ReedSmith
Driving progress
through partnership

William J. Sheridan
Direct Phone: +1 412 288 3156
Email: wsheridan@reedsmith.com

Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222-2716
+1 412 288 3131
Fax +1 412 288 3063
reedsmith.com

May 30, 2024

Via Email (lawrence.beaser@blankrome.com)

Lawrence J. Beaser, Esq.
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103

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

Dear Mr. Beaser,

I write on behalf of Highmark Health and Highmark Inc. (hereinafter "Highmark") to address certain legal issues related to Highmark's Request for Modification ("Request") to the Commissioner's Approving Determination and Order No. ID-RC-13-06 (the "Order").

Highmark submitted the Request to the Pennsylvania Insurance Department (the "Department") on October 16, 2023 and appreciated the opportunity to present testimony at the May 1, 2024 public informational hearing. As the testimony on behalf of Highmark showed, Highmark's strong view is that the change in factual circumstances from April 2013 to today justifies removal of the remaining competitive and financial conditions (the "Conditions") in the Order. Specifically, Highmark's robust financial condition as an integrated entity and the increased competition on both sides of the healthcare market in western Pennsylvania show that the Conditions are no longer justified. The PID should grant Highmark's Request because facts have changed and Highmark should be placed on a level playing field with other similarly situated integrated systems, as has been explained in Highmark's submissions and testimony.[1]

I write separately to address the legal framework for the Department's decision and Highmark's position that the PID lacks sufficient evidence to maintain the remaining Conditions. First, the Department's relevant statutory authority is limited to imposing conditions on the approval of mergers, and that authority does not allow for indefinite post-transaction regulation. Second, and relatedly, the Order approving the formation of Highmark Health contained a process for its own modification, and any

[1] Highmark explained at the hearing why the conditions applied in Order No. ID-RC-24-03-01, entered *In Re: Application of Risant Health, Inc. and Kaiser Foundation Hospitals in Support of the Request for Approval to Acquire Control of Geisinger Health Plan, Geisinger Quality Options, Inc., and Geisinger Indemnity Insurance Company*, (the "Risant Conditions") are not appropriate for Highmark. Among other issues, the Risant Conditions were tailored by the PID to that particular transaction and the role of Geisinger Health Plan and affiliated entities in certain markets. For many of the reasons discussed in this letter, the Risant Conditions should not be used as a "one size fits all" set of regulations for entities that happen to have transactions before the Department.

denial of a request for modification must, under Pennsylvania law, be supported by substantial evidence. Because there is not substantial evidence that any Condition remains necessary to remove a basis for disapproval of the 2013 transaction, the Request should be granted. Third, maintenance of the Conditions after more than 11 years, and in light of current market circumstances, would constitute impermissible special legislation directed at a single entity and would unfairly disadvantage Highmark to the benefit of its competitive rivals. For these reasons, in addition to those addressed at the May 1 hearing and in Highmark's other submissions, the Request should be granted.

I. The Department's Legal Authority for the Order Derives from Its Statutory Authority to Condition the Approval of Mergers.

The Department's authority to condition the approval of mergers is set forth in the Insurance Holding Companies Act (the "IHCA"). 40 Pa. Stat. § 991.1402(f)(1) provides that the Department may disapprove a proposed transaction only on seven enumerated bases, including where the effect of the transaction "would be to substantially lessen competition in insurance in this Commonwealth or tend to create a monopoly therein" or to ensure the financial stability of the insurer. The Department must otherwise approve the transaction.[2] The Department's stated basis for issuing the Order rests solely on this provision.[3]

Where the risk to competition in insurance has abated or the insurer's financial situation has solidified, as is the case here after 11 years, the Department lacks the requisite statutory authority to continue to regulate the transaction because the "basis of disapproval" no longer exists. Indeed, the Department may only condition its approval on removal of the basis of competitive concern "within a specified period of time."[4] This statutory directive does not allow the Department to impose conditions indefinitely.

