



February 9, 2024

Honorable Michael Humphreys, Insurance Commissioner  
Pennsylvania Insurance Department  
1326 Strawberry Square  
Harrisburg, PA 17120-2020

**Re: Highmark Modification Request: Order No. ID-RC-13-06**

Dear Commissioner Humphreys:

The Insurance Federation, on behalf of its member companies, writes in opposition to Highmark's Request for Modification of the 2013 Order that placed Conditions on its acquisition of the West Penn/Allegheny Health System that has since been rebranded as the Allegheny Health Network (AHN).

In effect, this request is not for a modification of the Order but rather an end to it. For the reasons enumerated below, Highmark has failed to justify the need to eliminate these Conditions that, according to the May 2023 Compass Lexecon report, are ***“necessary to promote competition and the public interest going forward in [western Pennsylvania].”***

With that as the backdrop, we submit the following considerations as part of the Insurance Department's review of this proposal.

**1. Process and timing**

The manner in which this request was first brought to our attention is itself worrisome.

Following the publication of a notice in the December 2, 2023, edition of the Pennsylvania Bulletin, we learned Highmark submitted the Request for Modification to the Insurance Department on October 16, 2023 – five months after the completion of the Compass Lexecon report which is dated May 2023.

This is the opposite of what should have occurred as it allowed the Compass Lexecon report to serve as the basis of Highmark's request and further allowed it to cherry pick certain elements of the report and

ignore less favorable ones. Further, in the absence of a formal request to modify the 2013 Order, what prompted the Compass Lexecon report in the first place?

Compare this to the events leading up to the 2013 Order:

- Highmark submits a Form A filing to acquire West Penn/Allegheny in November 2011.
- The Insurance Department shortly thereafter opens a public comment period that runs until June 1, 2012 (which is later reopened).
- The Department retains the services of Compass Lexecon in March 2012.
- The Department holds a public hearing on the Form A filing in Pittsburgh in April 2012.
- The Compass Lexecon report is published in April 2013.
- The Department's Order is made on April 29, 2013.

Granted, the novelty and enormity of the events at the time of the 2013 Order necessitated a review process that spanned approximately eighteen months. That should not, however, obscure the underpinnings of that process which were both transparent and robust.

While the Insurance Department granted our request for an extension of the public comment period, we remain concerned that Highmark's Request for Modification has not received the attention or level of analysis it deserves and believe it should be the subject of a public hearing by the Insurance Department. That's especially true in light of the findings of the Compass Lexecon report and Highmark's well-documented future ambitions as well as those that are not yet public.

## **2. The Compass Lexecon report and its interplay with Highmark's request**

Given its findings, we are astounded Highmark has based its request on the findings of the Compass Lexecon report which repeatedly states throughout that neither Highmark nor AHN have been adversely impacted by the Conditions contained within the 2013 Order.

The same holds true for the western PA region, with the Compass Lexecon report finding ***"no indication that the 2013 Order has had an adverse effect on healthcare insurance, healthcare delivery, or the quality of care and variety of plans available to Highmark members or other consumers in WPA."***

Highmark admits as much by asserting its strategy established in 2013 has been successful, but it goes a step further by stating the 2013 Order has eliminated any anti-competitive threats and should therefore be dissolved.

The problem with this assertion is that it ignores what might occur in the *absence* of these anti-competitive controls, all of which Compass Lexecon found to be in the public interest, favoring competition, and not deleterious for Highmark or AHN.

For example:

### **Condition 3 (5-year limit on provider/insurer contracts)**

- Highmark argues this Condition serves as a deterrent to investment in pro-consumer arrangements with providers and “poses particular competitive disadvantages for Highmark Inc.”
- The Compass Lexecon report correctly observes Highmark has sought and received waivers to this condition when it can demonstrate benefits to its members and the public. Because of this, Compass Lexecon determined “this Condition is working well and... there is no economic or competitive justification for modifying or eliminating the condition.” We agree.

### **Conditions 7 through 9 (Firewalls and related reporting)**

- Relying on federal price transparency rules, Highmark argues these Conditions are no longer needed and their existence results in an unlevel playing field when compared to others.
- Despite the uniqueness of this requirement as it relates to Highmark, Compass Lexecon found “no indication that the Conditions have adversely affected Highmark members or insurer or provider competition in [western Pennsylvania].”

### **Condition 20 (Consumer Choice Initiatives)**

- Highmark’s comments here are brief and note it has implemented contracts that incentivize patients to use lower cost and higher quality providers and that it does not use anti-steering/tiering provisions in these contracts.
- By comparison, the Compass Lexecon report devotes nearly four pages of its report to this condition (its most extensive analysis of all the Conditions) that it found to be “procompetitive” and common throughout the country as part of healthcare mergers. Further, unlike Highmark’s filing, the report notes exceptions to this condition have been granted by the Department in the past.

