IN THE MATTER OF

INFINITI OF CLARENDON HILLS, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE CONSUMER LEASING ACT AND REGULATION M

Docket No. C-4438; File No. 132 3188
Complaint, February 20, 2014 – Decision, February 20, 2014

This consent order addresses Infiniti of Clarendon Hills, Inc.'s advertisements for motor vehicles for sale and lease and failure to disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements. The complaint alleges that respondent has advertised that consumers can pay $0 up-front to lease a car for a specific monthly payment amount, but the advertised payment amounts exclude substantial fees, including but not limited to the first month's payment and an acquisition fee. The consent order requires that the respondent clearly and conspicuously make all of the disclosures required by the Consumer Leasing Act and Regulation M if it states relevant triggering terms, including the monthly lease payment. The order also prohibits the respondent from misrepresenting any material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan*, and *Katherine Worthman.*

For the *Respondent*: *Horst Korallus, President, pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Infiniti of Clarendon Hills, Inc., a corporation ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is an Illinois corporation with its principal office or place of business at 415 East Ogden Avenue, Clarendon

Hills, Illinois 60514. Respondent offers automobiles for sale or lease to consumers.

2. The acts or practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least May 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

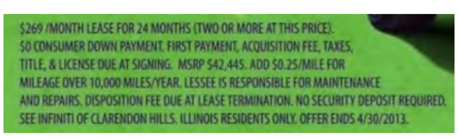
4. Respondent has disseminated or caused to be disseminated advertisements promoting consumer leases for automobiles, as the terms "advertisement" and "consumer lease" are defined in Section 213.2 of Regulation M, 12 C.F.R. §213.2, as amended.

5. Such advertisements have been posted on the website YouTube.com. A video copy of one such YouTube.com advertisement is attached as Exhibit A, and a screenshot capture of the video is attached as Exhibit B. The advertisement contains the following statements and depictions:

A picture of a vehicle appears below these prominent statements. While the statements and vehicle appear, a voice-over states:

> Lease a 2013 Infiniti G37x Sedan for just 269 a month with no money down.

Also, while the statements and vehicle appear, the following statement appears in small text on the bottom left corner of the screen:



Toward the middle of this statement, the following text appears: “First payment, acquisition fee, taxes, title, & licensing due at signing.”

6. Respondent also has placed advertisements representing that vehicles are available for “no money down” and specific monthly lease payment amounts on its website, www.infinitiofclarendonhills.com. Screenshot captures of several such advertisements are attached as Exhibit C.

For example, the following statement appears in one advertisement included in Exhibit C:

At the bottom of the advertisements, small text states that additional money is due at lease signing, including the first month’s payment and an acquisition fee. In numerous instances, respondent’s advertisements also state that a several-thousand dollar downpayment is due at lease signing. For example, the following statement, reflecting a “$3,499 Consumer Down Payment,” appears in one advertisement included in Exhibit C:

Thus, consumers must pay substantially more than the “NO MONEY DOWN” that is prominently stated near the top of the advertisement.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

Count I

Misrepresentation of Amount Due at Lease Inception

7. Through the means described in Paragraphs 5 and 6, respondent has represented, expressly or by implication, that consumers can pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount.

8. In truth and in fact, consumers cannot pay $0 at lease inception to lease the advertised vehicle for the advertised monthly payment amount. Consumers must also make downpayments and/or pay fees, including but not limited to the first month's payment and an acquisition fee, which range from several hundred to several thousand dollars. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M

10. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures ("additional terms") if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

11. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 5 and 6, are subject to the requirements of the CLA and Regulation M.

Count II

Failure to Disclose or to Disclose Clearly and Conspicuously Required Lease Information

12. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraphs 5 and 6, have included CLA triggering terms, but have failed to disclose or to disclose clearly and conspicuously additional terms required by the CLA and Regulation M, including one or more of the following:

a. That the transaction advertised is a lease.

b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation.

c. Whether or not a security deposit is required.

d. The number, amount, and timing of scheduled payments.

e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

13. Therefore, the practices set forth in Paragraph 12 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

THEREFORE, the Federal Trade Commission, this twentieth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

Exhibit A

Video Advertisement for Infiniti of Clarendon Hills, Inc.

Complaint

Exhibit B

Complaint

Exhibit C

Complaint

Page 2 of 2

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act ("FTC Act"), the Consumer Leasing Act ("CLA"), and its implementing Regulation M; and

Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), which includes: a statement by respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the FTC Act, the CLA, and its implementing Regulation M, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Infiniti of Clarendon Hills, Inc., is an Illinois corporation with its principal office or place of business at 415 East Ogden Avenue, Clarendon Hills, Illinois 60514.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

A. Unless otherwise specified, "respondent" shall mean Infiniti of Clarendon Hills, Inc., and its successors and assigns.

B. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. "Clearly and conspicuously" shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. “Consumer lease” shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

E. “Lease inception” shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

F. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.

G. “Motor vehicle” or “vehicle” shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

2. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any consumer lease, shall not, in any manner, expressly or by implication:

A. State the amount of any payment or that any or no initial payment is required at lease inception without disclosing clearly and conspicuously the following terms:

1. That the transaction advertised is a lease;

2. The total amount due at lease signing or delivery;

3. Whether or not a security deposit is required;

4. The number, amounts, and timing of scheduled payments; and

5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or

B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

C. All evidence in its possession or control that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

D. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600

Pennsylvania Avenue, NW, Washington, DC, 20580. The subject line must begin: FTC v. Infiniti of Clarendon Hills, Inc.

VI.

IT IS FURTHER ORDERED that respondent, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VII.

This order will terminate on February 20, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint;

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Infiniti of Clarendon Hills, Inc. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

The respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that consumers can pay $0 up-front to lease a car for a specific monthly payment amount. The complaint alleges that, in fact, the advertised payment amounts exclude substantial fees, including but not limited to the first month's payment and an acquisition fee. The complaint alleges therefore that the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges a violation of the Consumer Leasing Act and Regulation M for failing to disclose the costs and terms of certain leases offered, despite the respondent's use of certain triggering terms in the advertisements.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A prohibits the respondent from misrepresenting the cost of: (1) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or (2) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the CLA allegation. It requires that the respondent clearly and conspicuously make all of the disclosures required by CLA and Regulation M if it states relevant triggering terms, including the monthly lease payment. In addition, Part II prohibits any other violation of CLA and Regulation M.

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

IN THE MATTER OF

NIELSEN HOLDINGS N.V.
AND
ARBITRON INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT.

Docket No. C-4439; File No. 131 0058
Complaint, February 24, 2014 – Decision, February 24, 2014

This consent order addresses the $1.26 billion acquisition by Nielsen Holdings N.V. of certain assets of Arbitron Inc. The complaint alleges that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the market for national syndicated cross-platform audience measurement services. The consent order requires the divestiture of assets related to Arbitron's cross-platform audience measurement business, including data from its representative panel.

Participants

For the *Commission*: *Jordan S. Andrew, Erin L. Craig, William Huynh, Stephen A. Mohr, Brian O'Dea, Catherine M. Sanchez*, and *Aylin M. Skroejer.*

For the *Respondents*: *Aidan Synnott, Paul, Weiss, Rifkind, Wharton & Garrison, LLP;* and *Roxann Henry, Morrison and Foerster.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Nielsen Holdings N.V., ("Nielsen"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Arbitron Inc. ("Arbitron"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and

Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Nielsen is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at 85 Broad Street, New York, New York 10004.

2. Respondent Nielsen is engaged in, among other things, the sale of various audience measurement services, including television and cross-platform, to content providers, advertising agencies, and advertisers.

3. Respondent Arbitron is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 9705 Patuxent Woods Drive, Columbia, Maryland, 21046-1572.

4. Respondent Arbitron is engaged in, among other things, the sale of various audience measurement services, including radio and cross-platform, to content providers, advertising agencies, and advertisers.

5. Respondents are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

6. Pursuant to an Agreement and Plan of Merger dated December 17, 2012 (the "Agreement"), Nielsen proposes to acquire Arbitron for approximately $1.26 billion (the "Acquisition").

III. RELEVANT MARKET

7. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the market for national syndicated cross-platform audience measurement services.

8. For the purposes of this Complaint, the relevant geographic market in which to analyze the effects of the Acquisition is the United States.

IV. STRUCTURE OF THE MARKET

9. Cross-platform audience measurement services report the overall unduplicated audience size (i.e., reach) and frequency of exposure for programming content and advertisements across multiple media platforms, with corresponding individual audience demographic data. Advertisers use audience measurement services to determine which programming content is most likely to deliver audiences within their desired category of potential customers and use such data to make advertising campaign placement and media buying decisions. Similarly, media companies use audience measurement services to assess the value of their own advertising inventory and to inform programming decisions.

10. A national syndicated cross-platform audience measurement service is one that provides all subscribers with the same universe of data, showing the relative national audiences for various programming and advertising. Although there is no commercially available national syndicated cross-platform audience measurement service today, demand for such a service by advertisers and media companies is increasing. Nielsen and Arbitron (in partnership with comScore) have been developing their own national syndicated cross-platform audience measurement services although efforts to date have produced only custom projects or customer-sponsored beta-tests. Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because only Nielsen and Arbitron maintain large, representative panels capable of measuring television with the required individual-level demographics, the data source

preferred by advertisers and media companies. Additionally, both Nielsen and Arbitron have important existing audience measurement technology assets. This makes them better positioned to develop a national syndicated cross-platform audience measurement service than companies that lack large representative panels and existing audience measurement technology assets of the quality and character of Nielsen's and Arbitron's.

V. ENTRY CONDITIONS

11. Sufficient and timely entry or expansion into the market for national syndicated cross-platform audience measurement services is unlikely to deter or counteract any anticompetitive effects created by the Acquisition. In order to compete most effectively in the provision of cross-platform audience measurement services, a firm must have access to television audience data with individual demographics. Entry would not take place in a timely manner because of the significant expense and time required to recruit a representative panel of individuals and develop the necessary technology to generate the data needed to provide the television audience measurement component of a national syndicated cross-platform audience measurement service.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the market for national syndicated cross-platform audience measurement services in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by among other things:

a. by eliminating future competition between Nielsen and Arbitron for the provision of national syndicated cross-platform audience measurement services;

b. by increasing the likelihood that Respondent Nielsen would unilaterally exercise market power in the market for national syndicated cross-platform audience measurement services;

c. by increasing the likelihood that U.S. customers would be forced to pay higher prices for national syndicated cross-platform audience measurement services.

