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 Insurance Federation of Pennsylvania, Dated February 9, 2024

Highmark Health on behalf of itself and Highmark Inc. (hereinafter "Highmark") responds to the comment from Jonathan C. Greer, President and Chief Executive Officer of the Insurance Federation of Pennsylvania ("Insurance Federation") dated February 9, 2024 ("Insurance Federation Comment"), "in opposition to" Highmark's Request for Modification ("Request") to the Determination and Order No. ID-RC-13-06 (the "Order"). The Insurance Federation Comment is numbered as Document 15 on the Highmark Request for Modification page of the Pennsylvania Insurance Department (the "Department") website.

I. The Insurance Federation Misconstrues the Standard of Review.

The issue before the Department is whether the Order's Conditions are necessary to alleviate specific harm resulting from the formation of Highmark Health in 2013 (the "2013 Transaction"). The issue is not, as the Insurance Federation suggests in the introduction to its Comment, whether Highmark can justify the need to eliminate the Conditions. Section 1402 of the Insurance Holding Companies Act sets forth the legal standard underlying the Department's authority. Section 1402 requires the Department to approve a transaction unless one of several enumerated factors exist, including that the transaction could "substantially lessen competition in insurance in this Commonwealth or tend to create a monopoly therein." 40 Pa. Stat. § 991.1402(f)(ii) (Section 1402(b)). The Department may then condition approval "on removal of the basis of disapproval within a specified period of time[,]" 40 Pa. Stat. § 991.1402(f)(1)(ii)(C). The statute does not provide for indefinite regulatory oversight as a condition for approval of a transaction. To be sure, certain of the Financial Conditions and other non-Competitive Conditions were premised on the Department's authority to disapprove a transaction that is "unfair and unreasonable and fail[s] to confer benefit on policyholders of the insurer and is not in the public interest." 40 Pa. Stat. § 991.1402(f)(iv) (Section 1402(d)). Those non-Competitive Conditions, however, are sufficiently addressed by the Department's ongoing financial and regulatory oversight of Highmark through other channels of authority. Moreover, Highmark's financial picture is clear and fundamentally different from the uncertain forward-looking projections of what would become Highmark Health when the Findings of Fact and Conclusions of Law supporting the Order were issued on May 31, 2013. *See* Request at 10-13. Importantly, as the Department recognized in the Order the "burden is on the Department to show a violation of the standards." *See* Order at 2.

The Insurance Federation points to no evidence to show that the Order is necessary to alleviate any specific harms arising from the 2013 Transaction. The May 2023 Compass

Lexecon Report ("Compass Lexecon Report") supports Highmark's Request because it shows no foreseeable potential for Highmark to substantially lessen competition in the insurance market in Pennsylvania.

Instead of placing the burden of proof onto Highmark to justify a need to eliminate the Conditions, the Department must follow its own statutory mandate to condition its approval only to the extent that the 2013 Transaction still poses a risk of substantially lessening competition in the market for insurance in Pennsylvania. 40 Pa. Stat. §§ 991.1402(f). The Compass Lexecon Report and other evidence shows that competition in the insurance market in Pennsylvania is not at risk from the 2013 Transaction.

II. The Insurance Federation's Arguments Do Not Account for Competitive Reality or the Department's Limited Statutory Authority.

The Order subjects Highmark to duplicative and burdensome Conditions that fall beyond the purview of the Department's legal authority to regulate mergers. The Insurance Federation's comments address to the "process and timing" of the Request, the Compass Lexecon Report, regulation of integrated systems, and the current competitive environment. Highmark's request, however, is well founded and should be granted because it has appropriately followed the Department's process for seeking modification of the Order, the Compass Lexecon Report shows that competition is strong and does not contain evidence to suggest that the Order is necessary to prevent an anticompetitive threat from the 2013 Transaction, Highmark is the only integrated system subject to the duplicative and unduly burdensome Conditions, and the current reality is that as competition in health insurance markets increase, Highmark should not be limited in its ability to compete. Highmark will address each of the Insurance Federation's points in turn.

1. Highmark's Request for Modification as Well as the Process and the Timing Set Forth by the Department are Appropriate.

