy and witness fees were awarded.[14]

(g) This section shall remain in effect only until January 1, 2012, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2012, deletes or extends that date.[15]

Statutory Placement:

"California Health and Safety Code § 1348.9 (2007)"[1]

The Consumer Participation Program is governed by the California Department of Managed Health Care (DMHC), the mission of which is to ensure that health care service plans provide enrollees with access to quality health care services and protect and promote the interests of enrollees. Under this program, therefore, consumers are limited to participation in decisions regarding health plans regulated by DMHC.

The location within the state code where you choose to place your consumer participation program, will have an impact on the types of proceedings in which consumers will be able to participate. In creating a program, the threshold question you should ask is whether to create a general intervention statute in the administrative code that would cover all types of subject areas- from utilities to managed care regulations- or at the other extreme, one that specifically addresses a particular type of health policy decision. While the former may seem simplest since it does not require anticipation of all health issues that might benefit from consumer participation in the future, its very breadth may create a considerable political challenge. To date, California has adopted consumer participation programs framed around particular types of issues.

If you decide to focus your program on health-related proceedings, you should then ask yourself what types of health decisions would most benefit from the consumer perspective. The answer to this will help you decide in which statute to place the program. If the state has a number of nonprofit hospitals or health plans that may convert to for-profit or merge, for example, the appropriate place to put a program will be the state's conversion statute, if any, or nonprofit, corporation, or insurance code. If you are most interested in ensuring consumer participation in hospital closing decisions, health insurance rate-setting or the adoption of other health plan regulations you need to determine which agency governs those decisions, and incorporate the program into the statutory procedures laid out for such proceedings.

The next step is deciding where to place the program within the code that you choose. This will have an effect on the types of administrative proceedings in which groups will be eligible to participate. For instance, the intervenor program found within the California Insurance Code was adopted pursuant to voter Proposition 103 which deals specifically with rate setting procedures by automobile insurance companies. California Ins. Code §1861.10 provides that "any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article." As a whole, the California Department of Insurance handles a wide variety of proceedings to regulate the insurance industry. Though the language in this section sounds

very general, the placement of the language within the statute limits intervention to proceedings dealing with rates (Chapter 9) and limits challenges and enforcements to proceedings dealing specifically with reduction and control of insurance rates (Article 10.) Despite the limitation, this program has resulted in extensive participation that has saved California policyholders billions of dollars.

Decision-making Authority

"On or before July 1, 2003, the director shall adopt regulations to establish the Consumer Participation Program, which shall allow for the director…"[2]

The Consumer Participation Program designates the director of the DMHC as the decision-maker on consumer participation and compensation. The director, therefore, has the responsibility to promulgate regulations that create the program and make all decisions regarding eligibility to participate and whether contributions were substantial, thus entitling an intervenor to an award. Under this structure, the director (or other individual who is granted this authority, e.g. attorney general) also makes the decision with respect to the underlying issue concerning the regulated entity.

There are alternatives to having the regulator also be the sole decision-maker on consumer participation. For instance, you can create a panel intended solely for the purpose of determining eligibility to participate and granting compensation and fees. You can specify the make-up of the panel and have it represent different stakeholder groups. The manner in which the panel is appointed or elected and whether there is an appeal process for decisions made by the panel should also be spelled out. This model diffuses the power to make awards and separates the monetary issues from the underlying substantive decision. On the other hand, a panel creates an added layer of bureaucracy that can slow down the decision-making process and removes the decision from the party who may have the deepest understanding of the issues, procedural posture and consumer participant's true contribution. The California programs place decision making authority in agency directors which has proven to be workable.

Eligibility Processes

"(b) The regulations adopted by the director shall include specifications for eligibility of participation…"[7]

A program must include the steps required to first obtain approval to participate in the proceeding and then apply for and be granted compensation. When drafting the program in statute, you can choose to be very prescriptive and include this information in the law itself, or you can be more general and leave the details for the regulations. This program takes the second approach. Prescribing as much as possible in the statute avoids the risk of surprise impediments cropping up in regulations, and is therefore generally the preferable approach. In this section of the statute, the Director is charged with the task of adopting regulations that include specific procedures and minimum eligibility requirements.

Eligibility to Participate

"…to any person or organization that demonstrates that the person or organization represents the interests of consumers…"[4]

Standing (eligibility to participate in the program) is a preliminary consideration that must be made when developing a consumer participation program. As the title clearly states, the intent of the Consumer Participation Program under the DMHC is to allow participation only for groups that represent the interest of consumers. The program requires that an individual or group submit a request with a description of its experience advocating on behalf of health care consumers to ensure that they in fact represent the interest of consumers. Cal. Code Regs. title 28 §1010(c).

The DMHC program specifies that "a party which represents…any entity that is regulated by the Department shall not be eligible for compensation." Cal. Code Regs. title 28 §1010(b)(6). This program is not intended to financially assist entities solely motivated by a business interest or required by law to obtain regulatory approvals in order to do that business, e.g. HMOs. Rather, the program ensures that groups that represent consumers affected by certain regulatory decisions have a chance to give their viewpoint.

Other standards may generally allow standing to "interested parties", "aggrieved parties" or "parties whose participation is in the interest of justice." When deciding what types of entities will be eligible for compensation, you must think about the overall purpose of your program and the goal of eliciting voices otherwise unlikely to be heard. The purpose of the DMHC program

is to ensure that the consumer voice is present in departmental decisions that will affect that segment of the population. This reflects the reality that without this program, the consumer voice would be muted or missing because participation can be prohibitively expensive.

Additional Eligibility Requirements

"The regulations shall require that the person or organization demonstrate a record of advocacy on behalf of health care consumers in administrative or legislative proceedings…"[10]

The requirement that organizations or individuals show a record of advocacy "in administrative or legislative proceedings" heightens the eligibility standard in this case. This is something you may want to consider eliminating. There may be instances where a group has a demonstrated record of work on behalf of consumers, but is not experienced with formal proceedings. This lack of experience does not mean they are unable to contribute substantially to a regulatory proceeding. Removing this requirement will help encourage more public interest organizations to become familiar with formal administrative or legislative processes.

Note that policymakers sometimes try to add in requirements that consumer groups disclose their member's names and detailed data on all the organization's funding sources. These attempts should be adamantly resisted. The First Amendment to the Constitution protects the right of "association" and government monitoring of nonprofit membership is not permissible.

Avoiding Duplicative Representation

"…in order to determine whether the person or organization represents the interests of consumers…"[11]

It is possible that more than one individual or organization representing the interests of consumers will be found eligible to participate in the same proceeding. You may want to consider including a provision which can streamline the proceeding in order to avoid duplicative representation and possible depletion of funding. Though not included in the DMHC law, you can draft a provision that permits the decision-maker to consolidate the eligible participants likely to present the same or complimentary evidence. This should be done on a case-by-case basis. For sample language, see the Consumers Union Model Conversion Act, Section 8 (5). This model law is attached as Appendix E.

Types of Proceedings

"…to the adoption of any regulation or to an order or decision made by the director if the order or decision has the potential to impact a significant number of enrollees."[6]

The purpose of the DMHC is to regulate and ensure the financial stability of the managed health care system in California while helping consumers and providers resolve problems with their health plans. Because of this broad purpose, the DMHC makes both adjudicatory decisions that affect only the parties involved in a particular matter and regulatory decisions that impact large numbers of enrollees.

The Consumer Participation Program is not intended to allow for intervention in individual adjudications of health plan licenses or individual consumer grievances or complaints. Rather, intervention is encouraged for proceedings relating to adopting (or the decision not to adopt) regulations or other orders made by the Director. The regulations provide that the Director may identify regulatory proceedings in which he or she believes consumer participation would be helpful, though the list is not exhaustive. Cal. Code Regs. title 28 §1010(d)(1). Proceedings dealing with issues such as access to language assistance, claims settlement practices and unfair billing patterns are example of proceedings that "impact large numbers of enrollees." See discussion below for more about Limitations on Types of Issues.

Limitations on Types of Issues

"(c) This section shall apply to all proceedings of the department, but shall not apply to resolution of individual grievances, complaints, or cases."[12]

A pre-requisite to participation under the DMHC Consumer Participation Program is that the proceeding must have the "potential to impact a significant number of enrollees." This program is not intended to allow participation in individual patient grievances or plan disputes. See Cal. Code Regs. title 28 §1010(b)(5). This is an important limitation on the types of departmental decisions in which groups can intervene. See discussion above on Types of Proceedings for more on this topic.

Sometimes it may be necessary to create a program without this limitation. For instance, the California Public Utilities Code has a successful public participation program which provides compensation for participating or attaining legal "intervention" status in any proceeding of the Public Utilities Commission (PUC). Under this law, a proceeding is defined as an application, complaint, investigation, rulemaking or any informal or formal proceedings sponsored by the commission. Cal. Pub. Util. Code §§1801 and 1802(f). The PUC has a broad authority,

and therefore, there are many opportunities for an intervenor to contribute. Proceedings under the PUC may relate to establishing service standards and safety rules, authorizing utility rate changes, monitoring anti-competitive activity, prosecuting unlawful marketing and billing activities, resolving complaints by customers against utilities or implementing energy conservation programs. While some of these examples are regulatory in nature others are adjudicatory, such as prosecuting unlawful marketing or monitoring anti-competitive activity.

Under the PUC program, it is possible for a group to intervene in an individual complaint proceeding brought by utility customer against their electric company while participation is not permitted for individual complaints brought before the DMHC. It is important to note the difference between these two programs and decide what type of program provides the best method for protecting the intended interests.

Eligibility to Collect

"…and has made a substantial contribution on behalf of consumers …"[5]

"Substantial contribution" is the most common standard used to determine whether an intervenor is entitled to collect fees. Under the DMHC regulations substantial contribution means that "the participant significantly assisted the Department in its deliberations by presenting relevant issues, evidence, or arguments which were helpful, and seriously considered, and the participant's involvement resulted in more relevant, credible, and non-frivolous information being available to the Director." Cal. Code Regs. title 28 §1010(b)(8). It is important to note that substantial contribution does not require that the agency accept the intervenor's argument in order to receive compensation under the program. See also California Ins. Code §1861.10(b) and Cal. Pub. Util. Code §1802(i).

Compensation Rates

"…rates of compensation…"[8]

A program must detail the method for which compensation rates are calculated. This statute leaves the details up to the department to adopt in regulation, but it is possible to lay out the criteria in statute. In this program, like most intervenor programs, rates are computed taking into consideration market rates paid to people of comparable training and experience who offer similar services. The DMHC regulations specify that the market rate should be based on the prevailing rates in the state's two largest cities at the time of the director's decision to award compensation. Cal. Code Regs. title 28 §1010(3).

Fee Awards

"…to award reasonable advocacy and witness fees…"[3]

The Consumer Participation Program rewards "advocacy and witness fees;" expenses incurred by a participating group for the services of an advocate or expert witness. Cal. Code Regs. title 28 §1010(b). Groups that participate in consumer participation programs have varied resources and expertise. While one organization may have an attorney or other advocate on staff that is experienced in working on relevant legal issues, with proper funding others may want to hire such an advocate. There are also many issues that benefit from expert testimony and analysis which may require hiring outside the organization. Experts can be a critical asset in persuading the regulator about the consumer perspective.

