BEFORE THE INSURANCE DEPARTMENT
OF THE
COMMONWEALTH OF PENNSYLVANIA

Statement Regarding the Request for Modification of the Commissioner's Approving Determination and Order (Order No. ID-RC-13-06)

By Highmark Health (f/k/a UPE)

Response of Highmark Health to Comment on Behalf of Independence Blue Cross, Dated January 26, 2024

Highmark Health on behalf of itself and Highmark Inc. (hereinafter "Highmark") responds to the comment from Stephen P. Fera, Executive Vice President of Public Affairs & Government Markets for Independence Blue Cross ("IBX") dated January 26, 2024 ("IBX Comment") regarding Highmark's Request for Modification ("Request") to the Determination and Order No. ID-RC-13-06 (the "Order"). The IBX Comment is numbered as Document 13 on the Highmark Request for Modification page of the Pennsylvania Insurance Department (the "Department") website. In response to Highmark's request for relief from the Order after 10 years of regulation that no longer serves its statutory purpose, IBX calls for broader regulation of Highmark and other integrated systems than the Order currently requires. IBX's Comment largely exceeds the scope of Highmark's Request and the Department's review of the Request. Consistent with Highmark's positions, IBX's Comment highlights that the Department lacks the statutory authority to maintain the Order's Conditions because there are no facts to show any present risk of substantial lessening of competition or potential for a monopoly in the market for insurance in Pennsylvania arising from Highmark's 2013 affiliation with AHN.

Highmark's Request seeks to eliminate burdensome and duplicative Conditions on Highmark in the Order because those Conditions exceed the Department's statutory authority to review mergers, do not reflect current market competition, and apply to Highmark but not to other similarly situated integrated systems. IBX's comment calls on the Department to not only maintain the Order but expand it and conduct additional review of Highmark's financial condition that goes beyond what the Order contemplates. The Department, however, has no legal authority to adopt IBX's suggestions.

The Department should not adopt IBX's proposal for more intensive regulation of Highmark because (1) the Department lacks authority to expand regulation of Highmark or integrated delivery systems through this process; (2) the May 2023 Compass Lexecon Report shows that there is no factual basis for maintaining the Conditions; (3) Highmark's financial condition is strong; and (4) any broader regulation of integrated networks is beyond the Department's purview in its consideration of Highmark's Request. The Department should also give IBX's Comment limited weight in light of IBX's own competitive motivations, which are apparent from the face of its Comment.

I. The Department Lacks Authority Under Section 1402 of the Insurance Holding Companies Act to Adopt IBX's Positions.

Highmark's Request explained in detail why continuation of the Order after more than 10 years is not consistent with the Department's statutory authority. As discussed in the Request, Section 1402 of the Insurance Holding Companies Act, the sole statute the Department cited to support the Order, provides that the Department may only disapprove a proposed transaction on enumerated grounds, including where the change in control would lessen competition in the market for insurance in Pennsylvania. 40 Pa. Stat. § 991.1402(f). Section 1402 does not support the enactment of indefinite conditions, stating that the Department may condition approval "on removal of the basis of disapproval within a specified period of time." 40 Pa. Stat. § 991.1402(f)(1)(ii)(C). Highmark also noted in the Request that similar conditions imposed by federal antitrust enforcers commonly expire after 10 years.

Without reference to any legal authority, IBX contends that the Department should go *further* and "moderniz[e]" the conditions in the Order by expanding them. IBX asks the Department to conduct "additional independent analysis of both insurer and provider competition in western Pennsylvania" and to "modify[] the current conditions to reflect Highmark's activities and operations across the Commonwealth." IBX Comment at 2-3. The Department's principal authority underlying the Order, however, is to approve mergers with conditions tailored to remove "the basis of disapproval within a specified period of time" for a merger that would "substantially lessen competition *in insurance* in this Commonwealth or tend to create a monopoly therein." *See* 40 Pa. Stat. § 991.1402(f) (emphasis added); 40 Pa. Stat. § 991.1402(f)(1)(ii)(C). IBX's Comment does not identify any ongoing threat of reduced competition in the market for the sale of insurance in Pennsylvania and identifies no authority that would permit the Department to engage in any expanded review of Highmark's financial condition or business strategy.

II. The May 2023 Compass Lexecon Report Supports Highmark's Position and Provides No Basis for the Department to Maintain the Conditions.