VII. VIOLATIONS CHARGED

13. The Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The Acquisition described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of February, 2014, issues its Complaint against said Respondent.

By the Commission, Commissioner Ohlhausen recused, and Commissioner Wright dissenting.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Nielsen Holdings N.V. ("Nielsen") of the outstanding voting shares of Respondent Arbitron Inc. ("Arbitron"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Nielsen is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at 85 Broad Street, New York, New York 10004.

2. Respondent Arbitron is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 9705 Patuxent Woods Drive, Columbia, Maryland 21046-1572.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the Respondents, and this proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

A. "Nielsen" means Nielsen Holdings N.V., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Nielsen Holdings N.V., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, the term "Nielsen" shall include Arbitron.

B. "Arbitron" means Arbitron Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Arbitron Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Acquirer" means a Person approved by the Commission to acquire particular assets or rights that Respondents are required, pursuant to this Order, to assign, grant, license, divest, transfer, deliver, or otherwise convey.

D. "Acquisition" means Nielsen's acquisition of Arbitron pursuant to an Agreement and Plan of Merger executed December 17, 2012.

E. "Arbitron Calibration Panel" means the subset of individuals recruited from the Arbitron PPM Panel that provides single source reach levels and overlaps for television, tablets, smartphones, personal computers, and radio (or any other device that performs similar functions), by asking the panelists in addition to their Arbitron PPM Panel responsibilities to download software on their home personal computer, tablets, and smartphones (or any other device that performs similar functions); "Arbitron Calibration Panel" includes the panel of people as expanded pursuant to Paragraph IV. of this Order.

F. "Arbitron PPM Panel" means the panel of individuals in the U.S. who have been recruited by Arbitron to carry Arbitron's Portable People Meter® ("PPM") device to measure their exposure to encoded audio signals.

G. "Balance of Nation Panel" means a group of individuals recruited to supplement the Arbitron PPM Panel, such that when combined with the Arbitron PPM Panel, national audience projections are possible or enhanced.

H. "Calibration Panel Data" means the data from the Arbitron Calibration Panel or from the expansion of the Arbitron Calibration Panel.

I. "Commission" means Federal Trade Commission.

J. "comScore" means comScore, Inc., a corporation located at 11950 Democracy Drive, Suite 600, Reston, Virginia 20190.

K. "Confidential Information" means information not in the public domain, including, but not limited to, information regarding methodology, encoding share, customer identity, or customer contract details. "Confidential Information" shall not include any information that: (1) is publicly available when provided, disclosed, or otherwise made available; or (2) becomes publicly available after it is provided, disclosed, or otherwise made available by means other than a violation of this Order or Respondents' breach of a confidentiality or non-disclosure agreement.

L. "Cross-Platform Services" means any U.S. service that measures viewing of content, for the purpose of determining the size and composition of the audience of such programming and/or advertising across multiple distribution platforms including, but not limited to, television, online, mobile, radio and tablets (or any other device that performs similar functions), but in all events measuring at least television and online, and related insights and analytics.

M. "Direct Cost" means cost not to exceed the cost of labor, material, equipment, travel, and other expenditures to the extent the costs are directly incurred to provide the assistance or services required by this Order and that would not otherwise be incurred by Respondents. "Direct Cost" to the Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

N. "Encoding Equipment" means all equipment relating to the encoding of audio signals for detection by PPMs, including updates thereto.

O. "Encoding Technology" means all intellectual property, rights, know-how, licenses, and agreement related to the encoding of audio signals for detection by PPMs, including updates thereto.

P. "ESPN" means the multi-platform media company, ESPN, Inc., a subsidiary of The Walt Disney Company, which focuses on sports-related programming including live and recorded event telecasts, sports talk shows, and other original programming, that distributes its content on multiple platforms including cable and satellite television, online, mobile, and radio.

Q. "Key Arbitron Employees" means the employees listed on Confidential Exhibit A of this Order.

R. "Link Meter Technology" means (1) all software (source code and object code) intended for use in Project Blueprint that enables comScore to synchronize its media measurement data with the panelists in the Arbitron Calibration Panel; and (2) all other rights and interests arising out of, in connection with, or in relation to such software, including, but not limited to, all rights to causes of action and remedies related thereto.

S. “MRC” means the Media Rating Council, which accredits audience measurement services.

T. “Monitor” means the monitor appointed pursuant to Paragraph VI. of this Order.

U. “Panelist Characteristics” means the following information, provided on a non-personally identifiable basis, for a panelist: (1) age; (2) gender; (3) race/ethnicity; (4) presence of children in the household; (5) size of household; (6) time zone; (7) DMA and metro market code; and (8) five-digit zip code.

V. “PPM Equipment” means all equipment related to the operation of, and collection of data from, PPMs, including updates thereto.

W. “PPM Technology” means all intellectual property rights, know-how, licenses, and agreements related to the operation of, and collection of data from, PPMs, including updates thereto.

X. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.

Y. “Project Blueprint” means the collaboration between Arbitron and comScore for ESPN as contemplated by (1) the Multi-Platform Research Agreement with ESPN between Arbitron, comScore, and ESPN, executed August 8, 2012; and (2) the Collaboration

Agreement between Arbitron and comScore, effective August 1, 2012.

Z. "Prospective Acquirer" means the Person that Respondents (or the Divestiture Trustee, if appointed) intend to submit or have submitted to the Commission for the Commission's prior approval pursuant to Paragraph II.A. (or Paragraph VII., if applicable) of this Order.

AA. "Radio Data" means all data from the Arbitron PPM Panel that reflect Panelist Characteristics, dictionary of reported data fields, and records of encoded radio content detected by the panelists' PPMs as reported consistent with the practices Arbitron used for reporting data for Project Blueprint.

BB. "Remedial Agreement" means the agreement between Respondents and the Acquirer that includes the provisions required by this Order and that has been approved by the Commission, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be offered to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

CC. "Television Data" means all data from the Arbitron PPM Panel that reflect Panelist Characteristics, dictionary of reported data fields, and records of encoded video content detected by the panelists' PPMs as reported consistent with the practices Arbitron used for reporting data for Project Blueprint, and additionally including time shifted viewing data (which shall include video on demand) identified as such, which additional time shifted viewing data shall be provided to the Acquirer at Direct Cost.

II.

IT IS FURTHER ORDERED that:

A. No later than three (3) months after Respondents execute the Agreement Containing Consent Order, Respondents shall divest the Link Meter Technology absolutely and in good faith and at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission (including execution of a Remedial Agreement) and shall, pursuant to a Remedial Agreement, license to that Acquirer, on a non-exclusive basis, all know-how related to the Link Meter Technology;

1. Respondents shall obtain, and the Acquirer shall grant to Respondents, a royalty-free right to use the Link Meter Technology, for purposes of complying with the requirements of this Order;

2. *Provided, however,* that both the Acquirer and Respondents shall have unrestricted rights to use the know-how relating to the Link Meter Technology and each shall covenant not to bring litigation against the other to enjoin or seek recompense for the use of the Link Meter Technology or software designed to perform similar functions.

B. No later than the date Respondents divest the Link Meter Technology to the Acquirer pursuant to Paragraph II.A., above, Respondents shall, pursuant to a Remedial Agreement, for a period no less than eight (8) years from the date of the divestiture required by Paragraph II.A., above:

1. License to the Acquirer, on a royalty-free basis, for use in developing and providing a calibration panel

and/or Balance of Nation Panel for the provision of Cross-Platform Services:

a. the Encoding Technology; and

b. the PPM Technology; and

2. Provide, at Direct Cost to the Acquirer, such technical assistance (including know-how relating to the Link Meter Technology), Encoding Equipment, and/or PPM Equipment, as requested by the Acquirer to enable the Acquirer to:

a. provide Cross-Platform Services, including to encode additional content and/or advertising and developing and managing any panel using the PPM Technology for Cross-Platform Services provided by the Acquirer to its customers, and

b. obtain accreditation by the MRC in connection with the provision of Cross-Platform Services.

C. No later than the date Respondents divest the Link Meter Technology to the Acquirer pursuant to Paragraph II.A., above, Respondents shall, pursuant to a Remedial Agreement and consistent with the requirements of Paragraph IV.B.1., for a period of no less than eight (8) years from the date of the divestiture required by Paragraph II.A., above, provide to the Acquirer for purposes of developing and providing Cross-Platform Services to its customers, and grant to the Acquirer a perpetual, royalty-free license (for data delivered during the term of the Remedial Agreement) for the use of:

1. Television Data;

2. Radio Data; and

3. Calibration Panel Data;

Respondents shall provide the Television Data, Radio Data, and Calibration Panel Data (except for five- digit zip code data) to the Acquirer on a respondent-level basis and an aggregated basis by specified customers' stations, networks, websites, and/or other media distribution platforms, as identified by the Acquirer, in such form, at such frequency as reasonably requested by the Acquirer, but in no event less frequent than the frequency Arbitron used for reporting data for Project Blueprint, and according to such metrics as reasonably requested by the Acquirer; *provided, however,* that, with respect to five-digit zip code data, Respondents shall provide the total number of individuals by zip code as reasonably requested by the Acquirer (but at least monthly); and if Respondents make any zip code data, or any segment reporting derived from zip codes, available to its customers of national Cross-Platform Services, then Respondents shall provide five-digit zip code data to the Acquirer sufficient to provide similar information to Acquirer's customers, as reasonably requested by the Acquirer; p*rovided further, however,* that Respondents shall have and retain full and exclusive right, title, and ownership interest in and to any information provided by Respondents to the Acquirer except that the Acquirer shall have the right to use the information to develop and provide Cross-Platform Services to its customers pursuant to the Remedial Agreement; p*rovided further, however,* that, with respect to Radio Data, the Acquirer may not disclose Radio Data to any customer of the Acquirer who is not also a subscriber to Arbitron radio ratings.