As an example, during nonprofit health plan and hospital conversion hearings, in most states the regulator's decision to grant permission to convert to a for-profit corporation is dependent in part on detailed financial estimates of the company's value. Such valuations are extremely expensive. The applicant is usually required to submit a valuation with its request for conversion. Large corporations have the necessary funds to pay for this financial assessment. But without a financial expert to review the valuation from the consumer perspective, the decision-maker is left with a one-sided record. Allowing the agency to provide reimbursements for experts creates a more robust record with which to educate the decision-maker.

Fees

"(d) Fees awarded pursuant to this section may not exceed three hundred fifty thousand dollars ($350,000) each fiscal year.

(e) The fees awarded pursuant to this section shall be considered costs and expenses pursuant to Section 1356 and shall be paid from the assessment made under that section. Notwithstanding the provisions of this subdivision, the amount of the assessment shall not be increased to pay the fees awarded under this section."[13]

An essential decision is how to fund the program. There are a number of different options. Some will be more politically contentious then others, but you will have to weigh the pros and cons for each option to determine which will work best in your situation. The question of whether or not to place a cap on compensation may be based on the local politics in your state, on the size of the funding source, or both.

The DMHC funds the Consumer Participation Program through a general assessment that is made on every health plan licensed by the DMHC. This assessment was not created and is not

intended to be used solely for the Consumer Participation Program, but rather is included as part of the administrative overheard costs that the DMHC incurs while regulating the licensed entities. Note that the language clearly states that the assessment cannot be increased to pay the consumer participation fees.

Assessments are just one way in which to fund a consumer participation program. The DMHC assessment is a general assessment meant to pay for a variety of administrative costs. It was in place at the time the Consumer Participation Program passed and creates an ideal situation in which neither the regulated entity nor the state has to put out any additional money to fund the program. The costs are spread broadly, making it less adversarial.

If this option does not work, it is possible to adopt a special assessment on a regulated group for the specific purpose of funding a consumer participation program. This also spreads the burden over the entire industry and will not affect the state budget. It is possible though, that this will spark more opposition because the program is creating a new cost on the regulated industry.

If your program is tailored to deal with administrative proceedings in which there is an industry applicant seeking approval (such as a conversion proceeding or rate change application), one option would be to create an application fee that funds the compensation for consumer participation. This can be a flat fee or can be based on a percentage of the transaction size. It can be a nonrefundable fee, regardless of participation, or it can be refunded if there is no participant compensation is granted. This method of funding is not susceptible to state budget fluctuations and can be seen as the cost of doing business. In addition, it is less adversarial than requiring the applicant to pay an “award” to the participant. It focuses on the purpose of this funding which is to create a complete administrative record, not reward the opposition. On the downside, this type of funding will not work in regulatory proceedings in which there is no applicant.

Another option is to fund the program through either the state or administrative agency budget. These are much bigger funding pots and eliminate the need to require a single regulated group to fund the program. This can be justified because the purpose of these programs is to help the state make decisions in the public interest with a complete record. For this reason, it makes sense that the state should provide the funding. The problem with tying these programs to a state or agency budget is that it will be susceptible to budget cuts and increased political pressure.

Award Application Process

"…and procedures for seeking compensation."[9]

Every consumer participation program must include instructions detailing the process by which a person or group can seek funding for their contributions to the proceedings. There are three steps to the DMHC application process. First, a person or organization must file a request for a finding of eligibility to participate and seek compensation. This is the threshold step at which the intervenors show that they represent the interest of consumers and have experience advocating on behalf of healthcare consumers in administrative or legislative proceedings. Cal. Code Regs. title 28 §1010(c). A finding of eligibility lasts for two years. This type of preliminary screening helps minimize duplicative paperwork for both the agency and the petitioning organization when they wish to participate in more than one proceeding.

The next step required by the DMHC is for the organization to seek approval to actually participate in a particular proceeding. This step requires that the organization explain why it believes its participation is needed in the proceeding along with an estimation of the fees for which it will seek compensation. Cal. Code Regs. title 28 §1010(d).

The last step is the application for an award of fees at the end of a proceeding. In order to receive an award, an organization must give a detailed, itemized accounting of the work that was performed with all billing records. In addition, the organization must describe the ways in which it substantially contributed to the proceeding. Objections to the fee application can be filed by any person involved in the proceeding.

It is conceivable that a consumer participation program could be set up to provide funding before the hearing, rather than at the end. In the past, there were programs in New York and Ontario, Canada that provided pre-hearing funding, but both have since been repealed. The benefit to consumer groups of up-front funding is obvious; those that do not have the necessary resources to become fully involved in a long technical proceeding would be able to hire staff and/or consultants who could make the adequate time commitment. These programs can be politically controversial, however, because they fund participation that has yet to be completed. For this reason, they oftentimes contain more rigorous procedures for applying and receiving funding along with additional protections to prevent fraud. They also may provide for repayment mechanisms if the work is not completed or no substantial contribution made- an administrative complexity for everyone involved.

Reporting Requirements

"(f) The department shall report to the appropriate policy and fiscal committees of the Legislature before March 1, 2004, and annually thereafter, the following information:

(1) The amount of reasonable advocacy and witness fees awarded each fiscal year.

(2) The individuals or organization to whom advocacy and witness fees were awarded pursuant to this section.

(3) The orders, decisions, and regulations pursuant to which the advocacy and witness fees were awarded."[14]

A consumer participation program should include some procedure by which the administering agency reports either to the legislature or the public on important aspects of the program. This will maintain an adequate level of transparency and oversight.

Sunset Provision

"(g) This section shall remain in effect only until January 1, 2012, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2012, deletes or extends that date."[15]

Oftentimes, political realities will require you to incorporate a "sunset" provision into your bill language, requiring legislative renewal of the program by a certain date. This creates a trial period for the program. Prior to the sunset date, language to continue the program must be submitted and support from legislators garnered. Building a track record of successes, including significant contributions to improved policies that benefit consumers, will help ensure the program continues. While sunset provisions are by no means ideal, they are not uncommon and may be a required compromise; particularly in a state in which public participation statutes are novel.

Appendix A

California Department of Managed Health Care

Consumer Participation Program

Regulations Title 28 §1010

(a) Intent and Regulatory Purpose.

The purpose of this regulation is to establish the Department's substantive and procedural process and criteria, in accordance with section 1348.9 of the Health & Safety Code for determining discretionary awards, if any, of reasonable advocacy and witness fees to Participants on the basis that the Participant Represent the Interests of Consumers in a Proceeding, and has made Substantial Contribution to the Department in its deliberations. Nothing in this article shall be construed to prohibit any person from participating in a Proceeding if that person does not seek compensation pursuant to this article.

(b) Definitions.

For purposes of this section, the following definitions shall apply:

(1) "Advocacy Fee" means expenses, incurred for in-house advocates or billed, by a Participant for the services of an advocate in the proceeding. An advocate need not be an attorney. Advocacy fees shall not exceed market rates as defined in this section.

(2) "Compensation" means payment for all or part of the amount requested by a Participant for advocacy fees and witness fees in any proceeding relating to the adoption of any regulation or to an order or decision, including a decision not to adopt a regulation, made by the Director.

(3) "Market Rate" means, with respect to advocacy and witness fees, the prevailing rate for comparable services in the private sector in the Los Angeles and San Francisco Bay Areas at the time of the Director's decision awarding compensation to a Participant for attorney advocates, non-attorney advocates, or experts with similar experience, skill and ability. Billing rates shall not exceed the Market Rate.

(4) "Participant" means a person whose Request for Finding of Eligibility to Participate, filed under subsection (c) or Petition to Participate, filed under subsection (d) below, has been granted by the Director.

(5) "Proceeding" or "Administrative Proceeding" mean an administrative decision-making process of the Department of Managed Health Care that results in the adoption of a regulation, or in an order or decision of the Director that has the potential to impact a significant number of enrollees. For purposes of this Article, order or decision made by the Director" shall include a

decision not to adopt a regulation or take an action and shall not include resolution of individual grievances, complaints, or cases.

(6) "Represents the Interests of Consumers" means that the person or organization has a record of advocacy on behalf of health care consumers in administrative or legislative proceedings. A party which represents, in whole or in part, any entity regulated by the Department shall not be eligible for compensation.

(7) "Submit to the Director" means to send material electronically to The Director, at dmhc.ca.gov., or, for entities that do not have access to e-mail, by mail to The Director, Department of Managed Health Care, 980 9th Street, Suite 500, Sacramento, CA 95814.

(8) "Substantial Contribution" means that the Participant significantly assisted the Department in its deliberations by presenting relevant issues, evidence, or arguments which were helpful, and seriously considered, and the Participant's involvement resulted in more relevant, credible, and non-frivolous information being available to the Director.

(9) "Verified" means executing a statement stating that the facts contained in the Request for Finding of Eligibility to receive an award of compensation are true and correct, to the best of their knowledge.

(10) "Witness Fees" means expenses, incurred or billed, by a Participant for the services of an expert witness in the proceeding. Witness fees shall not exceed market rates as defined in this section.

(c) Request for Finding of Eligibility to Participate and Seek Compensation.

(1) A person who intends to seek an award under this article shall submit to the Director a Request for Finding of Eligibility to Participate and Seek Compensation, giving notice that it represents the interests of consumers and of its intent to claim compensation. The request shall be verified, and may be submitted at any time independent of the pendency of a proceeding in which the person seeks to participate.

(2) The request shall contain:

a. The petitioner's name, mailing address, telephone number, and e-mail address, if any.

b. A showing that the petitioner Represents the Interests of Consumers, including a description of its experience in advocating on behalf of health care consumers in administrative or legislative proceedings.

c. For petitioners that are organizations, the following information about the organization:

1. Names, addresses, and titles of the members of the organization's governing body,

2. A description of the organization's general purposes, size, and structure,

3. Whether the organization is a nonprofit organization, and

4. Under what statute the organization is incorporated.

(3) Within 30 days of the receipt of the Request for Finding of Eligibility to Participate, the Director shall rule on the requestor's eligibility to participate and to seek an award of compensation. If the Director finds that the requestor has met the requirements for eligibility, the Director shall grant the request. A finding of eligibility to seek compensation shall be valid in any proceeding in which a Participant's involvement commences within two years of the finding of eligibility so long as the Participant still Represents the Interests of Consumers.

(4) A person found eligible to participate and seek compensation shall promptly disclose to the Department any material changes in the information submitted in its request.

(d) Procedure for Petition to Participate.

(1) Periodically, the Director may identify regulatory proceedings in which he or she believes consumer participation would be helpful and anticipates that fees may be awarded. Nothing in this subsection shall be construed as limiting compensation only to those proceedings on the Director's list, if any. A person desiring to participate in a proceeding and seek an award of fees under this subsection shall submit electronically to the Director a Petition to Participate, as described in this subdivision. The request shall be submitted no later than the end of the public comment period or the date of the first public hearing in the proceeding in which the proposed Participant seeks to become involved, whichever is later. For orders or decisions, the request shall be submitted within ten working days after the order or decision becomes final.

(2) The Petition to Participate shall contain the following:

a. The petitioner's name, mailing address, telephone number, and e-mail address, if any.

b. An identification of the proceeding in which the petitioner seeks to participate.

c. A clear and concise statement of the petitioner's interest in the proceeding explaining why participation is needed.

d. A statement adopting or amending the information submitted in support of the request for a determination of eligibility to participate and seek compensation, or, if there has been no prior submission, a showing of eligibility to participate on the basis that the petitioner Represents the Interests of Consumers as set forth in subpart c of this section.

e. An estimate of the fees to be sought.