There is no evidence that the formation of Highmark Health in 2013 poses a risk today of reducing "competition in insurance" or of creating a "monopoly therein." The Department's statutory mandate does not permit permanent regulation of a single entity by order. Because the creation of Highmark Health no longer poses a competitive threat or a financial threat to Highmark Inc., the Department exceeds its statutory authority by continuing to regulate the merger.

II. The Conditions Are Not Supported By Substantial Evidence.

Highmark has presented evidence to the Department that shows, among other things, that the facts that gave rise to the Order and were embodied in the Findings of Fact underlying the Order have fundamentally changed and no longer support the Conditions. The burden of proof is not clearly allocated, but in other challenges before the Department, the initial burden of production and ultimate burden of persuasion have rested with the moving party.[5] Should there be a review of the Department's decision, it would be governed by the standard set forth in Section 704 of the Administrative Agency Law, and should be reversed if, among other things, constitutional rights have been violated or the decision is not supported

---

[2] 40 Pa. Stat. § 991.1402(f)(1); *Erie Ins. Exch. v. Pa. Ins. Dep't.*, 133 A.3d 102, 111 n.16 (Pa. Commw. Ct. 2016) ("Under Section 1402(f)(1) of the IHCA, . . . the Department may *only* disapprove a filing for seven specified reasons." (emphasis added)).

[3] *See* Findings of Fact and Conclusions of Law (May 31, 2013), at ¶¶ 128-132.

[4] 40 Pa. Stat. § 991.1402(f)(1)(ii)(C).

[5] *See Erie Ins. Exch.*, 133 A.3d at 106 (Department assessed that the party seeking relief under the ICHA, "bore the initial burden of production and the ultimate burden of persuasion").

by substantial evidence.[6] Highmark acknowledges that the request for modification process set forth in Condition 27 of the Order provides the Commissioner with the "sole discretion" to decide whether to grant requests for modification, but even where an agency has discretion to act, its decision must be supported by substantial evidence.[7] For the reasons discussed in this letter and in its submissions and testimony, Highmark has met its burdens of production and persuasion and any decision to maintain the Conditions would not be supported by substantial evidence.[8]

The Department's decision on Highmark's Request must be in accordance with Pennsylvania law, which requires that it be supported by substantial evidence.[9] Substantial evidence is that which a reasonable mind might accept as relevant and adequate to support a conclusion.[10] The Department's decision also can be overturned where it represents a "manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions."[11] In applying this standard, courts require the Department to act within statutory bounds,[12] avoid speculative conclusions unsupported by the evidence,[13] and support its findings with rational support in the record as a whole.[14]

Despite the suggestions by Compass Lexecon and other commenters,[15] whether the Conditions overly burden or even harm Highmark is irrelevant to the legal standard. The Department's decision must be in accordance with its limited authority in 40 Pa. Stat. § 991.1402 and supported by substantial evidence.[16]

The Order as agreed upon by Highmark in 2013 was grounded in facts that are not supported by substantial evidence because of changes at Highmark and in the markets in which it has operated over the

---

[6] *Id.* at 107 n.12.

[7] *See Nationwide Mut. Ins. Co. v. Commonwealth*, 15 Pa. Commw. 24, 29-30 (1974) (setting aside and remanding decision of the Insurance Commissioner).

[8] *See Erie Ins. Exch.*, 133 A.3d at 106-07, 107 n.12; *see also Nationwide Mut. Ins. Co.*, 15 Pa. Commw. at 36, 38 (where there was "not substantial evidence in the record to support either the findings or conclusions of the Commissioner" and the Commissioner's action "relie[d] on speculation[,]" the court set aside the Department's determination); *Commonwealth, Ins. Dep't v. Ciervo*, 24 Pa. Commw. 29, 32-33 (1976) (reversing in part and modifying in part a decision of the Department for lack of substantial evidence).

[9] 2 Pa. Cons. Stat.. § 704 (setting forth the standard for appeal of a decision by a Commonwealth agency, including that findings of fact must be "supported by substantial evidence"); *Erie Ins. Exch.*, 133 A.3d at 107 n.12 ("We note that this Court must affirm the Commissioner's determination unless we find that it violates Petitioners' constitutional rights, it is not in accordance with law, it violates a practice or procedure of Commonwealth agencies, or a necessary finding of fact is not supported by substantial evidence.").