D. Respondents shall:

1. Have no authority to, and shall not exercise or attempt to exercise any authority to, market or price the Cross-Platform Services that the Acquirer sells to the Acquirer's customers,

2. Not be entitled to any revenue, or portion thereof, that the Acquirer collects from its customers, or attempt to collect any revenue, or portion thereof,

from the Acquirer attributable to revenue that the Acquirer collects from its customers; and

3. Not make any change to the PPM Technology or Encoding Technology that has the effect of eliminating or impairing the ability of the PPM to collect records of encoded video content.

E. The Remedial Agreement shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Remedial Agreement, and any breach by Respondents of any term of the Remedial Agreement shall constitute a failure to comply with this Order. If any term of the Remedial Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order. No Remedial Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondents under such agreement.

F. The purpose of this Paragraph II is to ensure that the Acquirer can offer Cross-Platform Services, with the goal of providing a national syndicated cross-platform audience measurement service, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHERED ORDERED that Respondents shall:

A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Key Arbitron Employee, as and to the extent permitted by law:

1. Name, job title or position, date of hire, and effective service date;

2. A specific description of the employee's responsibilities;

3. The base salary or current wages;

4. The most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus; if any;

5. Employment status (i.e. active or on leave or disability, full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. At the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Key Arbitron Employee;

B. No later than ten (10) days after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Key Arbitron Employees, and to make offers of employment to any one or more of the Key Arbitron Employees.

C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Key Arbitron Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Key Arbitron Employees by the Prospective Acquirer;

D. Remove any impediments within the control of Respondents that may deter Key Arbitron Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Key Arbitron Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however,* that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

E. For Key Arbitron Employees who have accepted offers of employment with the Acquirer, not, for a period of one (1) year following the date such Key Arbitron Employee begins employment with the Acquirer, directly or indirectly, solicit or otherwise attempt to induce such Key Arbitron Employees to terminate his or her employment with the Acquirer; *provided, however,* that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Key Arbitron Employees; or

2. Hire Key Arbitron Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further, however,* that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Key Arbitron Employee if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined

the offer, or where the employee's employment has been terminated by the Acquirer.

F. For any employees (except those listed on Confidential Exhibit B) who are terminated by Respondents who had responsibilities for or were involved in Project Blueprint or who are engineers knowledgeable about the Encoding Technology, Respondents shall remove any impediments within the control of Respondents that may deter such employee from accepting employment with the Acquirer, including, but not limited to, removal, solely to the extent needed for the Acquirer's provision of Cross-Platform Services, of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to such an employee who receives a written offer of employment from the Acquirer.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Manage and maintain (and expand as required by Paragraph IV.A.2., below) the Arbitron Calibration Panel consistent with Respondents' own business practices and under the following conditions:

    a. Respondents shall assure that the Arbitron Calibration Panel comprises at least two thousand panelists no later than six (6) weeks after the date of the signing of the Remedial Agreement;

    b. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to managing and maintaining the Arbitron Calibration Panel*; provided*, *however*, that Respondents may enter into a Remedial

Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

c. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the Arbitron Calibration Panel; for the avoidance of doubt, Respondents shall retain all right, title and ownership interest in all underlying data from the PPM Panel that is an input into the data generated by the Arbitron Calibration Panel;

d. at the Acquirer's option, Respondents shall have the right to use the data generated by the Arbitron Calibration Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff;

e. *provided, however*, that Respondents shall have no obligation to manage and maintain the Arbitron Calibration Panel if the Acquirer requests in writing (with copies to the Commission staff and the Monitor) that it no longer requires that the Arbitron Calibration Panel be maintained; and

f. *provided, further, however* that Respondents shall have no obligation to continue to manage and maintain the Arbitron Calibration Panel if (1) the Acquirer fails to pay the Direct Costs directly attributable to managing and maintaining the Arbitron Calibration Panel as required by the Remedial Agreement; (2) Respondents notify the Acquirer, the Monitor, and Commission staff of Acquirer's failure to pay Direct Costs and give the Acquirer thirty (30) days from receiving that notice to cure the failure; and (3) the Acquirer fails to cure.

2. At the request of the Acquirer, expand the Arbitron Calibration Panel beyond the two (2) thousand panelists required in Paragraph IV.A.1.a. to enable national projections under the following conditions:

   a. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to the expansion of the Arbitron Calibration Panel; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

   b. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the expansion of the Arbitron Calibration Panel; and

   c. at the Acquirer's option, Respondents shall have the right to use the data generated by the expansion of the Arbitron Calibration Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff;

B. Respondents shall manage and maintain (and expand as required by Paragraph IV.B.2. below) the Arbitron PPM Panel consistent with Respondents' own practices and under the following conditions:

1. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to the cost of providing the data generated by the Arbitron PPM Panel to the Acquirer; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission; and

2. At the request of the Acquirer, expand the Arbitron PPM Panel to enable national projections under the following conditions:

    a. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to such expansion and to the collection of those data that are provided to and used solely by the Acquirer; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

    b. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the expansion of the Arbitron PPM Panel; and

    c. at the Acquirer's option, Respondents shall have the right to use the data generated by the expansion of the Arbitron PPM Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff.

V.

IT IS FURTHER ORDERED that after the date of the divestiture of the Link Meter Technology, Respondents shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish Confidential Information of the Acquirer, directly or indirectly, to or with any of Respondents' employees, officers, directors, agents or representatives with responsibilities relating to Respondents' audience measurement business, except as necessary to comply with the requirements of this Order.

VI.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that Respondents comply with all obligations and perform all responsibilities required by this Order and the Remedial Agreement.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the requirements of this Order and the Remedial Agreement.

D. If a Monitor is appointed by the Commission, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the underlying purpose of this

Order and in consultation with the Commission or Commission staff.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve until termination of this Order.

4. The Monitor shall report in writing to the Commission every sixty (60) days concerning the Monitor’s duties and responsibilities.

5. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents’ personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents’ compliance with their obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents’ compliance with this Order and the Remedial Agreement.

6. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor’s duties and responsibilities.

7. Respondents shall indemnify the Monitor and hold the Monitor harmless against all losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor’s duties, including all reasonable fees of

counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

8. Respondents may require the Monitor and each of the Monitor’s consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor (and its representatives) from providing any information to, or receiving information from, the Commission.

9. The Commission may, among other things, require the Monitor and each of the Monitor’s consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor’s duties.

10. In the event the Commission determines that the Monitor is no longer willing or able to perform his/her duties under this Order, or has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.

11. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

12. The Monitor appointed pursuant to this Paragraph VI. may be the same person appointed as the Divestiture Trustee pursuant to Paragraph VII. of this Order.

VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and licensing obligations of Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to perform Respondents' obligations in a manner that satisfies the requirements of this Order, including, but not limited to, Paragraphs II. and IV. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures in the media industry. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

1. No later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval

of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

   a. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

   b. the Divestiture Trustee shall have six (6) months after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six (6) month period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraphs II. and IV. of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, that the Commission may extend the period for only an additional three (3) months.

   c. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request.

Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VII. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

d. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously subject to the provisions of Paragraphs II. and IV., including, but not limited to, the requirement that the Acquirer pay Direct Costs as required by Paragraphs IV.A.1.b, IV.A.2.a., IV.B.1., and IV.B.2.a. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided*, *however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

e. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

f. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

g. the Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. the Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

i. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

j. the Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

C. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII.

D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

E. The Divestiture Trustee appointed pursuant to this Paragraph VII. may be the same person appointed as the Monitor pursuant to Paragraph VI. of this Order.

VIII.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until the Link Meter Technology is divested and the Remedial Agreement entered into pursuant to Paragraph II of this Order is approved by the Commission, Respondents shall submit to the Commission (and a complete copy to the Monitor) a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. For the period covered by this report, the report shall include, but not be limited to, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II of this Order, including a description of all substantive contacts or negotiations and the identity and contact information of all parties contacted. Respondents shall include in the reports copies of all material written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year after this Order is issued, annually for the next seven (7) years on the anniversary of that date, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of such Respondent;

B. Any proposed acquisition, merger, or consolidation of such Respondent; or

C. Any other change in such Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents made to either Respondents' principal United States office, registered office of its United States subsidiary, or its headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission and at the expense of the Respondents; and

B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on February 24, 2022.

By the Commission, Commissioner Ohlhausen recused, and Commissioner Wright dissenting.

Confidential Exhibits A and B

[Redacted From the Public Record Version, But Incorporated By Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Nielsen Holdings N.V. ("Nielsen") and Arbitron Inc. ("Arbitron"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from Nielsen's acquisition of Arbitron. Under the terms of the proposed Consent Agreement, Nielsen is required to divest and/or license certain technological assets (including intellectual property) and data to an acquirer approved by the Commission ("Acquirer"), enabling the Acquirer to develop and provide a national syndicated cross-platform audience measurement service.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to an Agreement and Plan of Merger dated December 17, 2012, Nielsen proposes to acquire Arbitron for approximately $1.26 billion. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for national syndicated cross-platform audience measurement services.

The Parties

Nielsen, headquartered in New York, New York and Diemen, the Netherlands, is a leading global media measurement and research company. In the United States, Nielsen provides television, online, mobile, and cross-platform audience measurement services to media companies, advertisers, and advertising agencies. Nielsen is the dominant provider of television audience measurement services[1] in the United States. In 2012, Nielsen generated global sales of $5.6 billion, about half of which it derived from business in the United States.

Arbitron, headquartered in Columbia, Maryland, is a leading media measurement and research company. Arbitron's radio ratings, which also estimate listenership size and demographic composition, are the standard metric used by radio broadcasters and advertisers to buy and sell radio advertising. Arbitron also offers products that measure television, online, mobile and cross-platform audiences. Almost all of Arbitron's 2012 revenue of $449 million was derived from business within the United States.