(3) Approval of a Petition to Participate shall not guarantee the payment of the dollar amounts set forth in the estimate, or any amount whatever.

(4) Within 30 days of the receipt of a completed Petition to Participate, the Director shall rule on whether the Petition to Participate shall be granted. The petition may be denied if the Director determines that he or she elects not to award compensation to any participants in that proceeding, or that the petition does not meet the requirements of this regulation or the governing statute.

(5) An amended estimate shall be submitted as soon as possible when the Participant learns that the total estimated amount substantially increases. The Director may approve or disapprove of an amended amount.

(e) Procedure for Applying For An Award Of Fees.

(1) Following the issuance of a final regulation, order or decision by the Director in the proceeding, a Participant who has been found to be eligible for an award of compensation may submit within 60 days an application for an award of advocacy and witness fees. A Participant who makes a Substantial Contribution may be eligible for full compensation.

(2) The application for an award of compensation shall be submitted electronically to the designated departmental hearing officer and shall include:

a. A detailed, itemized description of the advocacy and witness services for which the Participant seeks compensation;

b. Legible time and/or billing records, created contemporaneously when the work was performed, which show the date and the exact amount of time spent on each specific task; and

c. A description of the ways in which the Participant's involvement made a Substantial Contribution to the proceeding as defined in subpart (b)(8), supported by specific citations to the record, Participant's testimony, cross-examination, arguments, briefs, letters, motions, discovery, or any other appropriate evidence.

(3) As used in this subdivision, the phrase exact amount of time spent" refers either to quarters (15 minutes) of an hour for attorneys, or to thirty (30) minute increments for non-attorney advocates. The phrase each specific task," refers to activities including, but not limited to:

a. Telephone calls or meetings/conferences, identifying the parties participating in the telephone call, meeting or conference and the subject matter discussed;

b. Legal pleadings or research, or other research, identifying the pleading or research and the subject matter;

c. Letters, correspondence or memoranda, identifying the parties and the subject matter; and,

d. Attendance at hearings, specifying when the hearing occurred, subject matter of the hearing and the names of witnesses who appeared at the hearing, if any.

(4) Within 30 days after submission of the request, which will be posted on the Department's web site, the Department or any other person participating in the proceeding may file an objection to the request, which must be submitted to the Department and sent to the claiming Participant.

(5) If any person participating in the proceeding questions the Market Rates or reasonableness of any amount set forth in an application for an award of compensation, it shall disclose, in a verified declaration in support of its memorandum, the fees and rates which it anticipates will be, and which have been, billed or incurred for its advocates and witnesses in connection with the proceeding.

(6) The hearing officer may request additional information or documentation from the Participant to clarify or substantiate the claim, and, if considered necessary by the hearing officer, may request additional memoranda, and/or audit the records and books of the Participant to the extent necessary to verify the basis for the amount claimed in seeking the award.

(7) The hearing officer shall issue a written decision that determines whether or not the Participant has made a substantial contribution to the proceeding; and, if so, shall determine the amount of compensation to be paid, which may be all or part of the amount claimed. The decision will be posted promptly on the Department's web site and will be sent, electronically or by mail, as appropriate, to all parties who participated in the hearing.

(8) Within 30 days after posting and sending of the decision by the hearing officer, a Participant who is dissatisfied with that decision may appeal to the Director for review of the hearing officer's decision. The notice of appeal should state the relief which the Participant is seeking and the reasons why the decision by the hearing officer should be modified or changed. The Director may request additional briefing if the Director deems that would be helpful in reaching a decision. The review shall be of the written record and limited to whether the hearing officer's decision constituted an abuse of discretion. The Director's decision is final and there is no further administrative remedy.

Appendix B

California Public Utilities Code §§1801-1812 (2007)

1801. The purpose of this article is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission.

1801.3. It is the intent of the Legislature that:

(a) The provisions of this article shall apply to all formal proceedings of the commission involving electric, gas, water, and telephone utilities.

(b) The provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process.

(c) The process for finding eligibility for intervenor compensation be streamlined, by simplifying the preliminary showing by an intervenor of issues, budget, and costs.

(d) Intervenors be compensated for making a substantial contribution to proceedings of the commission, as determined by the commission in its orders and decisions.

(e) Intervenor compensation be awarded to eligible intervenors in a timely manner, within a reasonable period after the intervenor has made the substantial contribution to a proceeding that is the basis for the compensation award.

(f) This article shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding.

1802. As used in this article:

(a) "Compensation" means payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a proceeding, and includes the fees and costs of obtaining an award under this article and of obtaining judicial review, if any.

(b) (1) "Customer" means any of the following:

(A) A participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation that is subject to the jurisdiction of the commission.

(B) A representative who has been authorized by a customer.

(C) A representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers, or to represent small commercial

customers who receive bundled electric service from an electrical corporation.

(2) “Customer” does not include any state, federal, or local government agency, any publicly owned public utility, or any entity that, in the commission’s opinion, was established or formed by a local government entity for the purpose of participating in a commission proceeding.

(c) “Expert witness fees” means recorded or billed costs incurred by a customer for an expert witness.

(d) “Other reasonable costs” means reasonable out-of-pocket expenses directly incurred by a customer that are directly related to the contentions or recommendations made by the customer that resulted in a substantial contribution.

(e) “Party” means any interested party, respondent public utility, or commission staff in a hearing or proceeding.

(f) “Proceeding” means an application, complaint, or investigation, rulemaking, alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the commission, or other formal proceeding before the commission.

(g) “Significant financial hardship” means either that the customer cannot afford, without undue hardship, to pay the costs of effective participation, including advocate’s fees, expert witness fees, and other reasonable costs of participation, or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding.

(h) “Small commercial customer” means any nonresidential customer with a maximum peak demand of less than 50 kilowatts. The commission may establish rules to modify or change the definition of “small commercial customer,” including use of criteria other than a peak demand threshold, if the commission determines that the modification or change will promote participation in proceedings at the commission by organizations representing small businesses, without incorporating large commercial and industrial customers.

(i) “Substantial contribution” means that, in the judgment of the commission, the customer’s presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or

recommendation.

1802.3. A representative of a group representing the interests of small commercial customers who receive bundled electric service from an electrical corporation shall not be eligible for an award of compensation pursuant to this article if the representative has a conflict arising from prior representation before the commission. This conflict may not be waived.

1802.5. Participation by a customer that materially supplements, complements, or contributes to the presentation of another party, including the commission staff, may be fully eligible for compensation if the participation makes a substantial contribution to a commission order or decision, consistent with Section 1801.3.

1803. The commission shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or proceeding to any customer who complies with Section 1804 and satisfies both of the following requirements:

(a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.

(b) Participation or intervention without an award of fees or costs imposes a significant financial hardship.

1804. (a) (1) A customer who intends to seek an award under this article shall, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation. In cases where no prehearing conference is scheduled or where the commission anticipates that the proceeding will take less than 30 days, the commission may determine the procedure to be used in filing these requests. In cases where the schedule would not reasonably allow parties to identify issues within the timeframe set forth above, or where new issues emerge subsequent to the time set for filing, the commission may determine an appropriate procedure for accepting new or revised notices of intent.

(2) (A) The notice of intent to claim compensation shall include both of the following:

(i) A statement of the nature and extent of the customer's planned participation in the proceeding as far as it is possible to set it out when the notice of intent is filed.

(ii) An itemized estimate of the compensation that the customer expects to request, given the likely duration of the proceeding as it appears at the time.

(B) The notice of intent may also include a showing by the customer that participation in the hearing or proceeding would pose a significant financial hardship. Alternatively, such a showing shall be included in the request submitted pursuant to subdivision (c).

(C) Within 15 days after service of the notice of intent to claim compensation, the administrative law judge may direct the staff, and may permit any other interested party, to file a statement responding to the notice.

(b)(1) If the customer's showing of significant financial hardship was included in the notice filed pursuant to subdivision (a), the administrative law judge, in consultation with the assigned commissioner, shall issue within 30 days thereafter a preliminary ruling addressing whether the customer will be eligible for an award of compensation. The ruling shall address whether a showing of significant financial hardship has been made. A finding of significant financial hardship shall create a rebuttable presumption of eligibility for compensation in other commission proceedings commencing within one year of the date of that finding.

(2) The administrative law judge may, in any event, issue a ruling addressing issues raised by the notice of intent to claim compensation. The ruling may point out similar positions, areas of potential duplication in showings, unrealistic expectation for compensation, and any other matter that may affect the customer's ultimate claim for compensation. Failure of the ruling to point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant financial hardship in no way ensures compensation. Similarly, the failure of the customer to identify a specific issue in the notice of intent or to precisely estimate potential compensation shall not preclude an award of reasonable compensation if a substantial contribution is made.

(c) Following issuance of a final order or decision by the commission in the hearing or proceeding, a customer who has been found, pursuant to subdivision (b), to be eligible for an award of compensation may file within 60 days a request for an award. The request shall include at a minimum a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding. Within 30 days after service of the request, the commission staff may file, and any other party may file, a response to the request.

(d) The commission may audit the records and books of the customer to the extent necessary to verify the basis for the award. The commission shall preserve the confidentiality of the customer's records in making its audit. Within 20 days after completion of the audit, if any, the commission shall direct that an audit report shall be prepared and filed. Any other party may file a response to the audit report within 20 days thereafter.

(e) Within 75 days after the filing of a request for compensation pursuant to subdivision (c), or within 50 days after the filing of an audit report, whichever occurs later, the commission shall issue a decision that determines whether or not the customer has made a substantial

contribution to the final order or decision in the hearing or proceeding. If the commission finds that the customer requesting compensation has made a substantial contribution, the commission shall describe this substantial contribution and shall determine the amount of compensation to be paid pursuant to Section1806.

1806. The computation of compensation awarded pursuant to Section 1804 shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the comparable market rate for services paid by the commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services.

1807. Any award made under this article shall be paid by the public utility which is the subject of the hearing, investigation, or proceeding, as determined by the commission, within 30 days.

Appendix C

California Insurance Code §1861.10 (2007)

Consumer Participation.

(a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

(b) The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant.

(c) (1) The commissioner shall require every insurer to enclose notices in every policy or renewal premium bill informing policyholders of the opportunity to join an independant, non-profit corporation which shall advocate the interests of insurance consumers in any forum. This organization shall be established by an interim board of public members designated by the commissioner and operated by individuals who are democratically elected from its membership. The corporation shall proportionately reimburse insurers for any additional costs incurred by insertion of the enclosure, except no postage shall be charged for any enclosure weighing less than 1/3 of an ounce. (2) The commissioner shall by regulation determine the content of the enclosures and other procedures necessary for implementation of this provision. The legislature shall make no appropriation for this subdivision.

Appendix D

BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of the Application regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates,

Washington Citizen Action, Welfare Rights Organizing Coalition, American Lung Association of Washington, Northwest Federation of Community Organizations, Northwest Health Law Advocates, Service Employees International Union Washington State Council, The Children's Alliance, Washington Academy of Family Physicians, Washington Association of Churches, Washington Protection and Advocacy System and Washington State NOW,

Applicants for Intervention.