[10] *See Prudential Prop. & Cas. Ins. Co. v. Dep't of Ins.*, 141 Pa. Commw. 156, 171 (1991) (finding that the Commissioner failed to meet the substantial evidence standard for using a 12% rate where the Department failed to provide enough support in the record for a reasonable mind to accept the specific rate).

[11] *Nationwide Mut. Ins. Co.*, 15 Pa. Commw. at 31 (quoting *Ins. Dep't v. Philadelphia*, 196 Pa. Super. 221, 237 (1961)) (remanding to Commissioner where adjudication did not meet the requirements of the governing statute).

[12] *Erie Ins. Exch.*, 133 A.3d at 113 (vacating order of Commissioner where "Petitioners' allegations of impropriety relating to the Transactions do not fall within the Department's jurisdiction and are not so complex that they require the special competency of the Department.").

[13] *Nationwide Mut. Ins. Co.*, 15 Pa. Commw. at 38-39 (Commissioner's finding was not supported by substantial evidence found in the record where Commissioner speculated on the market position without evidence in the record to support such).

[14] *Prudential Prop. & Cas. Ins. Co.*, 141 Pa. Commw. at 171 (Department lacked substantial evidence from record to support Commissioner's conclusion of what, exactly, constituted an average industry rate over time).

[15] *See* Compass Lexecon Response to Highmark Health's Modification Request (Mar. 4, 2024), Doc. #25 (hereinafter "Compass Lexecon Response"), at 6-7; Comment from Independence Blue Cross (Jan. 26, 2024), Doc. #13.

[16] *See* Approving Determination and Order No. ID-RC-13-06 (Apr. 29, 2013), at 2 ("The burden is on the Department to show a violation of the standards. The standards are phrased in the negative and the Department is required to approve a transaction unless it finds that any of the standards are met.").

last 11 years. The critical assumptions forming the evidentiary basis to implement the Order are now factually inaccurate or moot as already addressed. By way of example, the Department relied on the following outdated facts in applying the Conditions in 2013:

- The Department's concern regarding West Penn Allegheny Health System, Inc.'s ("West Penn") previous financial difficulties;[17]
- Highmark's market share for commercial insurance in western Pennsylvania of approximately 60%;[18]
- The Department's concern regarding significant economic risks based on "uncertainty about whether Highmark will be able to shift large volumes of inpatients to West Penn, some of the economic assumptions underlying Highmark's projected IDN cost savings, and the assumed termination of Highmark's provider contract with UPMC as of December 31, 2014";[19]
- The projected "downside case" in which Highmark may only be able to attain 50% of the incremental discharges it projected, noting insufficient detail to conclude whether Highmark would be able to restore West Penn to a competitively-viable hospital system;[20]
- The fact that "few insurers" have experienced substantial market share growth over past several years and the Department's speculation that it is unlikely that any would attract members away from Highmark;[21]
- The Department's concern that Highmark's IDN strategy might materially decrease Highmark's liquidity and reduce the quality of its investment portfolio, which could potentially jeopardize the financial stability of Highmark;[22]
- The Department's concern with Highmark's commitment to community hospitals;[23] and
- The risk that UPMC and Highmark contract would not be extended in beyond 2014.[24]

Because these key findings of fact no longer hold, the Department lacks substantial evidence to support the Conditions. The Department's decision on Highmark's Request must be based on substantial evidence looking at the current record in its entirety – not just the market conditions of more than a decade ago.