Compass Lexecon's May 2023 Report (the "Compass Lexecon Report") shows that the Order's remaining Conditions are duplicative of the antitrust laws and place Highmark at a competitive disadvantage. The Compass Lexecon Report's analysis also is not tied to the legal standard in Section 1402 of the Insurance Holding Companies Act, and thus does not establish that any Conditions remain necessary to prevent the substantial lessening of competition in the insurance market in Pennsylvania. *See* 40 Pa. Stat. § 991.1402(f). IBX suggests that, among other things, the Compass Lexecon Report "concluded unambiguously" that "[t]he conditions remain necessary to promote competition and the public interest in western Pennsylvania." IBX Comment at 2. But a careful review of the Compass Lexecon Report shows that while it stated on page 72 that the Conditions remain necessary to "ensure" competition, its statement was anything but an unambiguous conclusion. Compass Lexecon's specific analysis of each group of Conditions stated quite different conclusions, none of which support an inference that any Conditions "remain necessary" for any purpose.

With respect to Conditions 1 and 2, Compass Lexecon noted that exclusive contracting has been challenged in courts with "mixed results" but ultimately Compass Lexecon

"conclude[d] that these Conditions are consistent with the present state of play in healthcare in WPA and that there is no competitive reason to change Conditions 1 and 2." Compass Lexecon Report at 61. Whatever Compass Lexecon may have meant when it said that Conditions 1 and 2 "are consistent with present state of play[,]" it plainly did not conclude – let alone unambiguously – that these conditions "remain necessary" to promote competition in Western Pennsylvania.

Similarly, with respect to Condition 3, Compass Lexecon stated that in its view the Condition "does not adversely affect Highmark's ability to compete because the Condition allows Highmark to seek approval for a waiver in circumstances where an extended contract is demonstrated to be or likely to be beneficial for Highmark's members and the public." *Id.* at 62-63. Again, this is not a conclusion that this Condition "remains necessary" for any purpose. Compass Lexecon also did not appear to consider the competitive effects of the time, burden, and costs associated with obtaining such a waiver when other similarly situated systems face no such hurdle. With respect to the other Conditions it analyzed, Compass Lexecon similarly reached no conclusion that they remain necessary for any purpose. *Id.* at 63-72 (Conditions 5-6: "We find that this Condition has protected Highmark members and competition in WPA."); (Conditions 7-9: "In sum, our analysis indicates that although Highmark is not operating under the same level playing field in terms of adhering to firewalls when its rivals are not required to do so, there is no indication that these Conditions have adversely affected Highmark members or insurer and provider competition in WPA."); ("Condition 20 continues to serve in the public interest members in a community and healthcare providers without harming competition and it is consistent with the current state of play of enforcement by other regulators."); (Condition 21: "We do not find an economic justification for eliminating this Condition."); (Condition 23: "Our analysis of the competitive conditions in the insurer and provider markets within WPA do not indicate that either Highmark members or competition in WPA has been adversely affected by Condition 23.")

For each set of Conditions that it analyzed, Compass Lexecon stated conclusions based on a variety of standards – e.g., "this Condition has protected . . . competition in WPA" or Highmark and competition have "not been adversely affected" – there is no indication that Compass Lexecon specifically considered or analyzed based on evidence whether the Conditions remain necessary to preserve competition going forward. Moreover, Compass Lexecon's analysis of several of the conditions included a discussion of antitrust case law and enforcement activity, underscoring that these regulations are under the purview of antitrust enforcers, not the Department. This is particularly true with respect to the firewall Conditions (Conditions 7-9), for which the Compass Lexecon notes Highmark "is not operating under the same level playing field . . . when its rivals are not required to do so" and supports its view that they should remain in place by citing other state and federal enforcers' imposition of similar conditions for 10-year periods. *Id.* at 67. That time has now passed here and, notably, the federal and state antitrust enforcement authorities did not impose any such conditions on the formation of Highmark Health.

It bears repeating and emphasizing that the standard set forth in the statute under which the Department derives authority to impose conditions on a merger is not whether the conditions are "necessary to promote competition and the public interest in western Pennsylvania" as stated in the Compass Lexecon Report. The sole standard in the statute and applicable here is whether

the Conditions are presently necessary to address the prospect that this decade old affiliation will "substantially lessen competition in insurance in this Commonwealth or tend to create a monopoly therein." *See* 40 Pa. Stat. § 991.1402(f). As discussed in the Request, the Department cannot as a matter of law maintain indefinite conditions on a merger that are no longer necessary to abate specific competitive harms in the market for insurance in Pennsylvania. IBX's Comment underscores that after a decade the Order has become unmoored from the Department's statutory authority.