No. G02-45

MEMORANDUM IN SUPPORT OF APPLICANT-INTERVENORS' MOTION TO INTERVENE

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I. INTRODUCTION

Applicant-Intervenors, Washington Citizen Action, Welfare Rights Organizing Coalition, American Lung Association of Washington, Northwest Federation of Community Organizations, Northwest Health Law Advocates, Service Employees International Union Washington State Council, The Children's Alliance, Washington Academy of Family Physicians, Washington Association of Churches, Washington Protection and Advocacy System and Washington State NOW, which are consumer, provider, advocacy and citizen organizations affected by the proposed conversion of Premera Blue Cross, submit this Memorandum in support of their Motion to Intervene, filed in this action on October 14, 2002.

Since Applicant-Intervenors filed their Motion to Intervene, the Insurance Commissioner has issued his "First Order: Case Management Order" [hereinafter "First Case Management Order"], which described the process, responsibilities and filing requirements for persons seeking participation in the Premera conversion adjudicative hearing. First Case Management Order at 4-6. This Memorandum is filed to further explain Applicant-Intervenors' significant interest in the proposed Premera conversion, as required under the First Case Management Order.

Applicant-Intervenors are all consumer, provider and advocacy organizations with membership or constituencies that have a significant interest in advocating to protect Washington's health system. Above and beyond their broad interest in the health system, Applicant-Intervenors have a direct, specific interest in the proposed Premera conversion because they represent Premera enrolled participants, participating providers, and purchasers of Premera coverage who have a direct pecuniary interest in the transaction. See e.g. Declarations

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declarations from representatives of the Applicant-Intervenors, describing the organizations' direct and significant interest in Premera's proposed transaction. See Declarations of Barbara Flye of Washington Citizen Action, Jean Colman of the Welfare Rights Organizing Coalition, LeeAnn Hall of the Northwest Federation of Community Organizations, Janet Varon of Northwest Health Law Advocates, Ellie Menzies of the Service Employees International Union Washington State Council, Elizabeth Arjun of The Children's Alliance, Vicki Black of the Washington Academy of Family Physicians, Julie Watts of the Washington Association of Churches, Mark Stroh of Washington Protection and Advocacy System, and Linda Tosti-Lane of the Washington State Chapter of the National Organization for Women [hereinafter known collectively as Declarations of Applicant-Intervenors].

Applicant-Intervenors represent members and constituencies that include Premera enrolled participants that will be significantly affected if the proposed Premera conversion is approved. Premera enrollees in Medicaid Health Options, the Basic Health Plan, the State Children's Health Insurance Program and other state-sponsored health coverage, as well as privately purchased coverage, will be affected by changes in Premera's business plan, rates, benefit packages, provider reimbursement rates, administration, and utilization review, among other changes. For example, Medicaid Healthy Options enrollees experienced serious dislocation and difficulty when Regence Blue Shield discontinued its participation in the Healthy Options program in many parts of the State. See Declaration of Janet Varon at 4. Applicant-Intervenors fear that Premera enrollees will face the same barriers to care if Premera pulls out of their region. Id. Moreover, the impact of a significant change in Premera's business plan will have a "ripple effect," impacting individuals, providers and businesses that may have no direct

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relationship with Premera. Id. at 5-6. Similarly, Premera participating providers will be significantly affected by changes to Premera's business plan and provider reimbursement rates. See Declaration of Vicki Black at 2-3.

Applicant-Intervenors are also beneficiaries of the nonprofit assets accumulated over time by Premera and its predecessor corporations. Both predecessor corporations to Premera Blue Cross – The Medical Services Corporation of Spokane County (later the Medical Services Corporation of Eastern Washington) and the Washington Hospital Service Association (later known as Blue Cross of Washington and Alaska) were dedicated to nonprofit health care purposes in Washington and Alaska. See Declaration of Eleanor Hamburger at 2-6, Exhibits 1-7. Since those corporations have merged into Premera Blue Cross and created a parent nonprofit, Premera, their assets have been dedicated to another similar nonprofit upon dissolution or conversion. Id. In its proposal, Premera has indicated its agreement to transfer its nonprofit assets to nonprofit health foundations in Washington and Alaska. Premera Form A statement at 3. Accordingly, Applicant-Intervenors and the members and constituencies that they represent, the various health care consumers in Washington state, are beneficiaries of the nonprofit assets held by Premera. See Hawes v. Colorado Div. of Ins., 32 P.3d 571, 573 (Colo. Ct. App. 2001) (a coalition of nonprofit and public interest organizations was properly granted full intervention status in a conversion proceeding because the organizations were potential recipients of the foundation to be formed as a result of the transaction).

Applicant-Intervenors have a significant vested interest in the proper nonprofit dedication of the assets held by Premera. Applicant-Intervenors' significant interest is rooted in common law tradition, and is embodied in the Washington Nonprofit Corporations Act, which

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recognizes that the assets of a nonprofit corporation are held dedicated to a particular purpose and may not be freely alienated. See RCW 24.03.225; 230; 255; 265. Under the charitable trust doctrine and cy pres, the nonprofit assets held by Premera are dedicated in perpetuity to the nonprofit mission under which they were initially formed: making health care and coverage more affordable and accessible to persons in Washington and Alaska. See Peth v. Spear, 63 Wash. 291, 115 P. 164 (1911). (Charitable trust is formed when documents describe the use of the property in question as dedicated to the benefit of members of an unincorporated association); Puget Sound Bank v. Easterday, 56 Wn.2d 937, 949; 350 P.2d 444, 450 (1960)(discussing the doctrine of cy pres).

III. ARGUMENT

A. Applicant-Intervenors' "significant interest" is affected by the proposed Premera conversion, and they should be permitted to participate in the adjudicative hearing.

Both the Holding Company Act for Insurers, enacted in 1993, and the Holding Company Act for Health Care Service Contractors and Health Maintenance Organizations, enacted in 2001, permit the participation in the adjudicative hearing by persons whose "significant interest" is determined by the Insurance Commissioner to be affected. RCW 48.31C.030(4); RCW 48.31B.015(4)(b). Neither Holding Company Act, nor the implementing regulations, define

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"significant interest."[2] This term first appears in the context of insurance law in a Washington Supreme Court case, Kueckelhan v. Federal Old Line Insurance Company, 69 Wn.2d 392, 411, 418 P.2d. 443, 455 (1966). In that case, a mutual insurance company challenged the Insurance Commissioner's authority to possession of the company under the Commissioner's statutory rehabilitation powers. The Court found that the Insurance Commissioner's regulatory powers were constitutional, and commented that a company's "policyholders, its creditors and the public have a *significant interest*" in the company's investments, and that their interest "demands a standard of conduct beyond the ordinary." Id. (Emphasis supplied.)

The Legislature is presumed to be aware of existing caselaw when it enacts statutes. In re Marriage of Williams, 115 Wn.2d 202, 208, 796 P.2d 421, 424 (1990). By specifically incorporating the term "significant interest" into both Holding Company Acts, one can infer that the Legislature intended to incorporate the Supreme Court's finding that policyholders, creditors and the public be included in the definition of "significant interest" when it enacted RCW 48.31C.030(4) and 48.31B.015(4)(b). Applicant-Intervenors are organizations that represent Premera enrolled participants and purchasers of insurance coverage (policyholders), participating providers (creditors) as well as likely beneficiaries of the nonprofit health assets held by Premera. See generally Declarations of Applicant-Intervenors, and discussion supra at II.

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[2] Although the Washington Holding Company Acts are based upon the Insurance Holding Company System Regulatory Act authored by the National Association of Insurance Commissioners (NAIC), the term "significant interest" does not appear in the relevant section of the Model Act, nor does its legislative history shed any light on the use of this term. See generally NAIC Insurance Holding Company System Regulatory Act and Legislative History, dated November, 2001.

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Accordingly, Applicant-Intervenors have a significant interest in the proposed Premera conversion.

The Legislature recognized that transactions regulated under the Holding Company Acts would be so complex that the Office of the Insurance Commissioner may not be able to represent fully every interest of the general public that may be impacted by a change of control of a health carrier. Accordingly, the Legislature included the provision that persons with "significant interest" as determined by the Insurance Commissioner, should participate in the hearing, in order to protect their rights. In fact, the Legislature deemed the involvement of persons with "significant interest" so important that it granted them the same rights of participation as health carriers at the adjudicative hearing. RCW 48.31C.030(4); RCW 48.31B.015(4)(b).

While the Office of the Insurance Commissioner is mandated to represent the interests of the general public in transactions under the Holding Company Acts, RCW 48.01.030; 48.02.060; 48.31C.030; 48.31B.015, the OIC's statutory authority and mandate does not diminish the Applicant-Intervenors' independent, significant interest. Nothing in the Holding Company Acts limits the participation of persons with significant interest to those subjects not addressed by the OIC staff. However, Applicant-Intervenors in this case seek participation, not to duplicate the effort by the OIC staff, but to enhance the Insurance Commissioner's review and to raise issues that may not be addressed by the OIC staff or consultants.

B. Applicant-Intervenors are "aggrieved" persons and are entitled to participate in the adjudicative hearing.

In addition to the specific intervention rights conferred on Applicant-Intervenors under RCW 48.31C.030, Applicant-Intervernors are entitled to participate as full parties in the

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adjudicative hearing because they are aggrieved by the possibility that the Commissioner's determination regarding Premera's conversion proposal will prejudice their interests.

The Insurance Code establishes the right of aggrieved persons to an adjudicative hearing on any action, threatened action, or failure to act by the Insurance Commissioner. RCW 48.04.010; 48.31C.140. In the First Case Management Order, the Commissioner declared that he would preside over an administrative hearing to determine whether Premera's petition to convert to for-profit status should be approved. First Case Management Order at 2. Explaining the statutory authority for such a hearing, the Commissioner stated:

> The Holding Company Act specifies that the hearing held by the Insurance Commissioner in connection with his review of the Application shall be conducted as an adjudicative proceeding, resulting in a final administrative order. *See* RCW 48.31B.070; RCW 48.31C.030 and 140.

First Case Management Order at 2. Therefore, the jurisdiction of the adjudicative hearing includes requests by "aggrieved" persons under RCW 48.31C.140 and RCW 48.04.010.[3]

Nowhere in Titles 48 or 34.05 RCW, nor in their implementing regulations, is the term "aggrieved" defined in the context of providing entitlement to an adjudicative proceeding. However, the Administrative Procedures Act (APA) does define the term "aggrieved" person in the context of standing to seek *judicial* review, which sheds light on the appropriate use of the term within the Insurance Code. See RCW 34.05.530 (defining a three factor test for standing to seek judicial review of an agency action under the APA). Since the Insurance Code permits "aggrieved" persons to request an adjudicative hearing when they are merely *threatened* by a

[3] Applicant-Intervenors' Motion for Intervention included RCW 48.04.010 as a basis for their participation in the adjudicative hearing.

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potential decision of the Commissioner, RCW 48.04.010(b), the three factor definition in RCW 34.05.530 should be read as follows in the present proceeding:

> A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
> (1) The agency action *or failure to act* has prejudiced or is likely to prejudice OR The agency action *or failure to act threatens to* prejudice or is likely to *threaten to* prejudice AND
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; AND
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action, *the threatened action or failure to act.*
>
> The three-factor definition in the APA has been explained as follows:
>
> > These three conditions derive from federal caselaw [citation omitted]. The first and third conditions are often called the "injury-in-fact" requirement and the second condition is known as the "zone of interest test."