The Department must have a basis in the current facts to support the Conditions. Compass Lexecon's findings in support of maintaining the conditions, however, are not based on substantial evidence. Throughout its reports and testimony, Compass Lexecon describes potential competitive harm in speculative terms. For example, Compass Lexecon identifies a "risk of potential anticompetitive behavior" due to what it describes as the concentration in provider and insurer markets in Western Pennsylvania, but also acknowledges it has "not conducted an assessment to determine the likely state of competition in a hypothetical world in which the 2013 Order is terminated[.]"[25] Without such an analysis, the Order is not based on substantial evidence that its conditions remain necessary to address any present competitive threat. In addition, Compass Lexecon speculates that, if the market is "left unchecked" by the

[17] Findings of Fact and Conclusions of Law (May 31, 2013), at ¶ 44.
[18] *Id.* at ¶¶ 146(b), 149, 155.
[19] *Id.* at ¶ 146(e).
[20] *Id.* at ¶ 146(f).
[21] *Id.* at ¶¶ 156-158.
[22] *Id.* at ¶¶ 232-233.
[23] *Id.* at ¶ 244.
[24] *Id.* at ¶ 243.
[25] Compass Lexecon Response, at 2, 7.

Order, it "*may* be subject to *risks* of *potential* anticompetitive effects."[26] This speculation does not constitute the concrete, substantial evidence required to support the Condition[27] – Compass Lexecon has not even attempted to show that any conditions are necessary to mitigate any "potential" risks.[28]

Compass Lexecon "neither stated nor concluded that," were the 2013 Order to terminate, "competition in [Western Pennsylvania] would remain robust[.]"[29] However, Compass Lexecon likewise neither stated nor concluded that, were the Order to terminate, competition *would* be harmed. Compass Lexecon identified no evidence either way. Notably, Compass Lexecon notes that with two vertically integrated systems in western Pennsylvania, competition could "take one of two forms—intense competition or tacit collusion[.]"[30] There is no evidence, however, to suggest that the latter is more likely than the former, and all evidence – including changes in market shares – points to intense competition between Highmark and UPMC. No other commenters or witnesses at the public hearing provided concrete evidence to show that any one of the Conditions remains necessary to abate any harm arising from the 2013 transaction. Accordingly, the Department lacks the requisite evidentiary basis required for continued monitoring through the Order.

Although Compass Lexecon refers to federal antitrust authority and public policy favoring certain of the competitive Conditions, the Department does not have plenary authority to act as an antitrust regulator. The Conditions, however, have made *per se* violations out of contracting practices that under long-standing federal and state antitrust law would be analyzed under the rule of reason.[31] There is no evidentiary or legal basis to treat such contracting practices differently when Highmark engages in them than when another similarly situated competitor – for example, UPMC – does. Any decision to the contrary runs a substantial risk of being found "purely arbitrary" in court.

Highmark's position is fully consistent with the approach typically taken by the federal antitrust enforcement agencies, and there is no evidentiary reason for the Department to impose more onerous merger conditions than would be imposed by the federal agencies that are tasked with enforcing the antitrust laws. The Insurance Holding Companies Act tracks the language of Section 7 of the Clayton Act, 15 U.S.C. § 18, which grants the Federal Trade Commission ("FTC") power to regulate mergers or acquisitions, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Conditions imposed by federal regulators for the approval of vertical mergers typically extinguish after 10 years.[32] Compass Lexecon acknowledges 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

---

[26] *Id.* at 4 (emphasis added).
[27] *Nationwide Mut. Ins. Co.*, 15 Pa. Commw. at 38-39 (no substantial evidence where Department's decision was based on speculation).
[28] *Prudential Prop. & Cas. Ins. Co.*, 141 Pa. Commw. at 171 (no substantial evidence due to failure to identify quantifiable basis for conclusion).
[29] Compass Lexecon Response, at 8.
[30] *Id.* at 3.
[31] Vertical restraints are presumptively examined under a rule of reason analysis. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *see also, e.g., Biddle v. Walt Disney Co.*, No. 5:22-cv-07317, 2023 U.S. Dist. LEXIS 176547, at *24 (N.D. Cal. Sept. 29, 2023) (analyzing most favored nation (MFN) clauses under the rule of reason); *Premier Comp Sols. LLC v. UPMC*, 377 F. Supp. 3d 506, 533 (W.D. Pa. 2019) (using rule of reason to analyze antitrust exclusive dealing claim); *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (analyzing anti-steering provisions under the rule of reason); *Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.*, 29 F.4th 337, 348-49 (7th Cir. 2022) (applying rule of reason to dismiss plaintiffs' challenge to long-term vertical contracts).
[32] *See, e.g.*, *Enforcement of Merger Consent Decrees*, GLOBAL COMPETITION REVIEW (Nov. 8, 2021) ("The DOJ's antitrust consent decrees typically last 10 years.").