In addressing Highmark's Request, the Department must answer, with factual support, the following question for each Condition it should seek to maintain: Is this Condition presently necessary, in view of the current competitive environment for health insurance described in the Compass Lexecon Report, to ensure that Highmark Inc.'s affiliation with AHN does not substantially lessen competition or tend to create a monopoly in the market for the sale of insurance in Pennsylvania? *See* 40 Pa. Stat. § 991.1402(f). The Compass Lexecon Report shows that for each Condition the answer is "no." Highmark respectfully submits that there is no evidence to support a conclusion that any Condition is necessary to serve the Department's clearly defined statutory authority to condition the approval of mergers.

III. The Department Should Grant Highmark's Request Because Highmark is Financially Strong.

IBX's letter acknowledges Highmark's financial strength, citing S&P and AM Best's coverage of Highmark, where it considered that information helpful to IBX. IBX Comment at 5. IBX asserts that Highmark concluded "paradoxically" that, while there is robust competition among insurers and providers in the market, the Order's Conditions inhibit Highmark's ability to compete. This is no paradox. It can be and is true that Highmark is financially strong while also subject to conditions that prevent it from competing fully. The fact that health insurer competition has increased since 2013, as shown by Compass Lexecon, does not mean that Highmark would not compete more vigorously against other insurers, providers, or integrated systems in a but-for world in which it was not subject to the duplicative or unnecessary conditions in the Order.

As recognized by the rating agencies, Highmark Inc.'s balance sheet is strong, with assets of nearly $9.7 billion, sufficient liquidity of $800 million, and healthy debt-to-capital and risk-based capital ratios that align with both rating agency and regulatory guidelines. IBX nevertheless asks the Department to go beyond the Order and independently analyze Highmark and AHN's financial strength, calling on the Department to examine cash transfers, analyze the sustainability of the offsets between Highmark and AHN and its impact on insurance premiums, and require Highmark to produce financial projections regarding its future expansion into Southeastern Pennsylvania. This request lacks any grounding in law or fact. Highmark Inc. and Highmark Health already are required by existing statutory authority to file detailed financial information.[1] AHN and Highmark Health publicly file audited financials as well as current reporting for AHN. Further, the Department has authority to audit and request financial

[1] 40 Pa. Stat. § 443.

information outside of the Order's conditions and separately regulates Highmark Inc.'s risk-based capital.

IBX's focus on AHN's losses as somehow indicating that Highmark is not financially stable misunderstands the fundamental integration of Highmark's and AHN's economics. As an initial matter, many hospitals are facing economic pressures post-pandemic, including AHN. That does not, however, implicate Highmark's financial stability, as shown above, nor does it indicate that consumers are being adversely impacted vis-à-vis other insurers or providers, integrated or not. Highmark's risk-based capital, after transfers to AHN, is expected to be in the 590-600 range as of December 2023. This is a very healthy risk-based capital level for any health insurance company and is evidence of Highmark's financial strength. Highmark's financial stability is also recognized, as noted by IBX, by the various rating agencies that rate Highmark. Importantly, the Department will continue to receive financial reports from Highmark on a regular basis, as already required by statute and regulation, even if the conditions are modified as requested by Highmark.[2] The Department will have no less authority to ensure Highmark's financial condition and stability without the Order's continuation. IBX's speculation that there must be some issue with Highmark's financial stability is countered by the facts about Highmark's financial condition, and those facts will remain available to the Department.

With respect to consumers, IBX does not address the facts in Highmark's Request showing that it delivers lower cost products to consumers through Highmark Inc. and high quality care through AHN, consistent with its incentives as an integrated system. Highmark has also presented the Department with data analysis showing that total medical expenditure for Highmark commercial, Medicare Advantage and Affordable Care Act enrollees attributed to AHN is lower relative to other Highmark members. Highmark members utilizing AHN's clinically integrated physician network have a three percent lower cost of care than Highmark members using nonaffiliated physicians in Western Pennsylvania. AHN's total cost of care for all Medicare patients is lowest among other large regional academic medical centers. Further, having AHN in Western Pennsylvania as a successful competitor to other hospitals and physicians in the area has resulted in a lower total cost of care in the Western Pennsylvania market as compared to other Highmark Pennsylvania markets. That means that AHN's success over the last decade has acted to moderate rates at other hospital systems, thereby keeping the costs of medical care down for all consumers in Western Pennsylvania.