Washington Independent Telephone Association, 110 Wn. App. 498, 511-12, 41 P.3d 1212, 1219 (2002) *citing* Seattle Bldg. & Const. Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 793, 920 P.2d 581, 583-84 (1996). To the extent that the criteria are applicable to requests for a hearing under the Holding Company Acts, the Applicant-Intervenors satisfy them all.

1. Zone of Interest

This "test is not meant to be especially demanding." Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399, 107 S. Ct. 750, 757, 93 L.Ed.2d 757, 769 (1987). "'The test focuses on whether the Legislature intended the agency to protect the party's interest when taking the action at issue' St. Joseph Hosp. [& Health Care Ctr. v. Dep't of Health], 125 Wn.2d [733], 739-40,

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887 P.2d 891 [(1995)]." Seattle Bldg. & Const. Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 797, 920 P.2d 581, 585 (1996).

In the general area of insurance regulation, the Legislature explicitly recognized a broad public interest that Title 48 is aimed at protecting:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

RCW 48.01.030. Moreover, the Legislature explicitly authorizes the Commissioner to disallow insurance company transactions of the sort at issue here if he finds a negative impact on a bevy of areas related to the availability of health care coverage, the interests of subscribers and the "insurance-buying public." See RCW 48.31C.030(5)(a)(ii)(B) and (C). The Applicant-Intervenors, who are all consumer and provider advocacy groups whose constituencies have significant interests in the impact of Premera's proposed conversion on the availability, price and quality of health care and health insurance all fall within the broad sphere of the public whose direct and substantial interests the Commissioner is explicitly required to consider in deciding whether to approve the transaction.

2. Injury-in-fact

As noted above, the first and third conditions can be collapsed into one requirement, characterized as the "injury in fact." In this case, the proper standard for determining "injury" is whether there is an injury in fact, or whether there is the possibility of an action or failure to act which could result in injury in fact to the person requesting a hearing. Under such a definition, Applicant-Intervenors are clearly aggrieved by the possibility that the Commissioner may rule

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against their interests as a result of his review of the Premera proposed conversion. Applicant-Intervenors' constituents, Washington's residents from all areas of the State and sectors of the community, many of whom are low-income and/or disabled, have a significant interest in seeing that Premera's conversion does not result in increases to insurance rates, diminishment of benefits offered to subscribers, and withdrawal by Premera from certain markets. See Discussion at II, supra. Similarly, Applicant-Intervenor groups have a significant interest in the protection, dedication, enhancement and distribution of the proceeds from the conversion, should it go forward. Id. The possibility that the Commissioner's determination on the proposed conversion may prejudice Applicant-Intervenors' interests, constitutes "injury" under the test, and entitles them to participation in the adjudicative hearing, pursuant to RCW 48.31B.070, 48.31C.140, 48.04.010(b) and 34.05.413.

C. Applicant-Intervenor WPAS' federal authority to protect and advocate for the rights of persons with disabilities in administrative and other fora strengthens its significant interests affected and prejudiced by Premera's threatened conversion and provides an independent basis for its intervention.

In passing the "Protection and Advocacy" Acts,[4] Congress required that each state establish a system to protect and advocate for the rights of persons with mental illness, developmental disabilities, and other disabilities. Congress has specifically mandated that each state-designated protection and advocacy system ("P&A") shall have the authority to pursue

[4] These include the "Developmental Disabilities Assistance and Bill of Rights Act" (DDA), 42 U.S.C. §15041, et seq., the "Protection and Advocacy for Individuals with Mental Illness Act" (PAIMI), as amended, 42 U.S.C. § 10801, et seq.; and the "Protection and Advocacy for Individual Rights" (PAIR), 29 U.S.C. § 794e.

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administrative, legal and other remedies to ensure the protection of and advocacy for the rights of disabled individuals. 42 U.S.C. §§ 10805(a)(1)(B), (C), § 15043(a)(i), 29 U.S.C. § 794e(3).[5]

Courts have recognized that, in conferring this broad authority on P&A's, Congress intended to grant the P&A's independent standing to advocate for the interests of persons with disabilities in administrative and legal matters. See Rubenstein v. Benedectine Hospital, 790 F.Supp. 396, 408 (N.D.N.Y. 1992); Trautz v. Weisman, 846 F.Supp. 1160, 1163 (S.D.N.Y. 1994). To underscore this holding, when Congress reapproved the DDA, [6] it specifically articulated its intent to grant P&A's standing .[7] S. Rep. No. 103-120, 103rd Cong., 1st Sess., 8/3/93.

WPAS has been designated by the Governor as the P&A with the federal authority and mandate to protect and advocate for the rights of persons with disabilities in this State. Declaration of Mark Stroh ¶¶ 3-5; RCW 71.08.080.[8] Under its federal mandate, WPAS has exercised its authority to establish "health care access for people with disabilities" as priorities

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[5] The language of the three statutes granting this authority is nearly identical, with minor exceptions. The DDA and PAIR, which were amended and reauthorized in 2002 are even broader than PAIMI in their statutory grants of such authority, reflecting a Congressional intent to widen P&A's ability to advocate for their constituents.

[6] The subsequently enacted PAIR explicitly confers on P&A's "the same general authorities" to advocate for persons with all disabilities not covered by the DDA and PAIMI as are granted to P&A's to advocate for persons with developmental disabilities. 29 U.S.C. § 794e(f)(2).

[7] "The Committee heard testimony about the waste of scarce resources that are expended on litigating the issue of whether [protection and advocacy] systems have standing to bring suit. The Committee wishes to make clear that [protection and advocacy systems have standing to pursue legal remedies to ensure the protection and advocacy for the rights of individuals with developmental disabilities within the State. The Committee has reviewed and concurs with the holding and rationale in Goldstein v. Coughlin, 83 F.R.D. 613 (1979) and Rubenstein v. Benedictine Hospital, 790 F.Supp.396 (N.D.N.Y. 1992)." S. Rep. No. 103-120, at 39-40.

[8] This statute reiterates the requirement that the P&A "shall have the authority to pursue legal, administrative, and other appropriate remedies to protect the rights of" persons with disabilities.

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for the agency's advocacy.[9] Declaration of Stroh ¶¶ 7-8. Given the broad negative impact that Premera's conversion is likely and threatens to have on the access to health care afforded to persons with disabilities, it falls squarely within WPAS' priorities, authority and mandate to participate in this administrative hearing to advocate for and protect its constituents' and its own significant interests.[10] See Declaration of Stroh ¶¶ 5-12; Declaration of Varon at 4; §II, III(A), (B) supra. See also RCW 48.31B.015(4)(b) and .070; 48.31C.030(4) and .140.

Further, courts have recognized that the unique experience and expertise that P&A's possess concerning the rights of and issues that impact persons with disabilities provides strong support for permitting P&A's participation and intervention in cases concerning such issues. See Naughton v. Bevilacqua, 458 F.Supp. 610 (D.R.I. 1979); Goldstein, 83 F.R.D. at 615.[11] WPAS not only possesses this general expertise but also has a wealth of specific experience in analyzing

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[9] See e.g., 42 U.S.C. § 10805 (a)(6), (c); 42 U.S.C. §§ 15043(2)(C), 15044(a); 29 U.S.C. § 794e(f)(2) detailing P&A authority and process to set priorities with public comment.

[10] It also falls within WPAS' mandate to advocate for its constituents' interests and its own interests as potential beneficiaries of whatever foundation may be created to continue to promote the public purposes to which Premera's assets are devoted. See Hawes, 39 P.3d at 573-74. Further WPAS has significant communicative rights under the First Amendment (see Developmental Disabilities Center v. Melton, 689 F.2d 281, 287 (1st Cir. 1982)), Art. 1, §5 of the Washington State Constitution and 42 U.S.C. § 15043(2)(L); 29 U.S.C. § 794e(f) (P&A's have the authority to educate policymakers) to express the concerns of its constituents and the agency itself regarding the impact and form of Premera's conversion and transfer of its assets in the public proceeding on this issue. The denial of Applicant-Intervenor's Motion to Intervene would substantially prejudice those significant interests.

[11] "Intervention by proposed intervenors [Rhode Island Protection and Advocacy System], whose insight into the problems and statutory protection of the developmentally disabled has already proved valuable, is granted." Naughton v. Bevilacqua, 458 F.Supp. 610, 616 (D.R.I. 1979). "[I]ts [New York Protection and Advocacy System for Developmental Disabilities] expertise may be valuable as the case proceeds, especially with respect to issues which are not strictly confined to the condition of [the named plaintiff] Therefore, defendants' motion [to dismiss for lack of organizational standing] is denied." Goldstein v. Coughlin, 83 F.R.D. 613, 615 (W.D.N.Y. 1979).

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the issues that impact the rights to health care coverage of persons with disabilities and advocating for the protection of those rights. Declaration of Stroh ¶¶ 8-9, 14. Particularly when combined with the complementary resources and experience of other Applicant-Intervenors, this insures that information concerning the health impact of Premera's conversion on a wide spectrum of Washington's most vulnerable citizens will be provided to the Commissioner in a depth and from a perspective that he is otherwise unlikely, if not unable, to receive. See § III D infra.; see also RCW 34.05.443.

D. Full participation by Applicant-Intervenors will enhance the effectiveness and efficiency of the proceeding, not impair it.

The First Case Management Order indicates that the Insurance Commissioner may place conditions upon an intervenor's participation, including limiting an intervenor's participation, use of discovery, cross examination, and requiring two or more intervenors to combine their presentations.[12]

[12] Applicant-Intervenors do not concede that their role as Intervenors may be limited, if they are determined to be participants with significant interests affected by the proposed Premera conversion, as discussed in Section III. A., supra. The plain language of the statute grants participants with significant interests the same rights as health carriers to discovery, examination and cross examination of witnesses, and oral and written argument. RCW 48.31C.030 (4); 48.31B.015(4)(b). Nothing in the Holding Company Acts limits the rights of participants with "significant interests."

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Applicant-Intervenors seek full party status, in order to adequately represent their members' and constituencies' interests in the adjudicative hearing.[13]

Applicant-Intervenors require the use of discovery, examination and cross-examination and argument rights in order to protect their interests. Applicant-Intervenors seek to participate in the adjudicative hearing in order to raise concerns about the health impact of the proposed Premera conversion, to ensure full valuation of Premera's nonprofit assets, and, in the event the Insurance Commissioner allows the transaction to proceed, to ensure the adequate funding and independence of the foundation or foundations formed as a result of the conversion.

If permitted full participation in the adjudicative hearing, Applicant-Intervenors will commission an impartial health impact study of the proposed conversion. Declarations of Applicant-Intervenors and Declaration of Eleanor Hamburger at 6-7. Applicant-Intervenors hope to finalize their agreement with a possible expert or experts to conduct the health impact evaluation within the next few weeks. Id. The expert or experts will conduct a broad, impartial analysis of the potential impact of the Premera conversion on Washington's health system, which should complement the evaluations and expert analyses conducted by the OIC consultants. Id.