The Relevant Product and Structure of the Market

The proposed acquisition would harm competition for national syndicated cross-platform audience measurement services. The proliferation of personal computers, smartphones and tablets has dramatically changed the way in which U.S. consumers are exposed to advertising and programming. As a result, advertisers and media companies desire cross-platform audience measurement services that measure audiences *across* multiple media platforms, as opposed to services that report audiences for a single media platform, such as television, in isolation. Cross-platform audience measurement services report the overall unduplicated audience size (i.e., reach) and frequency of exposure

1 Nielsen's television audience ratings provide the size and demographic composition of the audiences for television programming, and are the primary currency by which the buying and selling of commercial airtime is negotiated.

for programming content and advertisements across multiple media platforms, with corresponding individual-level audience demographic data. A syndicated national cross-platform audience measurement service is one that provides all subscribers with the same universe of data, showing the relative audiences across platforms for various programming content and advertising.

To be competitively viable, a national syndicated cross-platform audience measurement service must include two key features. First, it must have an accurate and widely-accepted television audience measurement component, as television viewing represents the vast majority of media consumption and accounts for the majority of advertising dollars. Second, a national syndicated cross-platform audience measurement service must report individual-level demographic data. Advertisers need individual-level demographic data in order to determine which programming content is most likely to deliver audiences within their desired category of potential customers and to make advertising campaign placement and media buying decisions. Similarly, media companies need individual-level demographic data to assess the value of their own advertising inventory and to inform programming decisions.

Although there is no national syndicated cross-platform audience measurement service today, demand for such a service by advertisers and media companies is increasing rapidly. Nielsen and Arbitron are developing national syndicated cross-platform audience measurement services. Nielsen currently provides Cross-Platform Campaign Ratings on a custom-basis and plans to launch a similar Cross-Platform Program Ratings service in the coming year. Arbitron partnered with comScore Inc. ("comScore") to provide customized cross-platform audience measurement services to ESPN, widely known as "Project Blueprint" Although these services are currently custom projects and/or customer-sponsored beta tests, Nielsen and Arbitron are developing national syndicated offerings.

Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because of their existing audience measurement panels and proven audience measurement technology assets. Large, representative panels, like those used by Nielsen and Arbitron for their respective television and radio audience measurement businesses, are considered the most accurate and preferred sources of individual-level demographic data for audience measurement purposes. Only Nielsen and Arbitron maintain large, representative panels capable of measuring television with the required individual-level demographics. Other firms working to develop cross-platform audience measurement services are not as well positioned to compete with Nielsen and Arbitron to develop a national syndicated cross-platform audience measurement service because they lack the representative panels, existing audience measurement technology assets of the quality and character of Nielsen's and Arbitron's, and strong brands in audience measurement.

The United States is the appropriate geographic market in which to analyze the competitive effects of the proposed transaction. Purchasers of U.S. cross-platform audience measurement services require these services to assist them in making decision about buying and selling advertising inventory aimed at U.S. consumers. National U.S. cross-platform audience measurement services provide U.S. customers with data on U.S. audiences and require a significant presence in the United States to gather such audience data.

Entry

Sufficient and timely entry or expansion into the market for national syndicated cross-platform audience measurement services is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition. In order to offer national syndicated cross-platform audience measurements, a firm must have access to television audience data with individual-level demographic data. Establishing the infrastructure to recruit and maintain a representative panel of individuals needed to provide the television audience measurement component of a national syndicated cross-platform audience measurement service requires substantial upfront and on-going investments. New entrants would also have to develop or license technology capable of collecting and generating the underlying data needed to provide a national syndicated cross-platform audience measurement service. Further, in order to attract customers, a new entrant must establish a strong reputation for quality and reliability in audience measurement. These significant barriers ensure that entry would not be timely, likely, or sufficient to counteract the anticompetitive effects of the proposed acquisition for several years at a minimum.

Effects of the Acquisition

The acquisition is likely to cause significant competitive harm in the market for national syndicated cross-platform audience measurement services. Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) national syndicated cross-platform audience measurement services. Both companies expect their respective cross-platform audience measurement services to become national syndicated offerings. The elimination of future competition between Nielsen and Arbitron would likely cause U.S. customers to pay higher prices for national syndicated cross-platform audience measurement services and result in less innovation for cross platform measurement services.

The Consent Agreement

The proposed Consent Agreement resolves the Acquisition's likely anticompetitive effects in the market for national syndicated cross-platform audience measurement services by requiring the divestiture of assets related to Arbitron's cross-platform audience measurement business, including data from its representative panel, to an Acquirer within three months of executing the consent agreement.

Pursuant to the proposed Consent Agreement, the Acquirer will receive the assets necessary to replicate Arbitron's participation in the development of a national syndicated cross-platform audience measurement service. Among other things, the Consent Agreement requires Nielsen to provide the Acquirer with a perpetual, royalty-free license to data, including individual-level demographic data, and technology related to Arbitron's cross-platform audience measurement business for a period of no less than eight years. Nielsen will also be required to make improvements and enhancements to the Arbitron panels at the request and expense of the Acquirer that will further the

Acquirer's ability to offer a national syndicated cross-platform audience measurement service. With respect to Arbitron personnel involved in cross-platform services, the Consent Agreement removes impediments that might otherwise deter certain Key Arbitron Employees from accepting employment with the Acquirer. It also requires that Nielsen provide the Acquirer with certain technical assistance, at the request of the Acquirer to facilitate the Acquirer's ability to replicate Arbitron's position in the cross-platform audience measurement market. Collectively, these provisions are intended to enable the Acquirer to develop and provide a national syndicated cross-platform audience measurement service to its customers. The Consent Agreement is designed to ensure that the benefits of competition that would have been realized from Arbitron's provision of cross-platform audience measurement services, are not lost as a result of the acquisition.

The Commission has appointed a monitor to oversee Nielsen's compliance with all of its obligations and performance of its responsibilities pursuant to the Commission's Decision and Order (the "Order"). The monitor is required to file periodic reports with the Commission to ensure that the Commission remains informed about efforts to accomplish the divestiture and Nielsen's compliance with its ongoing obligations and responsibilities pursuant to the Order until the Order terminates.

Finally, the proposed Consent Agreement contains provisions that allow the Commission to appoint a divestiture trustee if any or all of the above remedies are not accomplished within the time frames required by the Consent Agreement. The divestiture trustee may be appointed to accomplish any and all of the remedies required by the proposed Consent Agreement that have not yet been fulfilled upon expiration of the time period allotted.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

STATEMENT OF THE FEDERAL TRADE COMMISSION[1]

Today, the Commission is taking remedial action concerning the proposed acquisition of Arbitron Inc. by Nielsen Holdings N.V. We believe Nielsen's acquisition of Arbitron is likely to deprive media companies and advertisers of the benefits of competition between two firms that are currently developing, and are most likely to be effective suppliers of, syndicated cross-platform audience measurement services.[2] Our remedy is tailored to counteract the likely anticompetitive effects of the proposed acquisition while leaving intact any efficiencies that might be gained from the combination of the two companies. The remedy is consistent with the analytical framework through which we evaluate the effects of all mergers that come before us, whether those effects are likely to occur immediately or in the foreseeable future.

Nielsen and Arbitron are best known for their respective single-platform TV and radio audience measurement services. Nielsen ratings are the industry benchmark for determining the size and demographics of television audiences. Nielsen maintains a national panel of 20,000 households, comprising nearly 50,000 individuals whose television programming consumption is monitored on a continual basis. Arbitron provides radio ratings for traditional, or "terrestrial," radio that are similar to Nielsen's television ratings. Arbitron's panel covers 48 local markets and consists of approximately 70,000 people whose exposure to programming is captured by its proprietary Personal People Meter ("PPM") technology. In addition to measuring radio consumption, Arbitron measures panelists' television consumption and provides out-of-home audience measurement data to television broadcasters.

As television viewership has shifted from traditional television screens to mobile devices, tablets, and personal computers,

1 This statement reflects the majority view of Chairwoman Ramirez and Commissioner Brill. Commissioner Ohlhausen is recused and took no part in the decision on this matter.

2 A syndicated cross-platform audience measurement product is one that provides all subscribers with each programmer's unduplicated audience across platforms.

traditional television measurement is capturing a decreasing portion of the total viewing audience. As a result, media companies and advertisers are now seeking measurement services that account for the entire audience. Specifically, they seek a cross-platform solution that measures audiences across multiple platforms as well as determines the extent of audience duplication (e.g., whether the same individual is watching a program on both traditional TV and on the Internet). Media companies and advertisers would then use those measurements to determine the relative value of advertising inventory. This type of cross-platform measurement product has yet to be developed and marketed. But there is wide consensus among media companies and advertisers that Nielsen and Arbitron are best-positioned to provide this service because they are the only two companies that operate large and demographically representative panels that are capable of reporting television programming viewership, which is critical to developing a cross-platform product that meets likely customer demand. While other companies provide estimates of aggregate cross-platform viewership, only Nielsen and Arbitron provide individual demographic data, such as age and gender information, for television and, hence, cross-platform measurement.

The Commission also has reason to believe that Nielsen and Arbitron are the best-positioned firms to develop (or partner with others to develop) such a service. Nielsen already offers several products that provide audience measurement across different media platforms, including its Extended Screen and Cross-Platform Campaign Ratings (“XCR”) products. Extended Screen measures television and online viewing for a subset of its national panel. XCR is an advertising campaign measurement tool that combines online viewership data with Nielsen’s national television measurement product. Nielsen is in the process of introducing a product targeted at programmers, called Digital Program Ratings, that will measure the audiences for television programs that appear on line, and plans to launch a cross-platform measurement product, Cross-Platform Program Ratings, next year.

Arbitron is also developing a cross-platform audience measurement solution. Last year, it began a collaboration with comScore known as “Project Blueprint” to develop a product for

ESPN. Arbitron is contributing in-home and out-of-home television audience demographic data sourced from its PPM radio panel, radio audience data, and a "calibration" panel recruited from its PPM panel to measure audience duplication across platforms. comScore is providing online measurement and set-top box data. Arbitron has stated that Project Blueprint is "a major jumping off point" toward a "syndicable type [cross-platform] service," and both ESPN and comScore are enthusiastic about the project. There is considerable industry interest in participating in the next phase of Project Blueprint.

