



Response to Issues Related to Highmark Health's  
Request for Modification of the Commissioner's  
Approving Determination and Order dated April 29,  
2013

Prepared for

Pennsylvania Insurance Department

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## **I. Response to Highmark Health’s References to Compass Lexecon’s Reports and Competitive Findings**

In Compass Lexecon’s 2013 Report and its subsequent assessments in 2017 and 2023, the effects of the 2013 Order<sup>1</sup> on Highmark Health and AHN’s ability to compete, and the likelihood of harm to Highmark’s members and the public interest, were examined.<sup>2</sup> We conducted principled and objective analyses using well-recognized economic theories of competitive effects, both procompetitive and anticompetitive, of vertical integration and market competition. At the request of the Pennsylvania Insurance Department (the “Department”), Compass Lexecon recently reviewed Highmark Health’s support for its Request for Modification of the 2013 Order dated October 16, 2023 (the “Modification Request”) provided to the Department.

Based on our review of this information, it is our view that Highmark Health has misconstrued certain findings from Compass Lexecon’s 2017 and 2023 Reports and was selective in quoting findings from our three Reports while ignoring other findings adverse to Highmark Health’s position. This included, without limitation: (i) our conclusion that “but-for” the competitive and consumer choice conditions of the 2013 Order, the Western Pennsylvania Area (“WPA”) runs a risk of potential anticompetitive behavior in the healthcare insurance and provider sectors due to the highly concentrated WPA provider and insurer market segments, the Highmark/UPMC contract, and these two rivals’ increasing symmetrical vertical structures; and (ii) our recommendation that the 2013 Order’s competitive and consumer choice conditions remain in place as they serve to preserve competition and the public interest.<sup>3</sup>

The following paragraphs A through F provide examples of such statements by Highmark Health:

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<sup>1</sup> Pennsylvania Insurance Department Order No. ID-RC-13-06, as amended (the “2013 Order”). Any capitalized terms not defined in this report have the meaning ascribed to them in Appendix 1 (Definitions) to the 2013 Order.

<sup>2</sup> Compass Lexecon has submitted three reports relating to the competitive effects of Highmark Health’s affiliation with Allegheny Health Network (f/k/a West Penn Allegheny Health System): (1) Economic Analysis of Highmark’s Affiliation with WPAHS and Implementation of an Integrated Healthcare Delivery System, Submission to Pennsylvania Insurance Department, Margaret E. Guerin-Calvert, April 24, 2013 (hereafter “2013 Report”); (2) Assessment of Healthcare Competition Following Highmark Inc.’s affiliation with West Penn Allegheny Health System, Inc. and other Healthcare Providers, Prepared for Pennsylvania Insurance Department, July 2017 (hereafter “2017 Report”); and (3) Competitive Assessment of the Western Pennsylvania Insurance and Healthcare Markets, Prepared for Pennsylvania Insurance Department, May 2023, Reissued January 2024 (hereafter “2023 Report”).

<sup>3</sup> Susan Henley Manning, PhD and Margaret E. Guerin-Calvert are the authors of this submission conducted under an ongoing Compass Lexecon engagement; this submission encompasses the opinions and assessments of the authors, not of Compass Lexecon or FTI Consulting, Inc. as a firm, nor does it necessarily reflect views of other professionals at Compass Lexecon, FTI Consulting or other organizations with which the authors are or have been affiliated.

A. Statement on “no ongoing competitive threat”

Highmark Health asserts:

- "As set forth above, and consistent with the 2017 and 2023 Compass Lexecon Reports, there is no ongoing competitive threat from this decade-old transaction." (Modification Request at 6).

This is a misreading of the two Compass Lexecon reports and is in direct conflict with the review in our Reports about competitive conditions in WPA.

The Compass Lexecon reports determined that competition has strengthened in the insurance sector and has been maintained in the health provider sector relative to conditions that would likely exist *if the transaction had not occurred*. This is quite different from saying that there would be no ongoing competitive threats if the 2013 Order were to be terminated.