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[13]Similar coalitions of consumer and provider organizations have been granted full party status in conversion reviews in other states. For example, in Colorado, the Colorado Health Care Conversion Project, comprised of various nonprofits and public interest groups, was permitted full party status. See Hawes v. Colorado Div. of Ins., supra, 32 P.3d at 573. Similarly, the DC Appleseed Center for Law and Justice, part of a consumer and provider coalition called "Carefirst Watch" has been granted full party status in the pending adjudicative review of Carefirst's conversion in Washington DC, as has a coalition of 21 community organizations in the adjudicative hearing regarding the conversion of New Mexico Blue Cross and Blue Shield. Declaration of Eleanor Hamburger at 6, Exhibits 8, 9. It has been reported that other consumer groups have been granted the right to participate formally in adjudicative hearings to review conversion transactions in Kansas, Maine, and New Hampshire. See "Blue Cross Blue Shield Update – May 2002," Consumers Union, at http://www.consumersunion.org/health/bcbs602.htm.

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Additionally, Applicant-Intervenors intend to evaluate thoroughly the full Form A filing and related documents submitted by Premera to the OIC, depositions and written testimony submitted by Premera employees, the reports and testimony by the OIC consultants and the relevant valuation and securities issues, nonprofit corporation and tax issues, philanthropic formation and foundation issues, among others, as part of its intervention in the proposed Premera conversion. Id. Given the Applicant-Intervenors' long-standing history of advocacy on health care conversion issues, their access to national consumer advocates and experts on health care conversions, and their knowledge of the intricacies of Washington's health system, Applicant-Intervenors' participation can only enhance the range of helpful information available to the Insurance Commissioner as he makes his determination regarding the Premera proposal.

Applicant-Intervenors will participate in the adjudicative hearing as efficiently as possible, while representing their clients' interests. Applicant-Intervenors have already combined their individual efforts into a coalition of like-minded consumer, provider and advocacy organizations. Additionally, Applicant-Intervenors have worked collaboratively with other potential intervenors, such as the Washington State Hospital Association and the Washington State Medical Association, by submitting a joint brief on their Response to Premera's Motion for Partial Reconsideration and Clarification, coordinating on meetings with the OIC staff and sharing information. Applicant-Intervenors are confident that they have the resources, skills and experience to ensure that their participation will be efficient and will not interfere with a timely resolution to the Premera review under the Holding Company Acts. Moreover, Applicant-Intervenors will, in fact, provide the Insurance Commissioner and the public with significant, important information regarding the impact of the proposed conversion

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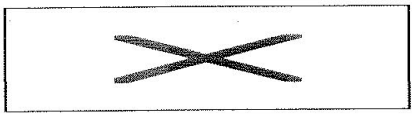
on our health system. Given these important and reasonably efficient contributions Applicant-Intervenors bring to the process, Applicant-Intervenors should be granted full intervenor status. See RCW 34.05.443.

IV. CONCLUSION

Applicant-Intervenors should be granted full participation in the adjudicative hearing regarding Premera's proposed conversion.

Dated this 26th day of November, 2002.

Respectfully submitted by:



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BEFORE THE DIVISION OF INSURANCE
STATE OF COLORADO

CASE NO. 0-97-024

REQUEST FOR PARTY STATUS AND ENTRY OF APPEARANCE

IN THE MATTER OF THE BLUE CROSS AND BLUE SHIELD OF COLORADO PLAN OF CONVERSION TO A STOCK INSURANCE COMPANY AND APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY

NOTICE TO ALL PARTIES:

Catholic Charities of the Archdiocese of Denver ("Catholic Charities") and the Colorado Health Care Conversions Project ("the Project"), by and through their undersigned counsel, request to become a party to these proceedings, and as grounds therefore state as follows:

1. Catholic Charities and the Project are organizations that may be affected by these proceedings and desire to participate in these proceedings as a party to help assure that the plan of conversion is "fair and reasonable and not contrary to law or to the interests . . . of the public . . .". C.R.S. 10-16-324(9)(b).

2. Catholic Charities has had a long-standing involvement in health care delivery and access for the citizens of Colorado. Monsignor John Mulroy, the first Executive Director of Catholic Charities, was one of the three original incorporators of the Blue Cross Hospital Insurance program in Colorado in 1938 (originally known as "The Catholic Hospital Service Association"). Monsignor Mulroy continued to be involved on the Board of Directors of the Blue Cross Plan until 1962.

3. Catholic Charities continues to be concerned with health care delivery and access through its three shelters for the homeless, seven emergency assistant centers, transitional housing programs for persons coming out of homeless shelters, group home for the developmentally disabled, hospice program, family counseling center, and other community services. Catholic Charities also participated in the passage of the 1996 legislation, 96 SB-100, which set the legislative framework for this proceeding.

4. Catholic Charities, therefore, has a special interest in these proceedings and requests party status to participate in these proceedings to ensure

that the historical mission of Blue Cross, as envisioned by Monsignor Mulroy, continues through the distribution of the charitable assets resulting from the conversion of Blue Cross and Blue Shield.

5. The Colorado Health Care Conversions Project, formed in 1996, is a community based alliance of more than twenty-five non-profit agencies, public interest organizations, consumer, church and labor groups and concerned Colorado citizens who have joined together to ensure public participation, to protect community assets and to assure that community health care needs are adequately addressed in the conversion of non-profit health care facilities such as the Blue Cross and Blue Shield Plan of Conversion. The Project has a special interest in these proceedings regarding the valuation and distribution of the charitable assets that result from this conversion, to assure that these funds are used for the benefit of the citizens of Colorado.

6. C.R.S. § 24-4-105(2)(c) sets forth the procedure by which a person affected by or aggrieved by agency action shall request party status. C.R.S. 10-16-324(4)(e)(I) further requires that any plan of conversion must "specify a reasonable treatment for the benefit of the citizens of the state of Colorado of the value of the corporation. . . ." Catholic Charities and the Project thereby invoke standing pursuant to those provisions in order to participate fully as an intervenor or party in these proceedings.

WHEREFORE, Catholic Charities and the Colorado Health Care Conversions Project respectfully request that their request for party status be granted and that they be treated as an intervenor or party for all purposes in these proceedings.

DATED this 14th day of March, 1997.

Respectfully submitted,

Mary Catherine Rabbitt

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Appendix E

A MODEL NONPROFIT CONVERSION ACT

Consumers Union of U.S., Inc.
West Coast Office 2007

A Model Nonprofit Conversion Act

An Act concerning conversion transactions where nonprofit assets are transferred to another nonprofit with a different mission or a for-profit corporation.

Digest

The Legislature recognizes the substantial changes in market and health care conditions that are affecting nonprofit corporations, and further recognizes the need for equal regulatory treatment and competitive equality for nonprofits. This bill subjects a nonprofit corporation to requirements before the nonprofit corporation enters into any agreement or transaction to sell, transfer, lease, exchange, option, convey, convert, give, enter a joint venture, merge or otherwise dispose of a material amount of its assets to a for-profit corporation or entity or to a mutual corporation or entity or to another nonprofit corporation or entity with a different mission. The Legislature recognizes the vital service hospitals, medical-surgical facilities, health maintenance organizations, health service corporations, and other nonprofit health providers/insurers provide and therefore includes special protections for the public when this type of conversion is proposed.

SECTION 1: DEFINITIONS

The following terms have the following meanings.

1. **"Acquiror"** means the for profit or nonprofit corporation which gain(s) an ownership or control in a nonprofit corporation.

2. **"Applicant"** is the nonprofit corporation that is seeking approval under this Act.

3. **"Control"** means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management services or otherwise, including but not limited to situations in which the power is the result of an official position of the person or a corporate office held by a person.

4. **" Conversion transaction"** means a substantial change in a nonprofit's mission, or the sale, transfer, lease, exchange, transfer by exercise of an option, optioning, conveyance, conversion, merger, affiliation, mutualization, joint venture or other disposition resulting in the transfer of control or governance of 10% or more of the assets or operations of a nonprofit or $5 million[1], whichever is less. A disposition or transfer constitutes a conversion transaction regardless of whether it occurs directly or indirectly and whether it occurs in a single transaction or a related series of transactions. If exercise of an option constitutes a conversion transaction, any consideration received for the granting of the option must be considered part of the transaction for purposes of applying the review criteria in Section 5.

[1] States may want to specify a higher or lower threshold, depending on amount of assets held by nonprofit organizations in the state.

SECTION 2. NOTICE AND APPROVAL FOR CONVERSION TRANSACTION

1. **Notice or approval required.**[2] Prior to completing a conversion transaction, an applicant must:

   a. If the full, fair market value of assets to be converted in the transaction is $5,000,000 or more, obtain approval from the Attorney General in accordance with Section 4; or

   b. If the value of the transaction is less than $5,000,000, provide notice to the Attorney General in accordance with Section 3.

2. **Appraisal required.** Full, fair market value must be determined by an independent appraisal for all conversion transactions. If the appraisal provides a range of values, the highest point of the range determines which Section of the law applies to the transaction pursuant to Section 2 (1).

3. **Failure to comply with this Section or Sections 3 to 7.** A transaction consummated in violation of any provision of this Section or Sections 3 to 7 is voidable. Officers and directors who receive private inurement or excess benefits from such a transaction are subject to the civil penalties provided in Section 10.

SECTION 3. CONVERSION TRANSACTIONS LESS THAN $5,000,000[3]

The applicant shall provide written notice to the Attorney General of its intent to enter into a conversion transaction if the value of the transaction is less than $5,000,000 and the applicant has not engaged in a similar transaction in the previous five (5) years. For purposes of review under this Act, the Attorney General has the authority to aggregate all transactions in the last five (5) years as provided for in Section 1 (2). The notice must include the name of the applicant, an independent valuation of the assets to be converted and the entity to which the assets will be transferred. The Attorney General may commission an independent appraisal of the assets. Sixty (60) days after providing notice to the Attorney General in accordance with this Section, the applicant is deemed to be in compliance with Section 2 and this Section unless the Attorney General notifies the applicant within those sixty (60) days that he or she is commissioning an independent appraisal of the value of the transaction, or related series of transactions over the past five years or that the filing otherwise fails to comply with this Act.

The Attorney General is not required to take any action on notices received under this Section for transactions under $5,000,000, except that, upon request of an applicant that has properly provided notice under this Section, the Attorney General shall issue a letter indicating that the applicant has complied with its obligation under this Section, Section 2 and Sections 4-7.

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[3] States may want to specify a higher or lower threshold, depending on amount of assets held by nonprofit organizations in the state.

SECTION 4. ATTORNEY GENERAL APPROVAL

1. **Filing with Attorney General.** To obtain approval of a conversion transaction when the independent appraisal of the full fair market value of the assets to be converted is $5,000,000[4] or more, an applicant must file a written request for approval with the Attorney General.

    a. Notice to the Attorney General shall describe the proposed transaction, including the parties, the value of the transaction, the timing of the transaction, the potential impact on services to the public, the proposed plan for utilizing the proceeds, and contain any other information the Attorney General deems necessary. No filing shall be complete until the Attorney General has deemed the application complete. Failure by the parties to the transaction to provide timely information shall be sufficient grounds for the Attorney General to disapprove the proposed transaction. Any material change in the terms or conditions of the proposed transaction shall be considered a new filing for purposes of this Act.

    b. Within 120 days of deeming the application complete, the Attorney General shall notify the applicant in writing of the decision to approve, disapprove or conditionally approve the agreement or transaction. The Attorney General may extend this period for an additional sixty (60) days if any of the following conditions are met:

        1) The extension is necessary to obtain relevant information from any state agency, experts of consultants.