Networks and advertisers believe that any syndicated cross-platform measurement services of Nielsen and Arbitron would compete directly. The proposed transaction would eliminate that competition. Although this is a future market, with an amount of concomitant uncertainty, effective merger enforcement always requires a forward-looking analysis of likely competitive effects. On the evidence here, the Commission has reason to believe that the proposed remedy is necessary to address the likely competitive harm that would result from the acquisition.

The proposed Consent Order is designed to address these specific competitive concerns by requiring divestiture of assets relating to Arbitron's cross-platform audience measurement services business, including audience data with individual-level demographic information and related technology, software, and intellectual property. The Consent Agreement also requires that the combined firm provide the acquirer with any needed technical assistance, and provide the acquirer with the tools and ability to expand the PPM panel to obtain additional data it deems necessary. With the divested assets, the acquirer will be well-positioned to step into Arbitron's shoes and replace the future competition between Nielsen and Arbitron that will be lost as a result of the proposed acquisition.

We agree with Commissioner Wright that the analysis of a merger's competitive effects in any market, including markets where the products are still in the development phase, must always be strongly rooted in the evidence. Where the product at issue is not yet on the market, it can be difficult to develop the evidence necessary to predict accurately the nature and extent of competition. Nevertheless, the 2010 Guidelines specifically indicate that the agencies will consider whether the merging firms have been or likely will become "substantial head-to-head competitors" absent the merger. § 2.1.4.[3]

Here, there is considerable evidence from which to predict that an anticompetitive effect is likely to occur if these two companies are allowed to merge without a remedy. Both companies meet the standard to be considered actual potential entrants.[4] As evidenced in both internal documents and statements they have made publicly and to potential customers, Nielsen and Arbitron (with comScore) both have invested significant time and resources to develop a national syndicated cross-platform audience measurement service. There is extensive evidence from customers that Nielsen and Arbitron are best positioned to compete in this area given their ability to provide individual-level demographic data. This forms the basis for our concern that there would be anticompetitive consequences from the combination, despite the fact that others are trying to develop cross-platform measurement services of their own. Customer views that Nielsen and Arbitron would be by far the two strongest competitors are supported by Nielsen and Arbitron statements about the products they are each developing and, in some cases, already beta testing with customers.

As with any transaction, the Commission does not merely accept a remedy because it is able to obtain one. We have accepted this consent because we have reason to believe that the transaction will harm competition, and because it is in the public interest to do so.

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3 In particular, the 2010 Horizontal Merger Guidelines explain that "[m]ost merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency, and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." § 1.

4 Commissioner Wright cites *B.A.T Indus*., 104 F.T.C. 852 (1984), as the applicable standard for actual potential entry. Most federal courts have applied a less stringent standard.

We recognize that the overall combination of Nielsen and Arbitron could yield efficiencies outside of the market that concerns us. The proposed consent does not affect those efficiencies. We also took into account the parties' predictions that national syndicated cross-platform measurement services were likely to have relatively modest sales for some time. Weighing these considerations and the evidence of likely harm, we have concluded that the public interest is best served by allowing the transaction to proceed while remedying the competitive concerns. The remedy proposed in this matter does just that.

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Nielsen Holdings N.V. ("Nielsen") to remedy the allegedly anticompetitive effects of Nielsen's proposed acquisition of Arbitron Inc. ("Arbitron"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Nielsen's acquisition will substantially lessen competition in the future market for national syndicated cross-platform audience measurement services in violation of Section 7 of the Clayton Act. I want to commend staff for conducting a thorough investigation. Staff has worked diligently to collect and analyze a substantial quantity of documentary and testimonial evidence, and has provided thoughtful analysis of the transaction's potential effects. Based upon this evidence and analysis, I conclude there is no reason to believe the transaction violates Section 7 of the Clayton Act.[1] It follows, in my view, that the Commission should close the

1 15 U.S.C. § 21(b) (2006) ("Whenever the Commission . . . vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect . . . .").

investigation and allow the parties to complete the merger without imposing a remedy.

I. Predicting Competitive Effects in Future Markets

Nielsen and Arbitron do not currently compete in the sale of national syndicated cross-platform audience measurement services. In fact, there is no commercially available national syndicated cross-platform audience measurement service today.[2] The Commission thus challenges the proposed transaction based upon what must be acknowledged as a novel theory—that is, that the merger will substantially lessen competition in a market that does not today exist. The Commission asserts that, in the absence of the merger, Nielsen and Arbitron would invest heavily in the development of national syndicated cross-platform audience measurement services, and that the products ultimately yielded by those efforts would compete directly against one another to the benefit of consumers. The Commission therefore has required Nielsen to license Arbitron's television audience measurement service to a third party in hopes of allowing the third party to one day offer national syndicated cross-platform measurement services in competition with Nielsen.

A future market case, such as the one alleged by the Commission today, presents a number of unique challenges not confronted in a typical merger review or even in "actual potential competition" cases. For instance, it is inherently more difficult in future market cases to define properly the relevant product market, to identify likely buyers and sellers, to estimate cross-elasticities of demand or understand on a more qualitative level potential product substitutability, and to ascertain the set of potential entrants and their likely incentives.[3] Although all

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2 Complaint ¶ 10, Nielsen Holdings N.V., FTC File No. 131-0058 (Sept. 20, 2013).

3 Somewhere between typical merger cases and future market cases are "actual potential competition" cases. Competitive effects in such cases typically are less difficult to predict than in future market cases because the Commission at least can identify the relevant product market and interview current buyers and sellers. Nevertheless, competitive effects in actual potential competition cases still are more difficult, on balance, to assess than typical merger cases because the agency must predict whether a party is likely to enter the relevant market absent the merger. It is because of this uncertainty and the

merger review necessarily is forward looking, it is an exceedingly difficult task to predict the competitive effects of a transaction where there is insufficient evidence to reliably answer these basic questions upon which proper merger analysis is based.[4] Without these critical inputs, our current economic toolkit provides little basis from which to answer accurately the question of whether a merger implicating a future market will result in a substantial lessening of competition.

The Commission of course already routinely engages in predictive merger analysis that seeks to compare present competitive activities to future market conditions.[5] For instance, the Horizontal Merger Guidelines ("Merger Guidelines") call upon the antitrust agencies to take into account efficiencies claimed by the parties, the likelihood of successful entry, and the possibility of a failing firm defense.[6] Significantly, however, each of these predictions about the evolution of a market is based upon a fact-intensive analysis rather than relying upon a general presumption that economic theory teaches that an increase in market concentration implies a reduced incentive to invest in innovation.[7] For example, when parties seek to show that a

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potential for conjecture that the courts and agencies have cabined the actual potential competition doctrine by, for instance, applying a heightened standard of proof for showing a firm likely would enter the market absent the merger. *See e.g.*, B.A.T. Indus., 104 F.T.C. 852, 926-28 (1984) (applying a "clear proof" standard).

4 *See* Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and The Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 15-17 (2012) (describing some difficulties associated with further incorporating dynamic analysis into merger review).

5 *See id.* at 8-10 (identifying areas in the merger context where the antitrust agencies have been able to predict confidently effects on future competition).

6 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 9-11 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html [hereinafter 2010 MERGER GUIDELINES].

7 The link between market structure and incentives to innovate remains inconclusive. *See, e.g.*, Ginsburg & Wright, *supra* note 4, at 4-5 ("To this day, the complex relationship between static product market competition and the incentive to innovate is not well understood."); Richard J. Gilbert, *Competition and Innovation*, *in* 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 577, 583 (W. Dale Collins ed., 2008)

proposed transaction has efficiencies that mitigate the anticompetitive concerns, they must provide the agencies with clear evidence showing that the claimed efficiencies are cognizable, merger-specific, and verifiable.[8] Similarly, when assessing whether future entry would counteract a proposed transaction's competitive concerns, the agencies evaluate a number of facts—such as the history of entry in the relevant market and the costs a future entrant would need to incur to be able to compete effectively—to determine whether entry is "timely, likely, and sufficient."[9] Likewise, to prove a failing firm defense successfully, the parties must show several specific facts, such as an inability to meet financial obligations in the near future or to reorganize in bankruptcy, to allow the agencies to predict that the firm would fail absent the merger. [10]

I believe the Commission is at its best when it relies upon such fact-intensive analysis, guided by well-established and empirically grounded economic theory, to predict the competitive effects of a proposed merger.[11] When the Commission's antitrust analysis comes unmoored from such fact-based inquiry, tethered tightly to robust economic theory, there is a more significant risk that non-economic considerations, intuition, and policy preferences influence the outcome of cases. Consequently, in merger cases where only limited or ambiguous evidence exists upon which to base our predictive conclusions, I believe the Commission will be best served by acknowledging these institutional limitations rather than challenging the transaction.

("[E]conomic theory does not provide unambiguous support either for the view that market power generally threatens innovation by lowering the return to innovative efforts nor the Schumpeterian view that concentrated markets generally promote innovation.").

8 2010 MERGER GUIDELINES, *supra* note 6, at § 10.

9 *Id.* at § 9.

10 *Id.* at § 11.

11 *See generally* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Evidence-Based Antitrust Enforcement in the Technology Sector (Feb. 23, 2013), Remarks at the Competition Law Center *available at* http://www.ftc.gov/speeches/wright/130223chinaevidence.pdf.

Although future market cases may warrant investigation under certain circumstances, the inherent difficulties associated with analyzing the competitive effects of a transaction where the market does not yet exist, and the present inability of economic theory and evidence to support confident and reliable prediction, each suggest such cases typically will not warrant an enforcement action.

II. The Evidence Does Not Provide a Reason to Believe the Transaction Will Result in a Substantial Lessening of Competition in the National Syndicated Cross-Platform Audience Measurement Market

At the outset, it is important to recognize that our task is not simply to assess whether Nielsen and Arbitron are the firms best positioned today to develop national syndicated cross-platform audience measurement services. They very well may be when compared to other options available today. However, our task is decidedly different and requires us to evaluate instead whether the merger will result in a substantial lessening of competition in a relevant product market. I have not been presented evidence sufficient to provide a reason to believe the proposed merger will substantially reduce future competition in the sale of national syndicated cross-platform audience measurement services. My decision is based primarily upon the absence of answers to key questions that are necessary to draw reliable conclusions about the merger's likely competitive effects.