Highmark's Request complies with the process for modification set forth in the Order. *See* Condition 17, Order at 18. This is the same process Highmark followed when it submitted a request for modification on March 27, 2017, which was approved on July 28, 2017. The Insurance Federation cryptically describes the process and timing of Highmark's Request as "worrisome", but articulates no concern supported by any facts. Highmark's Request meets the requirements of the Order and there is no basis to reject it on procedural or timing grounds.

The Insurance Federation further suggests that the process for review of the Request should mirror the initial review of the 2013 Transaction, but the Department's review of the Request is profoundly different from the initial review and imposition of the Order. The 2013 Order addressed potential future harm from the 2013 Transaction. There now is no need to speculate or project possible harms that may arise from the 2013 Transaction. The Compass Lexecon Report shows that, 10 years on, competition in the insurance market is vigorous and no further conditions on Highmark are necessary to maintain it. The Department has sufficient evidence to conclude that there is no longer a risk to competition in the Commonwealth from the 2013 Transaction. The Department also has access to data demonstrating that the competitive market is robust and that Highmark's competitors, which are unencumbered by the Order, are strong. In addition, Highmark is financially strong and subject to oversight such that the

Conditions are no longer necessary to ensure benefits are conferred on policyholders. *See* 40 Pa. Stat. § 991.1402(f)(iv).

The Order authorizes Highmark to request a modification at any time. The ten-year mark presents a paradigmatic opportunity to do so because, as pointed out in the Request, orders of this nature typically are limited to ten years. *See* Request at 6, n. 16. Highmark need only provide (and has provided) information for the Department to evaluate the competitive landscape and whether the Order is still consistent with the Department's mandate. If the Insurance Federation had any concrete evidence to suggest that competition in the insurance market in Pennsylvania would be substantially lessened from eliminating any Conditions, it could have included such evidence in its Comment. The fact that it did not do so and instead leads with a procedural argument is telling.[1]

2. <u>The May 2023 Compass Lexecon Report Supports Highmark's Request to Remove the Conditions Imposed by the Order.</u>

The Compass Lexecon Report shows that competition in the insurance market in Pennsylvania is robust. *See*, *e.g.*, Compass Lexecon Report at 18-19 (discussing health insurer total members from 2017-2021); 28-29 ("In addition to UPMC, there is an increased presence of national insurers in Pennsylvania and the WPA marketplace."); and 72-74. Notably, this stands in contrast to certain of the Department's Findings of Fact and Conclusions of Law in support of the Order in 2013, at which point the Department had "not found reliable information" that any competitors other than UPMC Health Plan were viable" and the Department concluded that "it is unlikely competing insurers would be able to expand readily and effectively[.]" Findings of Fact and Conclusions of Law at ¶¶ 157-58. The Compass Lexecon Report shows that those findings no longer hold. Because the Department is charged with preserving competition in the insurance markets in Pennsylvania, the Insurance Federation should not be "astounded" that Highmark would reply on the Compass Lexecon Report's findings of robust competition in that market to support a conclusion that the Order has outlived its usefulness.

Importantly, the standard for maintaining the Order is not, as Compass Lexecon stated and the Insurance Federation suggests, whether the Order has an "adverse impact" on Highmark's ability to maintain its business. The only question properly before the Department is whether there is substantial evidence to show that the Conditions presently are necessary to prevent any "substantially lessen[ed] competition" from the 2013 Transaction. The Compass Lexecon Report does not establish that any one of the Conditions meet this standard. Highmark respectfully points out that there is no factual support in the Compass Lexecon report to justify retaining any Condition under the standard of whether a Condition is necessary after 10 years to avoid a substantial lessening of competition in the insurance market. Indeed, the Compass Lexecon Report observes that the Conditions "may be partly responsible for Highmark's declining share" in the insurance market. Compass Lexecon Report at 29.

[1] In response to the Insurance Federation's suggestion that the Department hold a public hearing, Highmark notes that as recognized in the Department's Findings of Fact and Conclusions of Law in support of the Order at paragraph 259, Section 1402 does not require that the Department hold a public hearing.