The Compass Lexecon reports specifically discussed concerns about ongoing potential competitive threats in the WPA market. In fact, the Compass Lexecon 2023 report noted the potential that “but-for” the Order, WPA runs a risk of potential anticompetitive behavior due to the highly concentrated healthcare insurance and provider sectors, the Highmark/UPMC contract, and these two rivals’ increasing symmetrical vertical structures.

Specifically, as stated in the 2023 Report, “[w]ith two large and more symmetrical vertically-integrated healthcare delivery and financing networks competing against one another in WPA, competition can take one of two forms—intense competition or tacit collusion, or more specifically, diminished competition as rivals may tend to accommodate rather than react to competitor’s actions to raise price or reduce the quantity or quality of products and services.” (2023 Report at 11).

B. Statements on Competition within WPA Healthcare Markets

Highmark Health asserts:

- "Highmark Health’s analysis is consistent with that of the Department’s economist, Compass Lexecon. Compass Lexecon’s May 2023 Competitive Assessment of the Western Pennsylvania Insurance and Healthcare Markets (the “2023 Compass Lexecon Report”) prepared for the Department concluded that, since the Order, competition has been ‘strengthened’ in the insurer markets and ‘maintained’ on the delivery side of the market.” (See Modification Request at 5).
- “This [referring to above] is consistent with Compass Lexecon’s July 2017 Assessment of Healthcare Competition Following Highmark Inc.’s Affiliation with West Penn Allegheny Health System, Inc. and other Healthcare Providers (the “2017 Compass Lexecon Report”).” (Modification Request at 5, footnote 2).

These statements are technically true but misleading, especially as they relate to competition in the WPA. The 2023 Report states, “The 2013 Order has maintained competition in WPA, resulting in

AHN as a viable competitor in comparison to the financially troubled WPAHS that existed prior to its affiliation with Highmark.” (at 31) and “[c]ompetition within the WPA healthcare insurance marketplace has strengthened since 2017.” (2023 Report at 2).

However, finding that competition in the WPA health insurance sector has “strengthened” and has been “maintained” in the healthcare delivery market does not equate with a finding that the market sectors are highly competitive. Rather, in all three Compass Lexecon reports, we found that Highmark Inc. is predominant in the WPA health insurance sector and UPMC is predominant in the WPA health delivery market, with each being the other’s closest rival. Other rivals, we found, are distant fringe competitors. We found that these markets are highly concentrated and, if left unchecked by the Order’s conditions, may be subject to risks of potential anticompetitive effects.<sup>4</sup>

These Compass Lexecon reports’ conclusions are based on a competitive environment in which the 2013 Order, including the competition and consumer choice conditions, are fully in place and enforced. We have not conducted an analysis or reached any conclusions on the state of competition that would exist if the 2013 Order and its conditions were no longer in place. Although, as discussed herein, the reports have raised concerns about the potential for diminished competition in both the healthcare insurance and delivery sectors given the Highmark/UPMC contract, increasing vertical symmetries, and the continuing predominance of Highmark and UPMC in the marketplace.

### C. Statement on Consent Order expirations

Highmark Health asserts:

- "The 2023 Compass Lexecon Report notes that conditions such as these expire after 5-10 years, and the consent orders cited by Compass Lexecon were limited to 3, 5 or 10-year periods. Accordingly, after a decade, it is time to grant Highmark Health relief from the remaining Conditions in the Order.” (Modification Request at 6 citing for support the 2023 Report at 66).

The references to the enforcement periods take out of context our conclusions. The Compass Lexecon reports have never stated nor implied that all consent orders or similar conditions expire

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<sup>4</sup> The Compass Lexecon 2023 Report examined competition in the WPA healthcare insurance and provider markets under the status quo, i.e., with the 2013 Order in place and enforceable. Although the 2023 Report’s analysis determined that other insurers’ market shares of Total Annual Individual, Group, Title XVIII Medicare, Medicare Supplement, FEHB, and Medicaid membership have grown in the 2017 to 2021 period while Highmark’s and Geisinger’s shares have declined, it noted that Highmark has more members than the combined total of all other insurers excluding UPMC, which focuses on different segments of the market than Highmark, and with UPMC’s highest growth in the government insurance market segment. As of September 2022, UPMC’s Medicare and Medicaid membership accounted for over 60% of its physical healthcare plans. (2023 Report at 28).

after 10 years. There are consent orders that do not expire after 10 years and others that contain language that make conditions permanent. For example, FTC and DOJ consent decrees are typically 10 years but can be up to 20 years, or 10 years with the right to extend.