For example, we do not know whether each of the parties could and would develop a cross-platform product for the relevant market (however defined) absent the merger. For instance, if syndication ultimately is required for a successful cross-platform service, we do not know whether this is something both parties could offer. Furthermore, if the parties were to develop cross-platform products, we do not know the ultimate attributes of these products and whether, and to what extent, they would be substitutable by consumers. For example, we do not know if the parties would offer daily ratings or monthly ratings, and whether consumers would consider monthly and daily ratings to be complements or substitutes. Finally, we also do not know how the market will evolve, what other potential competitors might exist, and whether and to what extent these competitors might impose competitive constraints upon the parties.

Further, because cross-platform products are at best at the nascent stages of development, it is difficult even to define the relevant product market.[12] Indeed, the investigation has uncovered that "cross-platform services" means very different things to different industry participants. As with likely competitive effects from the transaction, there are also a number of questions we simply cannot reliably answer at this time with respect to defining the future market in which the competitive effects will allegedly occur. For example, across how many platforms must the product provide audience measurement in order to be competitive? Does the product need to be syndicated or do cross-platform products impose competitive constraints upon one another irrespective of syndication? Does the product truly need to be national and to what extent? Will customers require Nielsen's "currency" measurement to be a component or will something less suffice? Will radio audience measurement be a necessary component for a cross-platform audience measurement service to be successful? Depending upon the answers to these questions, the proper relevant product market unsurprisingly may be defined quite differently than it is defined in the Commission's Complaint.

It is true that the same concerns arising from predicting future anticompetitive effects also provide a challenge to predicting any cognizable efficiencies arising from the transaction. However, even assuming away the uncertainty discussed above, the evidence suggests that any anticompetitive effects arising from the transaction would be relatively small. One reason for this is that the alleged relevant market would constitute a small fraction of the value of the overall deal. Indeed, there is no reason to believe the prospect of supracompetitive profits in the national syndicated cross-platform audience measurement services market motivated the transaction. A substantial fraction of the potentially

12 Although the Merger Guidelines provide that the agencies need not begin their merger analysis by defining the relevant product market—that is to say, defining the relevant product market before assessing effects, the Merger Guidelines do not dispense with market definition because it is important to understanding where those effects ultimately might occur.

cognizable efficiencies from the transaction arise in markets that already exist—that is, outside the alleged relevant market. While out-of-market efficiencies are generally discounted by the agencies, the Merger Guidelines' analysis rejects the view that form should trump substance when assessing competitive effects. Indeed, the Merger Guidelines suggest that the Commission will consider out-of-market efficiencies when they are "inextricably linked" with the transaction as a whole and are likely to be large relative to any likely anticompetitive effects.[13] This appears to be precisely such a case. To be clear, I do not base my disagreement with the Commission today on the possibility that the potential efficiencies arising from the transaction would offset any anticompetitive effect. As discussed above, I find no reason to believe the transaction is likely to substantially lessen competition because the evidence does not support the conclusion that it is likely to generate anticompetitive effects in the alleged relevant market.

For these reasons, I dissent from the Commission's conclusion that there is reason to believe the proposed transaction will substantially lessen competition in the alleged relevant market.

III. Ensuring Consent Agreements are in the Public Interest

Nielsen and Arbitron have agreed to certain concessions in a Consent Agreement with the Commission despite the lack of evidence supporting the conclusion that the proposed transaction will result in a substantial lessening of competition in the market for national syndicated cross-platform audience measurement services. Some may conclude that there can be no harm in the Commission entering into a consent agreement and issuing a Complaint and Order imposing a remedy with sophisticated and willing parties. That of course need not be true. Nor does that view logically follow from the Commission's mission to prevent anticompetitive conduct and to promote consumer welfare.

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13 2010 MERGER GUIDELINES, *supra* note 6, § 10 n. 14.

Whether parties to a transaction are willing to enter into a consent agreement will often have little to do with whether the agreed upon remedy actually promotes consumer welfare. The Commission's ability to obtain concessions instead reflects the weighing by the parties of the private costs and private benefits of delaying the transaction and potentially litigating the merger against the private costs and private benefits of acquiescing to the proposed terms.[14] Indeed, one can imagine that where, as here, the alleged relevant product market is small relative to the overall deal size, the parties would be happy to agree to concessions that cost very little and finally permit the deal to close. Put simply, where there is no reason to believe a transaction violates the antitrust laws, a sincerely held view that a consent decree will improve upon the post-merger competitive outcome or have other beneficial effects does not justify imposing those conditions. Instead, entering into such agreements subtly, and in my view harmfully, shifts the Commission's mission from that of antitrust enforcer to a much broader mandate of "fixing" a variety of perceived economic welfare-reducing arrangements.

Consents can and do play an important and productive role in the Commission's competition enforcement mission. Consents can efficiently address competitive concerns arising from a merger by allowing the Commission to reach a resolution more quickly and at less expense than would be possible through litigation. However, consents potentially also can have a detrimental impact upon consumers. The Commission's consents serve as important guidance and inform practitioners and the business community about how the agency is likely to view and remedy certain mergers.[15] Where the Commission has endorsed by way of consent a willingness to challenge transactions where it might not be able to meet its burden of proving harm to

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14 *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM 177, 179-80 (2012).

15 *See, e.g.*, Deborah L. Feinstein, Bureau of Competition Dir., Fed. Trade Comm'n, The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts, Remarks at GCR Live, 4-5 (Sept. 17, 2013), *available at* http://www.ftc.gov/speeches/dfeinstein/130917gcrspeech.pdf.

competition, and which therefore at best are competitively innocuous, the Commission's actions may alter private parties' behavior in a manner that does not enhance consumer welfare.[16] Because there is no judicial approval of Commission settlements, it is especially important that the Commission take care to ensure its consents are in the public interest.[17]

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16 *See* Ginsburg & Wright, *supra* note 14, at 179.

17 15 U.S.C. § 45(b) (2006); *see also* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Consent Decrees: Is the Public Getting Its Money's Worth (Apr. 7, 2011), Remarks at the XVIIIth St. Gallen International Competition Law Forum, *available at* http://www.ftc.gov/speeches/rosch/110407roschconsent decrees.pdf (stating that "we at the Commission are responsible for conducting our own public interest inquiry before accepting proposed consent decrees, and this inquiry operates as a check on the 'wide discretion' that we otherwise wield to combat methods, acts and practices that violate the antitrust and consumer protection laws").

IN THE MATTER OF

NISSAN OF SOUTH ATLANTA, LLC
D/B/A
NISSAN SOUTH

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT AND REGULATION Z

Docket No. C-4441; File No. 132 3163
Complaint, February 28, 2014 – Decision, February 28, 2014

This consent order addresses Nissan of South Atlanta, LLC also d/b/a Nissan South's advertisements for automobiles and failure to clearly and conspicuously disclose required information concerning costs and credit terms. The complaint alleges that respondent has advertised that consumers can finance the purchase of vehicles by paying $99 per month with a $0 down payment however; consumers will pay $99 per month for only the first two months of an 84-month period. The complaint further alleges that the advertisements fail to state the amount of each payment beyond the first two months of financing. The consent order requires clear and conspicuous Truth in Lending Act and Regulation Z disclosures when advertising any of the relevant triggering terms with regard to issuing consumer credit. It also requires that if any finance charge is advertised, the rate be stated as an "annual percentage rate" using that term or the abbreviation "APR." Additionally, the order prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Participants

For the *Commission*: *Sana Chriss, Mark Glassman, John Jacobs, Carole Reynolds, Jason Schall, Christina Tusan*, and *Katherine Worthman.*

For the *Respondent*: *Stephen H. Block, Barrett, Daffin, Frappier, Levine & Block, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nissan of South Atlanta, LLC, also doing business as Nissan South ("respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and its implementing Regulation Z, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Georgia corporation with its principal office or place of business at 6889 Jonesboro Road, Morrow, Georgia, 30260-2902. Respondent offers automobiles for sale or lease to consumers.

2. The acts or practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least February 2013, respondent has disseminated or caused to be disseminated advertisements to the public promoting the purchase, finance, and leasing of automobiles.

4. Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “closed-end credit,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

5. Such advertisements include print advertisements published in paper circulations of Cars Magazine. A copy of one such advertisement is attached as Exhibit A. This advertisement contains the statements and depictions described below. Respondent’s advertisements in other editions of Cars Magazine contain substantially similar statements.

a. The top portion of the advertisement attached as Exhibit A includes the following representation in large, bold font:

$0 DOWN $99/MO

b. The middle portion of the advertisement depicts several vehicles, most of which contain the representation:

$0 DOWN · $99/MO

c. The bottom portion of the advertisement includes the following representation in small text:

$0 DOWN AT 5.499% APR FOR 84 MONTHS WITH APPROVED CREDIT. SEE DEALER FOR DETAILS. DEALER RETAINS ALL REBATES.
$99/MO IS FOR 1ST 2 MONTHS. CANNOT EXCEED TOTAL VALUE OF $800. NOT APPLICABLE WITH ANY OTHER OFFER

6. Respondent's advertisements fail to state clearly and conspicuously that consumers will pay $99 per month for only the first two months of an 84-month period. The advertisements also fail to state the amount of each payment beyond the first two months of financing.

FEDERAL TRADE COMMISSION ACT VIOLATIONS

<u>Count I</u>

Misrepresentation Regarding Monthly Payment Amount

7. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that consumers can finance vehicles for the prominently advertised terms, including the advertised monthly payment amount.

8. In truth and in fact, consumers cannot finance the vehicles for the prominently advertised terms, including the advertised monthly payment amount of $99. Instead, consumers pay $99 each month for the first two months only, and consumers owe a different monthly amount for the remaining 82 months. Accordingly, respondent's representation as alleged in Paragraph 7 was, and is, false and misleading.

9. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TRUTH IN LENDING ACT AND REGULATION Z

10. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain

disclosures (“additional terms”) if they state any of several terms, such as the monthly payment (“TILA triggering terms”).