Highmark addresses the specific Conditions mentioned in the Insurance Federation's Comment as follows:

- **Condition 3**, which places a 5-year limit on provider and insurer contracts, suppresses Highmark's ability to innovate and collaborate with other payors and providers in a way that facilitates value-based care. There is no evidence to suggest that this Condition presently prevents or mitigates against any substantial lessening of competition or monopolization by Highmark in the market for the sale of insurance in Pennsylvania. Compass Lexecon stated that in its view Condition 3 "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." Compass Lexecon Report at 62-63. Compass Lexecon does not state a conclusion as to whether or not the Condition "remains necessary" to substantially lessen competition in the market for insurance in Pennsylvania. Nor does Compass Lexecon address the costs, delays, and other burdens associated with submitting a waiver request to the Department – burdens that Highmark's similarly situated competitors do not face.

- The firewall Conditions (**Conditions 7-9**) are not necessary to prevent any competitive effects from the 2013 Transaction. The firewall Conditions are superfluous because other laws and regulations address anticompetitive sharing of competitively sensitive information. As the Compass Lexecon Report acknowledges, handling competitively sensitive information in compliance with the antitrust laws is something vertically integrated organizations must consider independent of any merger-related conditions, as indicated by its repeated citations to Gerald A. Stein and Albert Jui Li, "Handling Competitively Sensitive Information in a Vertically Integrated Firm: Practical Advice for In-house Counsel." *American Bar Association* 10/29/21. Compass Lexecon Report at 65. Along with price transparency regulations, antitrust laws already safeguard against the competitive concerns the Order intended to address. Whether the firewall Conditions "adversely impact" Highmark is irrelevant, because these Conditions are not necessary to promote competition in the market for insurance in Pennsylvania. And as Compass Lexecon states, Highmark is "not operating under the same level playing field in terms of adhering to firewalls" as its rivals. *Id.* at 67.

- **Condition 20**, which prevents Highmark from using contracts that limit consumer choice initiatives, is similarly superfluous because the antitrust laws would apply to any anticompetitive effort to limit tiering or steering. The Compass Lexecon Report cites examples of similar conditions enforced by federal and state antitrust agencies. Compass Lexecon Report at 68. The examples cited by Compass Lexecon limited similar conditions imposed as part of merger reviews to 10 years or less, demonstrating that any behavioral remedy of this nature cannot be justified after more than a decade. Whether or not this Condition encourages procompetitive contracting is not what the Department must analyze. The

Department must determine whether the Condition is still required to address any potential substantial lessening of competition or tendency to create a monopoly arising from the 2013 Transaction.[2] It is not.

The Insurance Federation's Comment did not specifically discuss any other Conditions.

3. The Insurance Department Should Level the Playing Field Between Integrated Systems by Granting Highmark's Request.

Highmark is in a strong financial position and is an effective competitor in the insurer and provider markets in Pennsylvania. There is nothing logically inconsistent with Highmark nonetheless seeking relief from the Conditions, which only serve to restrain it from competing more fully by creating an unnecessary and costly regulatory overhang. The logical inconsistency is entirely on the side of the Insurance Federation and other opponents of the Request who suggest that because Highmark is in a strong financial and competitive position, the Conditions must not limit Highmark. The Conditions are inherently costly and limiting because, among other things, they impose financial costs on Highmark that other integrated systems do not face and they place behavioral conditions and requirements for permission to act that other integrated systems do not face.

The Insurance Federation argues that Highmark is not disadvantaged in light of the successes of Highmark and AHN outlined in the Request. Insurance Federation Comment at 3-4. As Compass Lexecon twice admitted, the Conditions do not allow Highmark to operate on a "level playing field" with other integrated systems in the market.[3] The Insurance Federation Comment strains to defend this inequity. The Insurance Federation argues that Highmark, "unlike other IDSs that start with a health system creating or acquiring a health insurer," "inverted" the model by acquiring what has become AHN. This is a distinction without a difference that would serve to justify the Conditions. The Insurance Federation Comment provides no support to demonstrate why the Department needs to regulate Highmark differently from other integrated systems that began as providers.

It is neither circular nor inconsistent to point out that Highmark can be financially strong while still uniquely burdened by Conditions that are not applied to other integrated systems. In a but-for world where Highmark was no longer constrained by the duplicative and outdated Conditions in the Order, it could compete more effectively with other insurers, providers, and integrated systems. Importantly, the question is not whether Highmark can survive with the Conditions. The question is whether the Department has a legal and factual basis to maintain them after more than 10 years. It does not.