        2) The proposed agreement or transaction is substantially modified after the first public meeting conducted by the Attorney General in accordance with Section 4 (5) of this Act.

        3) The proposed agreement or transaction involved a multi-facility system serving multiple communities, rather than a single facility.

2. **Attorney General approval.** The Attorney General shall approve a conversion transaction if the applicant proves by clear and convincing evidence that the criteria set forth in Section 5 have been met. A final action by the Attorney General pursuant to this Section shall be subject to judicial review by the court at the initiation of the applicant or any person that was a party to the Attorney General's proceeding pursuant to Section 8 (1) of this Act.

3. **Public notice.** Within five (5) days of filing the request for approval under this Act, an applicant shall publish notice to the public, approved by the Attorney General, of its intent to enter into a conversion transaction. Notice shall be published once per week for three (3) weeks in a newspaper of general circulation in the applicant's service area, at the applicant's place of business in a manner such that anyone walking into the building will see the notice, on the applicant's web site, on the Attorney General's web site, and in papers designated by

[4] States may want to specify a higher or lower threshold, depending on amount of assets held by nonprofit organizations in the state.

the Secretary of State. The notice shall also be sent to all who request notice of such transactions. The notice shall:

a. describe the proposed transaction, including the parties, the value of the transaction, the timing of the transaction, the potential impact on services to the public and the proposed plan for utilizing the proceeds. The public notice shall also provide information on opportunities for the public to intervene under Section 8 of this Act and to provide comment on the proposal to the Attorney General.

b. be published in all languages spoken by 5% (five per cent) or more of the service population, or 1000 people in the service area, whichever is less.

4. **Public comment.** The Attorney General shall accept public comments regarding a proposed conversion transaction under this Section for at least sixty (60) days starting from the day proper notice has been provided to the public of the proposed conversion, as provided in Section 4 (3).

5. **Public hearings.** No later than forty-five (45) days after the Attorney General has deemed the application complete, the Attorney General shall conduct a reasonable number of, and at least one, public hearing(s), which must be held in the service area(s) of the applicant. At the public hearing, the Attorney General shall hear comments from interested persons regarding the proposed nonprofit conversion transaction. The Attorney General shall ensure that the communities affected by the transaction have an opportunity to participate in the public hearing process. Among the factors to be considered in defining a reasonable number of public hearings are the size of the applicant's service area and the nature and value of the transaction. Any person may file written comments, provide exhibits, and make a statement at the hearing. Each party to the transaction must ensure that at least one person representing the party is present at any public hearing that the Attorney General convenes.

6. **Notice of public hearings.** Notice shall be published once per week for three (3) weeks in a newspaper of general circulation in the applicant's service area, at the applicant's place of business in a manner that anyone walking into the building will see the notice, on the applicant's web site, on the Attorney General's web site, and to all those who request notice of such transactions and in papers designated by the Secretary of State. The notice shall:

a. describe the proposed transaction, including the parties, the value of the transaction, the timing of the transaction, the potential impact on services to the public and the proposed plan for utilizing the proceeds. The public notice shall also provide information on opportunities for the public to provide comment on the proposal to the Attorney General; and

b. be published in all languages spoken by 5% (five per cent) or more of the service population, or 1000 people in the service area, whichever is less.

7. **Maintenance of public comments.** The Attorney General shall make available to the public all written and oral comments made in advance of and at the public hearing, including all

questions posed, and shall require answers of the appropriate parties. The comments and answers shall be filed in the office of the Attorney General and in the public library(ies) for the community(ies) served by the applicant, and a copy shall be made available upon request to the Attorney General.

8. **Inquiry during public hearing.** As part of the public hearing process, the Attorney General shall solicit comments and input regarding the potential risks and benefits of the conversion on the community's access to services and/or health insurance coverage.

9. **Discovery authority.** The Attorney General shall have the power to subpoena additional information or witnesses, require and administer oaths, and require sworn statements at any time prior to making a recommendation on a conversion application.

10. **Public records.** All documents submitted to the Attorney General by a person filing a request under Section 4 (1), in connection with the Attorney General's review of a proposed conversion transaction are public records. Documents, including but not limited to all applications, reports, plans, valuations, conflict-of-interest issues, depositions, interrogatories, budgets, audits, and listings of staff and board members, relating to the proposed conversion or related transactions pursuant to a conversion review by the Attorney General are public records.

11. **Public access to records**. The Attorney General shall provide prompt and reasonable access to the records concerning the proposed transaction to the public at no charge. The records shall be considered public records and be made available to the public at both the Attorney General's office and the office of the applicant. Access to these records shall be available at least 21 days before a public hearing is held and at least thirty (30) days before the end of the public comment period. The Attorney General shall post the conversion plan, the plan for distribution of proceeds, the valuation and any other documents submitted in accordance with a conversion review that are in electronic format on the Attorney General's web site as soon as feasible after the documents are filed with the Attorney General. The Attorney General may charge the parties to the transaction for the costs of providing the public with notice and reasonable access to records relating to the proposed agreement or transaction of the applicant.

12. **Contracts with consultants; reimbursement for costs.** To assist in the review of a proposed conversion transaction pursuant to this Section, the Attorney General shall contract with an expert to provide an independent valuation, and shall also contract with an expert to provide an independent health impact statement when the applicant is a nonprofit hospital, medical-surgical facility, health maintenance organization, health services corporation or other nonprofit health provider or insurer. The Attorney General may contract with additional experts or consultants to provide additional information about due diligence, foundation issues, compensation or other issues the Attorney General considers appropriate. If a public hearing has already been held prior to the completion of any of the expert analysis, the Attorney General shall hold another hearing specifically to address the expert analysis.

a. Contract costs incurred by the Attorney General pursuant to this Subsection may not exceed an amount that is reasonable and necessary to conduct the review of the proposed conversion transaction. The applicant filing an action under Section 4 (1) shall pay the Attorney General promptly upon request for all costs of contracts entered into by the Attorney General.

b. The Attorney General is exempt from the provisions of applicable state laws regarding public bidding procedures for purposes of entering into contracts pursuant to this Subsection.

SECTION 5. REVIEW CRITERIA

1. **Required determinations.** The Attorney General shall not approve a proposed conversion transaction unless the applicant proves by a preponderance of the evidence that:

   a. The nonprofit mission of the applicant has become impossible, impractical, or unlawful;

   b. The nonprofit will receive full, fair market value. The full, fair market value must be based upon an appraisal conducted in accordance with Section 5 (5) and must use the projected closing date of the conversion transaction as the valuation date;

   c. The proposed distribution of proceeds of the transaction complies with Section 6;

   d. The conversion transaction is in the public interest. An agreement or transaction is not in the public interest unless appropriate steps have been taken to safeguard the value of the charitable assets and ensure that any proceeds of the transaction are irrevocably dedicated to the charitable purposes;

   e. The conversion transaction will not result in a violation of anti-trust laws and will not reduce competition; and

   f. If the nonprofit applicant is a health plan, hospital, or clinic, the transaction must preserve or improve the availability, affordability, and quality of health care of the community. (See 5(4) below)

2. **Considerations.** Before determining whether the criteria in Section 5 (1) are met, the Attorney General shall find that:

   a. The nonprofit will receive the full, fair market value;

   b. The terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit;

   c. The full, fair market value of the nonprofit's assets to be transferred has not been manipulated by the actions of the parties in a manner that causes the full, fair market value of the assets to decrease;

   d. The agreement or transaction will not result in private inurement to any person or entity;

   e. The proposed conversion transaction will not result in a breach of fiduciary duty or violate any statutory or common-law duty or obligation on the part of the directors, trustees or other parties involved in the transaction, including but not limited to conflicts

of interest related to payments or benefits to officers, directors, board members, executives and experts employed or retained by the parties;

f. The governing body of the nonprofit exercised due diligence in deciding to dispose of the nonprofit's assets, selecting the acquiring entity and negotiating the terms and conditions of the disposition;

g. The Attorney General has been provided with sufficient information and data by the applicant to evaluate adequately the agreement or transaction and the effects of the agreement or transaction on the public;

h. The proceeds of the conversion of the nonprofit are distributed either to an existing or new foundation or nonprofit organization pursuant to Section 6;

i. The proceeds of the proposed conversion transaction will be used in accordance with the rules of any constructive, implied, or express trust under which the assets were held by the nonprofit applicant, including any geographical service boundaries of the trust, and that the proceeds will be controlled as funds independent of the acquiring entity and any entity related to the acquiring entity;

j. The entity surviving after the conversion transaction will be financially viable, competently managed and will have a governance structure that includes some measure of local governance.

k. The transaction will, at a minimum, maintain the availability and accessibility of services to the affected community;

l. The conversion plan and transaction complies with all applicable laws, including the State's Nonprofit Corporation Act and state tax code;

m. The conversion plan has been approved by a vote of not less than 2/3 of the applicant's board of directors or trustees; and

n. The purchase and sale agreement does not contain a confidentiality agreement pertaining to the offer or an agreement limiting the capacity of the Board of Directors to solicit or accept additional offers.

3. **Review of possible anti-trust laws violations** The Attorney General shall seek an opinion from the Federal Trade Commission on whether the proposed conversion transaction would violate any anti-trust laws or decrease competition.

4. **Special requirements for health care entities**[5] Where the applicant is a nonprofit hospital, medical-surgical facility, health maintenance organization, health service corporation or other nonprofit health provider/insurer, the Attorney General shall determine the effect the proposed transaction will have on the availability and accessibility of health care services to the affected community and the for-profit's ability to maintain and improve health care access and coverage. The Attorney General shall not consent to a health facility agreement or transaction in which the seller restricts the type or level of medical services that may be provided at the health facility that is the subject of the agreement or transaction. Before approving the transaction, the Attorney General shall find that:

[5] In some states, the Insurance Commissioner will be the appropriate regulator to enforce the special requirements for health care entities as specified in this Act.

a. sufficient safeguards are in place to ensure the affected community has continued access to affordable, quality health care;

b. the acquiring entity has made a commitment to provide health care to the disadvantaged, the uninsured, and the underinsured at a level comparable to the level historically provided by the converting healthcare entity;

1) Before approving the transaction, the Attorney General shall require a written and legally enforceable commitment from the for-profit to maintain and/or improve the level of health services to the community and the public as determined by the assessment and the public hearing. The commitment must address any deficiencies or shortcomings identified by the Attorney General through the independent health impact assessment process. The final plan from the acquiror shall include, but not be limited to, the following:

a) a long-term commitment to maintain the same level or increased level of indigent care services that the nonprofit applicant has provided on average over the past ten years;

b) long-term commitments to preserve essential community services, for example, emergency room care, and coverage for otherwise uninsured or high risk individuals.

c) The parties to the transaction have submitted a health impact study that outlines how the for-profit entity will ensure that health care will not be harmed by the proposed transaction. The health impact study must include a business plan including the five-year profit goals and methods for achieving these goals through financial, operational and administrative management. The applicant must submit a comparative premium rate analysis of the applicant's and the acquiror major plans, and product offerings, comparing actual premium rates for the three -year period prior to the filing of the plan and projected premium rates for the three-year period following any proposed conversion. As part of the public hearing conducted pursuant to Section 4 (5) of this Act, the Attorney General shall solicit comments and input regarding the potential risks and benefits of the conversion on health care access and quality as raised by the health impact assessment. If a public hearing has already been held prior to the completion of the assessment, the Attorney General shall hold another hearing specifically to address the assessment.