firm."[33] Conditions exceeding 10 years imposed by the FTC or Department of Justice are utilized for cease-and-desist orders addressing other forms of anticompetitive conduct or particularly egregious cases of monopolization by a buyer that could impose high barriers of entry to prevent rivals from fairly competing. By way of example, only one Consent Order from the FTC imposed conditions exceeding 10 years out of 16 Clayton Act merger cases since 2021.[34] There is no evidence of monopoly here, nor is there any evidence that Highmark can impose or has imposed barriers to entry against UPMC or other rivals entering the market for commercial insurance.

After 11 years, competition, not duplicative regulation, is the most appropriate way to ensure that consumers in Pennsylvania receive high quality care at a reasonable cost. Compass Lexecon has failed to point to evidence to suggest otherwise. It is notable that in its May 2023 Updated Competitive Assessment, all of the competitive impact conditions cited by Compass Lexecon were limited to 3, 5, or 10-year terms.[35] Compass Lexecon's Response also does not point us to a consent order that exceeded 10 years, let alone one comparable to the transaction at hand.

The Conditions are no longer grounded in fact or law and should be removed per Highmark's Request.

III. Maintenance of the Conditions After 11 Years Would Amount to Impermissible Special Legislation.

The Department's decision must not violate the constitutional rights of the applicant.[36] The Pennsylvania Constitution prohibits special legislation which treats an entity differently where the classification does not reasonably relate to accomplishing an articulated state policy interest.[37] Although the legislature may use classifications, the classification must "rest upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation."[38] The classification must be founded on real distinctions rather than artificial ones used for the purpose of

---

[33] Compass Lexecon Response, at 5.

[34] *See In the Matter of Amgen Inc. and Horizon Therapeutics plc.*, Decision and Order, Docket No. 9414, FTC Matter No. 2310037, at 11 (Dec. 14, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09414amgenhorizonfinalorderpublic.pdf (15-year termination of reporting and monitoring conditions and 10-year termination of prior approval condition in pharmaceutical transaction involving two medications to treat serious conditions which do not any competition in the market place and where buyer had strong incentives post-acquisition to raise barriers to entry for rivals who may gain FDA approval). Unlike this order, Highmark faces robust and growing competition in the marketplace and is not incentivized to raise barriers to entry.

[35] *See* Highmark's Request for Modification (Oct. 16, 2023), at 6 & n.4.

[36] 2 Pa. Cons. Stat. § 704 ("[T]he court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence."). Agency actions are therefore reversible if the action violates the constitutional rights, is not in accordance with agency procedure or with applicable law, or unless any finding of fact necessary to support the adjudication is not based upon substantial evidence. *See, e.g.*, *Bufalino v. Dep't of Just.*, 66 Pa. Commw. 272 (1982) (an order denying attorneys payment for their representation of a Commonwealth employee was reversed under Section 704's standard due to a constitutional violation of the attorneys' due process rights to an administrative hearing on the matter); *State Farm Mut. Auto. Ins. Co. v. Ins. Dep't*, 133 Pa. Commw. 644 (1990) (on appeal from a Department letter denying insurer a hearing, the court found the Department could not act in violation of insurer's constitutional rights).

[37] Pa. Const. art. III, § 32; *see also Pa. Tpk. Comm'n v. Commonwealth*, 587 Pa. 347, 357-60 (2006) (collective bargaining law regulating a single employer deemed unconstitutional special legislation despite Commonwealth's argument that it was a rational first step in a pilot program to address public supervisors).