## **3. IDS regulation**

This is perhaps the oddest aspect of Highmark’s request given its circular logic. On one hand, the filing goes to great lengths to outline the collective successes of Highmark and AHN since the 2013 Order. On the other hand, Highmark argues the Order has placed a “unique burden” on its ability to compete with others that are not subject to the same Conditions.

In support of this position, Highmark cites a passage from the 2017 Compass Lexecon report (itself unusual given the 2023 update) that notes these Conditions raise the prospect of an unlevel playing field and consideration should be given to broader regulation of IDSs.

Such an assertion overlooks the obvious: Unlike other IDSs that start with a hospital system creating or acquiring a health insurer, Highmark inverted that model through its acquisition of what was then the West Penn/Allegheny Health System. In that sense, Highmark/AHN is different from other IDSs and is precisely why the 2013 Order exists.

That is why this unusual – if not unprecedented – approach to becoming an IDS necessitated the filing of a Form A by Highmark in 2011 that was subject to Insurance Department review pursuant to Sections 1402 and 1403 of the Insurance Holding Company Law to determine if the acquisition would substantially lessen competition or tend to create a monopoly.

As the 2023 Compass Lexecon report determines, the Conditions imposed by the Department in 2013 have guarded against that concern by balancing the competitive needs of western Pennsylvania without disadvantaging Highmark. That is the mark of success.

#### **4. The circumstances surrounding Highmark's request**

Insofar as the Conditions contained within the 2013 Order were guided by the principles of protecting competition and the financial stability of a newly created IDS, Highmark's attempt to be relieved of these Conditions must take into consideration the environment in which this request is being made.

As an industry, health care providers and insurers are facing new economic challenges in the form of rising medical expenses coupled with reduced operating margins. The 2023 Compass Lexecon report illustrates the degree to which hospital margins "plummeted" in 2022 but does not delve into future predictions in this area. That said, the experiences of 2023 – higher medical loss ratios, hundreds of hospitals at the risk of closure, and workforce reductions – signal future challenges. While no one is immune from these challenges, we do not believe now is the time to consider reducing regulatory oversight of a uniquely structured payor-provider with significant market share and clear ambitions for costly geographic growth.

Highmark's ambitions for future growth are driven, at least in part, by what the Compass Lexecon report refers to as a "major competitive development" – the 2022 BCBSA Settlement. While the report looks to the reduction in competitive barriers between Blues plans that may result in new entrants to the western PA market, it does not evaluate the possible enterprise impacts on Highmark/AHN if Highmark avails itself of the new competitive allowances in the form of geographic expansion – something that has already begun.

Further, the Compass Lexecon report does not consider the extent to which AHN's financials, which remain buffeted by industry-wide macroeconomic forces, are the product of investments by Highmark that were only possible due to protectionist market Conditions that no longer exist as a result of the BCBSA Settlement.

For the first time in modern history we are at the precipice of real competition among historically market dominant Blues plans. With that in mind, is this the moment at which the Insurance Department should monitor *less* carefully the financial condition of a unique, payor-owned hospital system that is directly impacted by this potential sea change in market dynamics? We think not.

## 5. Concluding thoughts

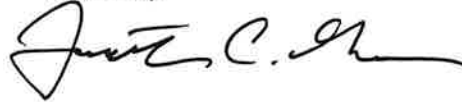
In its Request for Modification, Highmark notes that Orders made by federal antitrust agencies “typically terminate after a set period of time – usually 10 years.” Seeking to draw a parallel, Highmark states that “after a decade, it is time to grant Highmark Health relief from the remaining Conditions in the Order.”

If the Insurance Department intended for any of the Conditions in its 2013 Order to expire after a finite period of time, it would have included a sunset provision to that effect. And contrary to Highmark’s characterization of it as a relic from a different era that should no longer apply, the reality is the Order includes a waiver process which the Compass Lexecon report refers to as a “safeguard for Highmark” that it has successfully pursued in the past.

As a final observation, the 2013 Order was intended to preserve the welfare of the western Pennsylvania region as a whole; it was never intended to be a punitive measure imposed on Highmark. Otherwise, why did Highmark agree to its terms? And as the Compass Lexecon report bears out repeatedly, the Order has successfully achieved its goals while not disadvantaging Highmark or AHN in any material way.

For these reasons, and in the absence of any evidence to the contrary, we see no objective basis to grant Highmark’s request.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan C. Greer". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Jonathan C Greer, President and CEO

C: Honorable John DiSanto, Majority Chair of the Senate Banking and Insurance Committee  
Honorable Sharif Street, Minority Chair of the Senate Banking and Insurance Committee  
Honorable Kevin Boyle, Majority Chair of the House Insurance Committee  
Honorable Tina Pickett, Minority Chair of the House Insurance Committee