d) The Attorney General shall review the health impact study submitted by the parties. To facilitate the review, s/he shall conduct an independent community health impact assessment to ensure that the health impact plan submitted by the parties meets the needs of the affected community. The Attorney General's independent assessment process must:

(1) Interview affected community members, their representatives, and individuals to assess community needs and potential risks regarding health access and coverage affected by the conversion; and

(2) Determine the level, quality, and importance to the community of health services that the nonprofit applicant has historically provided, including but not limited to, indigent care, emergency room services, outpatient services, community education and training, and preventive programs.

e) Any other criteria the Attorney General and/or the court considers necessary to determine whether the standards for approval have been met

5. **Valuation.** The Attorney General shall contract with an independent expert to conduct an independent appraisal of the full fair market value of assets to be converted. To the extent that the appraisal is based on a capitalization of the *pro forma* income of the converted assets, the appraisal must indicate the basis for determination of the income to be derived from any proceeds of the sale of stock and demonstrate the appropriateness of the earnings-multiple used, including assumptions made regarding future earnings growth.

   a. To the extent that an appraisal under this Subsection is based on the comparison of the capital stock of the converted entity with outstanding capital stock of existing stock entities offering comparable products, the existing stock entities must be reasonably comparable to the converting entity in terms of such factors as size, market area, competitive conditions, profit history and expected future earnings.

   b. If the value of assets being converted is $5,000,000[6] or more, the appraisal must include any element of value arising from the accomplishment or expectation of the conversion transaction, including any value attributable to projected operating efficiencies to result from the conversion, net of the cost of changes to produce such efficiencies.

   c. An appraiser under this Subsection may not serve as an underwriter or selling agent under the same conversion plan and an affiliate of an appraiser may not act as an underwriter or selling agent unless procedures are followed and representations and warranties made to ensure that an appraiser is separate from the underwriter or selling agent affiliate and the underwriter or selling agent affiliate does not make recommendations or in any way have an impact on the appraisal.

   d. An appraiser may not receive any other fee except the fee for services rendered in connection with the appraisal.

   e. If a public hearing has already been held prior to the completion of the valuation, the Attorney General shall hold another hearing specifically to address the valuation.

SECTION 6. DISTRIBUTION OF PROCEEDS

1. **Requirements.** The proceeds of a conversion transaction must be distributed to an existing or new foundation or other nonprofit organization that meets the following requirements.

   a. The foundation or nonprofit organization must operate pursuant to 26 United States Code, Section 501(c)(3) or 501(c)(4), and, regardless of whether the foundation is classified as a private foundation under 26 United States Code, Section 509, the

[6] States may want to specify a higher or lower threshold, depending on amount of assets held by nonprofit organizations in the state.

foundation or nonprofit must operate in accordance with the restrictions and limitations that apply to private foundations in 26 United States Code, Sections 4941 to 4945.

b. The foundation or nonprofit organization must have a mission statement that is as close as possible to the mission of the converting nonprofit.

c. The foundation or nonprofit organization's assets may not be used to supplant government funds.

d. The foundation or nonprofit organization shall not be an agent or instrumentality of the government.

e. The foundation or nonprofit organization and its directors, officers and staff must be and must remain independent of the for-profit company and its affiliates. A person who is an officer, director or staff member of a nonprofit submitting a conversion plan, at the time the plan is submitted or at the time of the conversion transaction or within five (5) years thereafter, is not qualified to be an officer, director or staff member of the foundation. A director, officer, agent or employee of the nonprofit submitting the plan or the foundation receiving the charitable assets may not benefit directly or indirectly from the transaction. Public officials, elected or appointed, may not serve as an officer, director or staff member of the foundation, or nonprofit organization.

f. A foundation or nonprofit organization must have or establish formal mechanisms to avoid conflicts of interest and to prohibit grants benefiting the for-profit corporation or members of the board of directors and management of the for-profit corporation.

g. Trustees or directors of the foundation or nonprofit organization shall reflect the geographic, ethnic, gender, age, socioeconomic and other factors that the board considers to represent the diversity of nonprofit applicant's service area. In addition, trustees or directors shall have the following qualifications and qualities: (a) interest in and concern for the foundation or nonprofit organization and its mission, (b) objectivity and impartiality, (c) willingness and ability to commit time and thought to the foundation or nonprofit organization's affairs, and (d) commitment to the foundation or nonprofit organization's as a whole and not to a special interest.

h. Boards of trustees or directors shall include persons with special knowledge, expertise and skills in investments and asset management, finance, and nonprofit administration.

i. The Attorney General shall retain oversight and monitoring authority over the charitable corporation that receives the proceeds of a proposed transaction.

SECTION 7. PREVIOUS MUTUALIZATION WITH NO CHARITABLE TRUST SET ASIDE[7]

(1) Where a nonprofit corporation with a charitable trust mutualized prior to the effective date of this Act, the Attorney General shall apply the following conditions:

(a) Any nonprofit corporation which becomes a mutual company without satisfying its charitable trust obligation retains an obligation to preserve its assets for charitable purposes, as required by Sections 5 and 6 of this Act. This obligation shall be paid any time the

[7] States may have to amend their mutualization and demutualization statues to reflect these provisions.

mutual company enters into an agreement or transaction with a for-profit corporation or otherwise generates sufficient funds to fulfill its charitable trust obligation. The fair market value of the nonprofit corporation on the date of conversion to a mutual company, augmented by any increase in value of the mutual company attributable to the use of the charitable trust assets or to its prior status as a nonprofit corporation, shall be the basis for the valuation of the trust obligation, consistent with Section 5 (5) of this Act.

(b) At such time that the mutual company, which was formerly a nonprofit charitable corporation, enters into an agreement or transaction to demutualize, it shall submit an asset distribution plan to fulfill its charitable obligations, consistent with the requirements under Sections 4- 6 of this Act. The Attorney General shall hold public hearings consistent with 4 (5) of this Act. No agreement or transaction of a mutual company to demutualize shall occur until the Attorney General has made a determination that the agreement or transaction is fair and equitable to the public, and that it has complied with the other provisions of this Act.

SECTION 8. INTERVENTION AND JUDICIAL REVIEW

1. **Right to intervene.** Except as provided in Section 8 (4) of this Act, the Attorney General, on timely application shall allow any person with a significant interest in the outcome of a conversion proceeding to intervene as a party to that proceeding. Any person who petitions the Attorney General pursuant to the state constitution will be considered a party with respect to the rights granted in this Section. Policyholders, consumer advocates, and community representatives shall all be considered persons with a significant interest. Any person whose significant interest is determined to be affected may present evidence, examine and cross-examine witnesses, and offer oral and written arguments, and in connection therewith may conduct discovery proceedings in the same manner as is allowed in the court of this state. The specific intervention provisions of this Act shall control in the event of a conflict with the requirements of general state administrative law.

2. **Intervenor Funding.** The Attorney General shall award reasonable advocacy and witness fees and expenses to any party that demonstrates that (1) the party represents the interests of consumers, and, (2) the party has made a substantial contribution on behalf of consumers to the adoption of any regulation or to an order or decision made by the Attorney General under this law. Where such advocacy occurs in response to an application for approval of a conversion transaction, the award shall be paid by the applicant.

3. **Regulations.** On or before [*insert date*], the Attorney General shall adopt regulations detailing the specifications for eligibility to intervene, rates of compensation, and procedures for seeking compensation.

4. **Attorney general power to consolidate intervenors.** This Section does not limit the power of the Attorney General to consolidate parties with similar interests for the purpose of intervention.

5. **Right to Appeal.** A final action by the attorney general shall be subject to judicial review by the court in the county where charitable assets are located or services rendered at the initiation of the applicant or any person that was a party to the proceeding, pursuant to Section 8 (1) of this Act.

SECTION 9. ATTORNEY GENERAL AUTHORITY

1. **Rules.** The Office of the Attorney General may adopt rules it considers appropriate to implement Sections 1 through 11.

2. **Attorney General authority not limited.** Sections 1 through 11 do not limit the common law authority of the Attorney General to protect charitable trusts and charitable assets in this state. The penalties and remedies provided in Section 10 are in addition to, and are not a replacement for, any other civil or criminal action the Attorney General may take under common law or statute, including an action to rescind the conversion transaction or to obtain injunctive relief or a combination of injunctive relief and other remedies available under common law or statute.

SECTION 10. PENALTIES

1. **Attorney General to bring action.** The Attorney General may initiate an action in court to:

   a. Void a conversion transaction pursuant to Section 10 (2). Such an action may be brought in the court in the county in which the nonprofit assets to be transferred are located;

   b. Seek a civil penalty against an individual pursuant to Section 10 (3). Such an action must be brought in the court in the county in which the nonprofit assets to be transferred are located or in the county in which the individual resides; and

   c. Obtain on behalf of the nonprofit the return or repayment of any property or consideration received as private inurement or an excess benefit in violation of nonprofit corporate standards.

2. **Transaction voidable.** The court may void a conversion transaction entered into in violation of applicable provisions of this Act. If the court voids the transaction, it may also grant any orders necessary to restore the nonprofit to its former position, including removing the board of the nonprofit or voiding contracts.

3. **Penalties against individuals.** An individual officer, director, trustee or manager in a position to exercise substantial influence over the affairs of a nonprofit is subject to a civil penalty if that person receives property or consideration from the nonprofit that constitutes private inurement in the standards established under the State's Nonprofit Corporation Code or similar statute for conduct by directors or officers or for avoiding conflicts of interest.

The civil penalty under this subsection is a fine of up to $100,000, plus 100% of the excess benefit or private inurement received, and may be recovered in addition to costs and fees incurred by the Attorney General in bringing the action.

SECTION 11. OVERSIGHT AND REPORTING

1. **Corrective oversight.** The Attorney General may collect funds from the acquiror necessary to monitor the acquiror's compliance with the conditions of the conversion. If the Attorney General receives information indicating that the acquiror is not fulfilling its commitments to the affected community under this Act, the Attorney General shall hold a public hearing upon ten (10) days notice to the affected parties and consistent with the public hearing requirements of Section 4 (5) of this Act. If, after such hearing, the Attorney General determines that the information is true, the Attorney General shall institute proceedings to require a corrective action plan from the acquiror. The Attorney General shall retain oversight of the acquiror's obligations under the corrective action plan for as long as necessary to ensure compliance with this Act.

2. **Annual reporting.** The foundation or nonprofit organization established to receive the proceeds of the sale shall provide the Attorney General with an annual report of its grant-making and other charitable activities related to its use of the charitable assets received. The annual report shall be made available to the public at both the Attorney General's office and the office of the foundation or new nonprofit organization, and on the foundation or new nonprofit organization's web site, if any.

3. **Oversight and monitoring of foundation.** The Attorney General shall retain oversight and monitoring authority over the existing or new foundation or other nonprofit organization that receives the proceeds of the sale.

SECTION 12: EMERGENCY ACT

Since an emergency exists, this Act takes effect when passed and approved according to law.

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