We noted that 10 years is often considered an appropriate length of time for a newly vertically integrated firm to learn to operate its business under specific imposed conditions and to allow rivals to adjust to competing with the vertically integrated firm. Different market conditions and firms operating in highly concentrated markets may warrant different consent order periods, and termination dates. The decision to expire a consent order is not dependent on an arbitrary date but typically involves whether market conditions and conditions of competition have changed sufficiently to remove or reduce the risk of anticompetitive harm.

#### D. Statements on “Level Playing Field”

Highmark Health asserts:

- "Further, as noted by Compass Lexecon, Highmark Health’s ability to compete on the same playing field as its competitors has been constrained.” (Modification Request at 7 citing for support the 2017 Report at 53).
- "The 2017 Compass Lexecon Report stated, “[i]n our view, Highmark legitimately asserts that, imposing these conditions on Highmark and AHN without also imposing the same competitive and consumer choice conditions on its rivals does not ensure a level playing field in competing for insureds or patients.”” (Modification Request at 8 citing 2017 Report at 53).

Highmark Health mischaracterizes these quotes referenced from the 2017 Report. Even though the conditions may not ensure a level playing field, the Compass Lexecon Reports have never found Highmark’s ability to compete has been constrained. The 2017 Report states that, “[o]ur competitive assessment indicates that these competitive conditions have not placed Highmark at a competitive disadvantage.” (2017 Report at 53). And, most recently in the 2023 Report, we stated, “[o]ur competitive assessment indicates that the 2013 Order and Conditions have not placed Highmark at a competitive disadvantage with its healthcare insurer rivals.” (2023 Report at 73).

With respect to Conditions 7-9 regarding firewalls to protect dissemination of competitively sensitive information, Highmark Health is incorrect in its position that federal price transparency laws now provide adequate protection against the flow of competitively sensitive information. While antitrust laws restrict the flow of competitively sensitive information across firms, antitrust laws do not restrict the flow of such information within firms, specifically vertically integrated firms, which leads to the use for firewalls in consent orders applied to vertical transactions.

In addition, by imposing these competitive and consumer initiative conditions as part of the 2013 Order, the Department conveyed information to market participants in WPA that these types of conduct can be problematic and can lead to anticompetitive effects.

E. Statement on Condition 21 (impact on community hospitals) reporting requirements

Highmark Health asserts:

- “In addition, reporting is burdensome and the 2023 Compass Lexecon Report notes that it is unaware of any other jurisdictions or transactions requiring this type of monitoring and reporting.” (Modification Request at 11 citing for support the 2023 Report at 71).

Although the Highmark Health statement is technically correct that any additional requirements can be viewed as imposing some burden, it fails to capture the remaining discussion in this section of the 2023 Report that details the rationale for and benefits of this reporting requirement.

As we stated in the 2023 Report, Condition 21 arose from the 2013 concerns of community hospitals that Highmark was (and remains) the largest commercial insurer in WPA and that these community hospitals are highly dependent on Highmark members for patient volume. Community hospitals voiced concerns that Highmark might favor its affiliated AHN healthcare providers, either through contracting, steering, or other mechanisms, and this would shift patients away from these community providers to AHN providers. In the 2023 Report, we relayed that Condition 21 provides the Department (and the public) with additional transparency into the healthcare marketplace in a timely manner. We also noted in the 2023 Report that we did not find evidence that providing these data to the Department was overly burdensome given its importance.