11. Respondent’s advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, are subject to the requirements of the TILA and Regulation Z.

Count II

Failure to Disclose or Disclose Clearly and Conspicuously Required Credit Information

12. Respondent’s advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

a. The amount or percentage of the down payment.

b. The terms of repayment, including any balloon payment.

c. The “annual percentage rate,” using that term, and, if the rate may be increased after consummation, that fact.

13. Therefore, the practices set forth in Paragraph 12 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

THEREFORE, the Federal Trade Commission, this twenty-eighth day of February, 2014, has issued this complaint against respondent.

By the Commission.

Exhibit A

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act ("FTC Act"); the Truth in Lending Act ("TILA"), as amended, 15 U.S.C. §§ 1601-1667; and Regulation Z, 12 C.F.R. Part 226; and

Respondent, respondent's attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), which includes: a statement by respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the FTC Act, TILA, and Regulation Z, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Nissan of South Atlanta, LLC, also doing business as Nissan South, is a Georgia corporation with its principal office or place of business at 6889 Jonesboro Road, Morrow, Georgia 30260.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

A. Unless otherwise specified, “respondent” shall mean Nissan of South Atlanta, LLC, also doing business as Nissan South, and its successors and assigns.

B. “Advertisement” shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

C. “Clearly and conspicuously” shall mean as follows:

1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.

2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.

4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.

D. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.

E. “Lease inception” shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.

F. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.

G. “Motor vehicle” or “vehicle” shall mean:

1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

2. Recreational boats and marine equipment;

3. Motorcycles;

4. Motor homes, recreational vehicle trailers, and slide-in campers; and

5. Other vehicles that are titled and sold through dealers.

I.

IT IS HEREBY ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for the purchase, financing, or leasing of motor vehicles, shall not, in any manner, expressly or by implication:

A. Misrepresent the cost of:

1. Purchasing a vehicle with financing, including but not necessarily limited to, the amount or percentage of the down payment, the number of

payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or

2. Leasing a vehicle, including but not necessarily limited to, the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments; or

B. Misrepresent any other material fact about the price, sale, financing, or leasing of any vehicle.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, in connection with any advertisement for any extension of consumer credit, shall not in any manner, expressly or by implication:

A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

1. The amount or percentage of the down payment;

2. The terms of repayment; and

3. The annual percentage rate, using the term “annual percentage rate” or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

B. State a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term; or

C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

C. All evidence in its possession or control that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

D. Any documents reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to all documents obtained, created, generated, or that in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC, 20580. The subject line must begin: **FTC v. NISSAN OF SOUTH ATLANTA, LLC, also d/b/a NISSAN SOUTH**.

VI.

IT IS FURTHER ORDERED that respondent, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VII.

This order will terminate on February 28, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint;

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, *further*, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Nissan of South Atlanta, LLC, also d/b/a Nissan South. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons.

Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

The respondent is a motor vehicle dealer. According to the FTC complaint, respondent has advertised that consumers can finance the purchase of vehicles by paying $99 per month with a $0 downpayment. The complaint alleges that, in fact, consumers will pay $99 per month for only the first two months of an 84-month period. The complaint further alleges that the advertisements fail to state the amount of each payment beyond the first two months of financing. The complaint alleges therefore that the respondent's representations are false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges that the respondent violated the Truth in Lending Act ("TILA") and Regulation Z for failing to clearly and conspicuously disclose required information concerning costs and credit terms.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I.A prohibits the respondent from misrepresenting the cost of: (1) purchasing a vehicle with financing, including but not necessarily limited to the amount or percentage of the downpayment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or (2) leasing a vehicle, including but not limited to the total amount due at lease inception, the downpayment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments. Part I.B prohibits the respondent from misrepresenting any other material fact about the price, sale, financing, or leasing of any vehicle.

Part II of the proposed order addresses the TILA allegations. It requires clear and conspicuous TILA and Regulation Z disclosures when advertising any of the relevant triggering terms with regard to issuing consumer credit. It also requires that if any finance charge is advertised, the rate be stated as an "annual percentage rate" using that term or the abbreviation "APR." In addition, Part II prohibits any other violation of TILA or Regulation Z.

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification to the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

IN THE MATTER OF

FIDELITY NATIONAL FINANCIAL, INC.
AND
LENDER PROCESSING SERVICES, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4425; File No. 131 0159
Complaint, December 23, 2013 – Decision, March 4, 2014

This consent order addresses the $2.9 billion acquisition by Fidelity National Financial, Inc. of certain assets of Lender Processing Services, Inc. The complaint alleges that the acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act and, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between Respondents and by increasing the likelihood of collusion or coordinated interaction in the markets for the provision of title information services in seven relevant markets in Oregon. The consent order requires Respondents to divest a copy of LPS's title plants serving Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon, to a Commission-approved acquirer. The order also requires Respondents to divest an ownership interest equivalent to LPS's share in the joint title plant that serves the Portland, Oregon, metropolitan area to a Commission-approved buyer.

Participants

For the *Commission*: *Jessica S. Drake.*

For the *Respondents*: *Joe Simons* and *Aidan Synnott, Paul, Weiss, Rifkind, Wharton & Garrison LLP* and *Peter Barbur, Cravath, Swaine & Moore LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Fidelity National Financial, Inc. ("Fidelity") and Lender Processing Services, Inc. ("LPS") have entered into an acquisition agreement that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "Title plant" means a privately-owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

2. "Title information services" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

3. "Respondent Fidelity" or "Fidelity" means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by Fidelity; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. "Respondent LPS" or "LPS" means Lender Processing Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by LPS; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

II. RESPONDENTS

5. Respondent Fidelity is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside

Avenue, Jacksonville, FL 32204. Fidelity, among other things, is engaged in the sale of title insurance and the provision of title information services.

6. Respondent LPS is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside Avenue, Jacksonville, FL 32204. LPS, among other things, is engaged in the sale of title insurance and the provision of title information services.

7. Respondents and each of their relevant operating subsidiaries are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

8. Pursuant to an Agreement and Plan of Merger dated May 28, 2013, Fidelity proposes to acquire all of the outstanding common stock of LPS for a total equity value of approximately $2.9 billion.

IV. RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the proposed acquisition is the provision of title information services.

10. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the proposed acquisition in the relevant line of commerce are the following jurisdictions in the state of Oregon: Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties; and the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties. Title information is generated and collected on a county level and because of the local character of the real estate markets in which the title information services are used, geographic markets for title information services are highly localized.

V. STRUCTURE OF THE MARKETS

11. Oregon law requires title insurers and title insurance producers, who are the only users of title information services, to own an interest in a title plant in each county in which they issue policies. Oregon's regulatory requirement prevents third-party information providers from offering title information services in the relevant geographic areas listed under Paragraph 10.

12. Four independent title plants provide title information services in Josephine and Polk counties, Oregon. Three independent title plants provide title information services in Clatsop, Columbia, Coos, and Tillamook counties, Oregon. Each independent title plant in these counties has a single owner, a title insurer or title insurance producer, who is the plant's sole user. Both Respondents own title plants in each of these counties.

13. A single jointly-owned title plant provides title information services in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties. The jointly-owned title plant is governed by an agreement permitting each owner to use the title plant. The agreement sets forth the terms under which the owners can vote to expel other owners from the joint title plant. Both Respondents own interests in the joint title plant.

14. The markets for title information services in the geographic areas listed under Paragraph 10 are highly concentrated. The proposed acquisition significantly increases concentration in the relevant markets.

VI. BARRIERS TO ENTRY

15. Entry into the market for providing title information services is unlikely and would not occur in a timely manner to deter or counteract the adverse anticompetitive effects described in Paragraph 16, because of, among other things, the time and expense necessary to collect, compile, and index historical real property records.

VII. EFFECTS OF THE ACQUISITION

16. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition in the relevant markets in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Respondents Fidelity and LPS in the relevant markets;

b. by increasing the likelihood of collusion or coordinated interaction in Clatsop, Columbia, Coos, and Tillamook counties, Oregon, where the proposed acquisition reduces the number of independent title plants from three to two;

c. by increasing the likelihood of collusion or coordinated interaction in Josephine and Polk counties, Oregon, where the proposed acquisition reduces the number of independent title plants from four to three; and

d. by increasing the likelihood of collusion or coordinated interaction in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties, Oregon, where the proposed acquisition reduces the number of joint title plant owners necessary to expel other owners from the joint title plant.

VIII. VIOLATIONS CHARGED

17. The agreement described in Paragraph 8 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

18. The acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-third day of December, 2013 issues its Complaint against Respondents.

By the Commission, Commissioner Wright dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. ("Fidelity"), of Respondent Lender Processing Services, Inc. ("LPS"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Complaint and Order to Maintain Assets ("Order"):

1. Respondent Fidelity is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 601 Riverside Avenue, Jacksonville, FL 32204.

2. Respondent LPS is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 601 Riverside Avenue, Jacksonville, FL 32204.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the definitions in the Decision and Order issued in this matter shall apply as well as the following definition:

A. "Decision and Order" means the:

   1. Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a final Decision and Order by the Commission; and

   2. Final Decision and Order issued and served by the Commission.

II.

IT IS FURTHER ORDERED that, until Respondents fully comply with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall:

A. Take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and the Tri-County Title Plant and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets and the Tri-County Title Plant except for ordinary wear and tear;

B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than as required by this Order) and the Tri-County Title Plant nor take any action that lessens their viability, marketability, or competitiveness; and

C. Maintain the Divestiture Assets and the Tri-County Title Plant in the regular and ordinary course of business and in accordance with past practice, and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets and the Tri-County Title Plant to the extent and in the manner maintained prior to the Acquisition, including, but not limited to, updating the records and/or indices contained in the Divestiture Assets and the Tri-County Title Plant and not compromising the ability and suitability of the Title Plant Assets and the Tri-County Title Plant to meet Oregon state requirements for title insurers and title insurance producers.