Most fundamentally, IBX's call for "thorough" financial analysis of Highmark and AHN lacks any support in Section 1402 and is unconnected to the Department's mandate to impose conditions on mergers only so as to eliminate the threat of anticompetitive market concentration in the market for the sale of insurance. For this reason alone, Highmark's Request should be granted.

[2] The Department has access to both AHN and Highmark Health's audited financials through public sources, as well as its own regulatory oversight into Highmark Inc. (and its interactions with Highmark Health and AHN) through statutory filing requirements, auditing authority, and reporting requirements. These sources are more than sufficient to provide the Department with a full financial picture of Highmark Health's financial wellness. *See, e.g.*, 40 Pa. Stat. § 459.8; 31 Pa. Code § 25.22; 40 Pa. Stat. § 443; 26 U.S.C §§ 6001, 6033; *see also* Request, at 9-11.

IV. IBX's Call for an IDN Regulatory Structure in the Commonwealth is Misplaced.

Like Compass Lexecon, IBX acknowledges that Highmark raises "a valid consideration" when it points out that it is the only integrated delivery system in Pennsylvania that is subject to the regulations in the Order, or to overlapping regulations to the extent those in the Order are duplicative of other state and federal regulatory regimes. IBX Comment at 5. IBX suggests that the Department's "oversight may need to evolve" to provide "specific oversight" for integrated systems, adding that the "objectives" of a new "regulatory framework" would be to "ensure fiscal stability, fair competition, and the delivery of high-quality care[.]" *Id.* There is no mechanism for the Department to adopt any such new regulatory framework through this process, which is for public comments on Highmark's Request for Modification of the Order. The Department should not continue to subject Highmark to uniquely burdensome regulations while it considers whether and how to regulate integrated systems within its statutory authority.

V. IBX's Comment Seeks Competitively Sensitive Material Specific to SEPA and Should Be Given Limited Weight Given IBX's Motivations.

In a revealing indication of its motivations, IBX calls for an "examination" of Highmark's financial strength and includes a specific request for "production of financial projections regarding Highmark's expansion into Southeastern Pennsylvania in 2024 – specifically the expenses that expansion entails, including the cost and difficulty of establishing provider networks and pricing absent utilization history in the region." IBX Comment at 4. IBX asks that this "future examination" be "fully transparent[.]" *Id.* at 2. This plainly is an effort by IBX to gain competitive intelligence about Highmark's efforts to compete in Southeastern Pennsylvania and it shows that IBX is concerned with limiting competition from Highmark in its core territory, not fostering a competitive health insurance environment across Pennsylvania.

Indeed, IBX's opposition to Highmark's Request is disingenuous and is consistent with its previous failed attempt to constrain another competitor, as pointed out by Judge Pappert in *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, No. 20-0113 (E.D. Pa. Dec. 8, 2020). In *Jefferson*, Judge Pappert provided the following analysis of IBX's views and motivations when IBX challenged the proposed merger of Jefferson and Einstein Hospitals:

> . . . IBC has a clear motive, other than antitrust concerns, to oppose this merger. . . . IBC considers Jefferson to be a potential competitive threat as an insurer. [cite omitted.] IBC recognized, and does not like, that 'the merger would take Jefferson from being less of a potential competitor to IBC [to] more of an actual competitor.' Specifically, Jefferson and Einstein currently compete with IBC as insurers through their ownership in Health Plan Partners Plans, Inc. ('HPP'), a Medicaid and Medicare insurer that covers approximately 256,000 lives in southeastern Pennsylvania.

Id. at 550. Highmark, too, is a competitor of IBX. Judge Pappert concluded that IBX had no credibility when challenging Jefferson's proposed merger:

> IBC' views on this merger merit little weight. . . . What the record does show is that IBC is far more concerned with hospitals joining forces where, as here, IBC views them as a competitive threat in the insurance market.

Id. at 551. The Department should give IBX's views in this matter the same weight that Judge Pappert gave their views in the Jefferson matter.

VI. Conclusion

Highmark's Request is well-founded both legally and factually. The Department lacks authority to maintain indefinite regulations specific to Highmark as a condition for a 2013 merger that poses no threat of creating a monopoly for the sale of insurance in Pennsylvania. Competitive conditions have evolved over the past 10 years such that Highmark is a strong player in a robust and competitive environment for the sale of health insurance and the delivery of healthcare in Pennsylvania. Against this backdrop, the Department should eliminate the remaining conditions from the 2013 Order.

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