F. Other Highmark Health statements of concern

Highmark Health asserts:

- “Plainly, there is no risk from the formation of Highmark Health that there will be any reduction in ‘competition in insurance in this Commonwealth’ or the creation of any ‘monopoly therein.’” Modification Request at 7 citing for support 40 Pa. Stat. § 991.1402(f)(1)(ii).
- “Because competitive circumstances have changed, the Order is no longer consistent with the competitive conditions that justified its imposition.” Modification Request at 8 citing for support the 2023 Report at 12-13.<sup>5</sup>

As we have discussed above, we do not find these statements are supported based on the 2017 and 2023 Reports.

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<sup>5</sup> “Since 2017, the competitive dynamics in Pennsylvania and WPA have continued to change in the healthcare insurance markets. UPMC’s Health Plan has grown significantly by focusing on health plans that reach the Medicaid, Medicare, and ACA (Affordable Care Act) communities, and by expanding its commercial health plans. Other national insurers, such as UnitedHealthcare and Aetna, have remained competitors and have slightly increased their share of the market since 2017. In addition, potential new competition from other BCBSA insurers may provide additional insurance choices in the near future as a result of the BCBSA Settlement.”

Although we have not conducted an assessment to determine the likely state of competition in a hypothetical world in which the 2013 Order is terminated, we identified concerns in the 2017 and 2023 Reports that market conditions, such as the highly concentrated WPA healthcare insurance and delivery market segments, remain a competitive concern if Highmark and its rivals would re-engage in contracting practices subject to the 2013 Order’s Conditions that have the potential to raise rivals’ costs or foreclose access to the WPA market by new entrants or expansion by existing rivals.

Highmark Health asserts:

- “Compass Lexecon has suggested that the Department issue regulations like those in the Order on other integrated delivery systems in Pennsylvania, but the more straightforward and fair approach, and the approach consistent with the Department’s statutory authority, is to grant the request for modification and relieve Highmark Health from the remaining Conditions.” (Modification Request at 8).

In responding to requests in conducting the 2017 Report, Highmark Health agreed that the competitive and consumer choice initiative conditions were procompetitive but objected to their imposition solely on Highmark and AHN. We continue to have concerns that it would be counterproductive to terminate such procompetitive conditions on this basis (*i.e.*, on the basis that they do not apply to others) and for which these Conditions have shown not to harm Highmark and AHN. Moreover, we note that the conditions are of a type that promote procompetitive practices *ex ante* rather than *ex post* following anticompetitive harm to consumers.

## II. Concluding Remarks

Based on Compass Lexecon’s 2017 and 2023 Reports, which are consistent with our initial findings in 2013, the competitive and consumer choice conditions play an important role, given market conditions, in strengthening and maintaining competition in both the health insurance and healthcare provider market sectors with the WPA healthcare marketplace.

The 2023 Report concludes, “The competitive and public interest Conditions appear to continue to achieve their purposes while not placing Highmark at a competitive disadvantage. The Conditions appear to continue to achieve their purpose of preserving or enhancing competitive dynamics in the WPA for both healthcare insurance and healthcare delivery services. These Conditions do not exhibit any material impact that would suggest that these Conditions have placed Highmark or AHN at a competitive disadvantage in the period from 2017 to the present, or hampered Highmark’s and AHN’s ability to respond to material changes in the conditions of competition, *i.e.*, the Pandemic, and the Highmark and UPMC insurer/provider contract. The ability of Highmark to request waivers to these Conditions provides a safeguard for Highmark to respond to changing competitive conditions, and Highmark has made waiver requests and such waiver requests [have] been granted by the Department.” (2023 Report at 3).

In sum, in the Compass Lexecon reports, we have neither stated nor concluded that, were the 2013 Order's competitive and consumer choice conditions terminated, competition in WPA would remain robust to the benefit of Highmark members or WPA consumers. To the contrary, the Compass Lexecon Reports have recommended to the Department, based on the evidence examined in the Reports, that these conditions remain in place as they serve to preserve competition and the public interest. Highmark Health's statements that the Compass Lexecon reports and assessment or conclusions support termination of the 2013 Order are not accurate.