[38] *Pa. Tpk. Comm'n*, 587 Pa. at 364.

evading the constitutional bar.[39] The unconstitutionality of a statute may be increased where the class consists of one member.[40]

The General Assembly cannot pass a law targeting Highmark alone for the sole reason that it was created from an insurer's acquisition of a health system. There are multiple other integrated delivery systems in Pennsylvania, including UPMC, Geisinger, and Thomas Jefferson. As shown by Bates White, there is no legal or factual basis for treating a payor-first integrated delivery system like Highmark differently from these provider-first systems. Such distinct treatment does not reasonably relate to any legitimate policy goals of monitoring integrated delivery systems generally.[41]

The Department also cannot use indefinitely imposed conditions to end-run the constitutional prohibition on regulation of a single entity. Nothing prohibits the Department from regulating a merger within bounds of its statutory authority. However, the Department's actions here are akin to permanent regulation. This disparate treatment of Highmark compared to other integrated delivery systems would not be constitutional if imposed by the General Assembly, so it cannot withstand scrutiny when accomplished by means exceeding the agency's statutory authority.[42]

Some commenters on Highmark's Request called for generally increased oversight of integrated delivery systems.[43] To the extent that would be sound public policy, it should be accomplished through appropriate legislation. The current "incremental approach" – implemented if and when companies happen to have a transaction before the Department – to address a Commonwealth-wide concern is impermissible.[44] The Department's targeted efforts to regulate individual integrated delivery systems "lacks the settled consideration and consent of the lawmaking body . . . evades statewide responsibility . . . encourages local activity . . . [and] discourages the attrition of minds and the consideration of those problems which make for a wise public policy."[45] Pennsylvania law is clear that generally applicable legislation is the appropriate way to address any broader competitive concerns related to the operation of integrated systems.

---

[39] *Id.* at 364-65.

[40] *Id.* at 369; *see also Harrisburg Sch. Dist. v. Hickok*, 563 Pa. 391, 397-98 (2000) (statute deemed unconstitutional for singling out a school district with low test performance where there was no rational basis for treating such school district differently than other school districts with failed educational systems).

[41] *Pa. Tpk. Comm'n*, 587 Pa. at 368 ("This Court can discern no significant distinctions between the Commission's first-level supervisors and other publicly employed first-level supervisors to justify such special differential treatment.").

[42] Other states have found that a regulatory agency's action was unlawful because it would constitute special legislation. *See, e.g., Beach v. Planning & Zoning Comm'n*, 141 Conn. 79, 85 (1954) ("In the third place, even if the statute had given the commission power to legislate in this regard, it would not follow that the commission could, in one isolated case and without any standards to guide it, disapprove a subdivision for a reason which it would not be required to apply to all subdivisions as to which the same reason obtained. Such action would be special legislation of the worst type. It would amount to substitution of the pure discretion of the commission for a discretion controlled by fixed standards applying to all cases of a like nature.").

[43] *See, e.g.*, Comment from Penn Medicine (Feb. 9, 2024), Doc. #16; Comment from Independence Blue Cross (Jan. 26, 2024), Doc. #13; Comment from Capital Blue Cross (Feb. 13, 2024), Doc. #19.

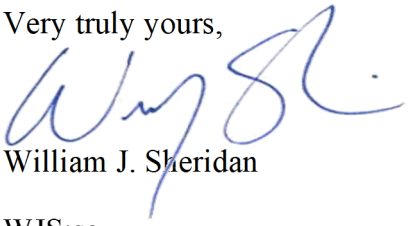
[44] *Pa. Tpk. Comm'n*, 587 Pa. at 367 ("This Court has addressed incremental approaches by the General Assembly to resolve Commonwealth-wide challenges. We have explained that 'there is nothing improper about this method of attacking social problems of statewide dimension, as the Legislature is free for reasons of necessity or otherwise, to address such issues incrementally.' However, this Court has not held that such incremental approaches may be approved via special legislation. . . . The General Assembly indeed may take an incremental approach to rectify problems that are of legitimate Commonwealth-wide concern, but it may not employ an incremental approach that constitutes special legislation." (citation omitted)).

[45] *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 90, 326 S.E.2d 395, 400 (1985) (citations omitted).

***

Highmark respectfully requests that the Department consider these legal arguments in addition to the factual arguments in its Request and other submissions. Please do not hesitate to reach out to me if you have any questions or would like to discuss anything.

Very truly yours,



William J. Sheridan

WJS:sg