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[2] Although Condition 20 is not categorized in the Order as a Competitive Condition, it does contain limitations that arise from principles of antitrust law and was discussed in the Compass Lexecon Report along with other Competitive Conditions. There also is not substantial evidence to support this Condition as failing "confer a benefit on policyholders" under 40 Pa. Stat. § 991.1402(f)(iv).

[3] Compass Lexecon Report, at 53 (July 2017) ("In 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.") Compass Lexecon Report, at 67 (May 2023) ("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….").

4. This is the Right Time to Grant Highmark's Request.

In section 4 of its Comment, the Insurance Federation argues that Highmark's Request should take into consideration the current "environment" in healthcare. The Comment is light on specifics, but suggests that the Department should carefully "monitor . . . the financial condition" of Highmark during this "potential sea change in market dynamics[.]" Insurance Federation Comment at 4. The Insurance Federation's Comment is too vague to inform the Department's analysis. It also fails to recognize that the Department will continue to have financial and regulatory oversight over Highmark. *See* Request at 10-13.

The Insurance Federation provides important support for Highmark's Request in this section where it notes that "reduction in competitive barriers between Blues Plans . . . may result in new entrants to the western PA market[.]" *Id.* This increased competition in the insurance market is a reason to grant Highmark's Request now. With an already competitive insurance market poised to see increased competition, there is no evidence to suggest that the 2013 Transaction poses a continuing threat to competition.

III. The Department Should Give the Insurance Federation's Comment Limited Weight.

The Department should take into consideration that the Insurance Federation's membership includes competitors of Highmark, including UPMC Health Plan.[4] UPMC Health Plan's CEO is a member of the Board of Directors of the Insurance Federation.[5] UPMC Health Plan is described in the Compass Lexecon Report as a "formidable competitor of Highmark" and it is a part of an integrated system that is not subject to the Conditions. *See* Compass Lexecon Report at 73. It would be difficult to read the Compass Lexecon Report and conclude that it is procompetitive to impose the Conditions on Highmark and not UPMC given UPMC's market positions. Comments from Highmark's competitors or groups comprised of competitors should be given appropriately limited weight by the Department because those entities have a clear interest in ensuring that Highmark faces disproportionate regulatory burdens.

The majority of comments to date have been in support of Highmark's Request. The comments in support of Highmark's Request are from a broad array of private and public parties: consumers and patients,[6] employer group customers,[7] and public stakeholders[8]. Elected representatives have also voiced support for granting Highmark's Request.[9] Where comments opposing the Request come from Highmark's competitive rivals, the Department should consider the source and whether they really seek more competition or less.

[4] The Insurance Federation's list of its membership can be accessed here: https://ifpenn.org/membership/.
[5] *See* https://ifpenn.org/about-us/.
[6] *See, e.g.*, Comment from Jack F. Lee, Jr. (Jan. 8, 2024), Document # 8.
[7] *See, e.g.*, Comment from Michael Gore, Penn United Technologies, Inc. (Dec. 12, 2023), Document # 6.
[8] *See, e.g.*, Comment from Matt Smith, Greater Pittsburgh Chamber of Commerce (Jan. 10, 2024), Document # 11; Comment from Joyce Bender, Bender Consulting Services, Inc. (Jan. 9, 2024), Document # 9.
[9] *See, e.g.*, Comment from Rep. Timothy O'Neal (Dec. 14, 2023), Document # 4; Comment from Sen. Dan Laughlin (Jan. 5, 2024), Document # 7.

IV. Conclusion

The Request established that there is no factual or statutory basis to subject Highmark to the Conditions 10 years on from the 2013 Transaction. Highmark is now in a competitive landscape where it is a stable, strong player but could enhance the robust competition among integrated systems if the Conditions are removed. The Department should grant Highmark's Request.[10]

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[10] The Insurance Federation posed a puzzling question at the conclusion of its Comment, asking of the Order "why did Highmark agree to its terms?" Highmark did not "agree to" the terms of the Order, they were imposed on Highmark pursuant to the Department's authority under Section 1402.