III.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraph II. of this Order and with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall submit to the

Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of a Respondent;

B. Any proposed acquisition, merger, or consolidation of a Respondent; or

C. Any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

V.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and five (5) days notice to a Respondent, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours and in the presence of counsel, to all facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent relating to compliance with this Order, which copying services shall be provided by such Respondent at its expense; and

B. To interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order shall terminate after the last of the divestitures required by the Decision and Order is completed.

By the Commission, Commissioner Wright dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. ("Fidelity"), of Respondent Lender Processing Services, Inc. ("LPS"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its

Complaint and Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Fidelity is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 601 Riverside Avenue, Jacksonville, FL 32204.

2. Respondent LPS is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 601 Riverside Avenue, Jacksonville, FL 32204.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Fidelity" means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by Fidelity; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Fidelity shall include LPS.

B. "LPS" means Lender Processing Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by LPS; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" means any and all Persons approved by the Commission pursuant to Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.

E. "Acquisition" means the acquisition by Fidelity of all of the outstanding common stock of LPS pursuant to the Agreement and Plan of Merger dated May 28, 2013.

F. "Copy" means a reproduction of a Title Plant that will enable an Acquirer to use the reproduction in a qualitatively similar way to the Title Plant. A Copy will reproduce all of the records, indices, documents, and other information contained in the Title Plant, as of the Divestiture Date, and enable such information to be accessed no less quickly and no less conveniently than it could be using the Title Plant.

G. "Divestiture Agreement" means any and all agreements between the Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer, and all amendments, exhibits, attachments, agreements, and schedules thereto, that have been approved by the Commission pursuant to Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.

H. "Divestiture Assets" means:

1. Portland Title Agency Interest, and

2. Title Plant Assets.

I. “Divestiture Date” means each date on which Respondents (or a Divestiture Trustee) fully complete the divestiture of each of the Divestiture Assets, as applicable, as required by Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.

J. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph IV. of this Order.

K. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business entity, and any subsidiaries, divisions, groups, or affiliates thereof.

L. “Portland Title Agency” means Portland Title Agency, LLC, a wholly-owned subsidiary of Fidelity.

M. “Portland Title Agency Interest” means the Title Plant Interest held by Portland Title Agency in the Tri-County Title Plant.

N. “Respondents” means Fidelity and LPS, individually and collectively.

O. “Third Party” means any non-governmental Person other than the Respondents or each Acquirer.

P. “Title Information Services” means providing selected information contained in a Title Plant to a customer or user or permitting a customer or user to have access to information contained in a Title Plant.

Q. “Title Plant” means a privately-owned collection of records and/or indices regarding the ownership of and interests in real property. Title Plants include such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

R. "Title Plant Assets" means a Copy of each Title Plant, and all rights associated with each Copy, owned or otherwise held by LPS prior to the Acquisition, covering each of the Oregon counties listed below:

1. Clatsop,

2. Columbia,

3. Coos,

4. Josephine,

5. Polk, and

6. Tillamook.

S. "Title Plant Interest" means any and all rights, present or contingent, of a Person to hold any membership or partnership share, voting or nonvoting stock, share capital, equity or other interests, and/or beneficial ownership of a Title Plant.

T. "Tri-County Title Plant" means the joint venture Title Plant established pursuant to the Tri-County Title Plant Partnership Agreement, effective as of October 15, 1992, and all amendments, exhibits, and attachments thereto, which covers records and/or indices regarding the ownership of and interests in real property located in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties, Oregon.

II.

IT IS FURTHER ORDERED that:

A. Not later than five (5) months after the date this Order is issued, Respondents shall divest the Portland Title Agency Interest, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner (including a Divestiture Agreement) that receives the prior approval of the Commission; *provided, however,* that no proposed divestiture of the Portland Title Agency Interest to a Person that owns or controls a Title Plant Interest in the Tri-County Title Plant at the time of the divestiture will be approved if that Person's Title Plant Interest, when combined with the Portland Title Agency Interest and the Respondents' Title Plant Interests in the Tri-County Title Plant, would equal or exceed 70% of the outstanding Title Plant Interests in the Tri-County Title Plant.

B. Prior to the Divestiture Date, Respondents shall obtain all consents, approvals, and waivers from all Third Parties that are necessary to permit Respondents to divest the Portland Title Agency Interest and transfer all associated rights to the Acquirer.

C. Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, exercise any of their voting rights, or influence any other partners to exercise any of their voting rights, under Section 11.01(f) of the Tri-County Title Plant Partnership Agreement (as reflected in the version of the agreement in effect as of the date Respondents execute the Agreement Containing Consent Orders), to expel the Acquirer of the Portland Title Agency Interest.

D. The purpose of the divestiture of the Portland Title Agency Interest is to ensure the continuation of the Portland Title Agency Interest as an independent interest in the Tri-County Title Plant and to remedy the lessening of competition in Title Information Services resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Not later than five (5) months after the date this Order is issued, Respondents shall divest the Title Plant

Assets, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner (including a Divestiture Agreement) that receives the prior approval of the Commission.

B. Prior to the Divestiture Date, Respondents shall obtain all consents, approvals, and waivers from all Third Parties that are necessary to permit Respondents to divest each of the Title Plant Assets and transfer all associated rights to each Acquirer.

C. The purpose of the divestiture of the Title Plant Assets is to remedy the lessening of competition in Title Information Services resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations of Paragraphs II. and III. to divest all of the Divestiture Assets, the Commission may appoint a trustee ("Divestiture Trustee") to complete the divestiture of any remaining Divestiture Assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by, Paragraphs and II. and III. of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, Paragraphs II. and III. of this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to effectuate the required divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to divest or believes the divestitures can be achieved within a

reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the Divestiture Assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays caused by Respondents shall extend the time for divestiture under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to each Acquirer as required by this Order; *provided*, *however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further*, *however*, that Respondents shall select such Person within five

(5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the specified divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

10. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.

E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each of the divestitures required by this Order.

V.

IT IS FURTHER ORDERED that, until Respondents fully comply with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall:

A. Take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and the Tri-County Title Plant and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets and the Tri-County Title Plant except for ordinary wear and tear;

B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than as required by this Order) and the Tri-County Title Plant nor take any action that lessens their viability, marketability, or competitiveness; and

C. Maintain the Divestiture Assets and the Tri-County Title Plant in the regular and ordinary course of business and in accordance with past practice, and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets and the Tri-County Title Plant to the extent and in the manner maintained prior to the Acquisition, including, but not limited to, updating the records and/or indices contained in the Divestiture Assets and the Tri-County Title Plant and not compromising the ability and suitability of the Title Plant Assets and the Tri-County Title Plant to meet Oregon state requirements for title insurers and title insurance producers.

VI.

IT IS FURTHER ORDERED that:

A. No Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondents under such agreements.

B. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.

C. Respondents shall comply with all terms of each Divestiture Agreement, and any breach by Respondents of any term of a Divestiture Agreement shall constitute a failure to comply with this Order. If any term of a Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

VII.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission, acquire any:

1. Title Plant covering any county in Oregon, if, as a result of such acquisition, there would be three (3) or fewer independent Title Plants covering the county;

2. Title Plant Interest of any Title Plant covering any county in Oregon:

    a. if, as a result of such acquisition, when aggregated with any and all Title Plant Interests already owned or otherwise held by Respondents in such Title Plant, Respondents would own or otherwise hold an interest of fifty (50) percent or more in such Title Plant; or

b. if, as a result of such acquisition, there would be three (3) or fewer independent Title Plant Interest holders in such Title Plant.

B. The prior notification required by this Paragraph VII. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. In addition to the information required to be supplied on such Notification and Report Form pursuant to the above-referenced regulation, Respondents shall submit the following supplemental information in Respondents' possession or reasonably available to Respondents:

1. The name of each county to which the terms of Paragraph VII.A. are applicable;

2. A description of the Title Plant or Title Plant Interest that is being acquired; and

3. With respect to each Title Plant covering each county to which the terms of Paragraph VII.A. are applicable (including all Title Plants in which the Respondents own or otherwise hold a direct or indirect Title Plant Interest, as well as other Title Plants known to the Respondents), the names of all Persons that own or otherwise hold any direct or indirect Title Plant Interest in the Title Plant and the percentage interest held by each Person; the time period covered by each category of title records contained in the Title Plant; whether the respective categories of title records are regularly being updated; the indexing system or systems used with respect to each category of title records;

and the names of all Persons, including, but not limited to, title insurers or title insurance producers, who have access to the Title Plant.

C. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph VII. may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VIII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. and III. (and Paragraph IV., if applicable) of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. (and Paragraph IV., if applicable) of this Order, including a description of all substantive contacts or negotiations for accomplishing the specified actions and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the accomplishment of the specified actions and obligations.

B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of a Respondent;

B. Any proposed acquisition, merger, or consolidation of a Respondent; or

C. Any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and five (5) days' notice to a Respondent, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours and in the presence of counsel, to all facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent relating to compliance with this Order, which copying services shall be provided by such Respondent at its expense; and

B. To interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on March 4, 2024.

By the Commission, Commissioner Wright dissenting.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Fidelity National Financial, Inc. ("Fidelity") and Lender Processing Services, Inc. ("LPS") (collectively, "Respondents"). Fidelity proposes to acquire LPS, a combination that would reduce competition in seven relevant markets in Oregon where Respondents own overlapping title plant assets. The proposed Consent Agreement remedies the competitive concerns arising from the acquisition. The proposed Consent Agreement requires, among other things, that Respondents divest: a copy of LPS's title plants covering Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties in Oregon; and an ownership interest equivalent to LPS's share in a joint title plant serving the Portland, Oregon, metropolitan area.

On May 28, 2013, Respondents entered into an acquisition agreement under which Fidelity would acquire all of the outstanding common stock of LPS for approximately $2.9 billion (the "Acquisition"). The Commission's Complaint alleges that the acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between Respondents and by increasing the likelihood of collusion or coordinated interaction in the relevant geographic markets.

II. The Parties

Fidelity, a publicly-traded company headquartered in Jacksonville, Florida, provides title insurance, transaction services, and technology solutions to the mortgage industry. Fidelity is the nation's largest title insurance company, operating six underwriting subsidiaries.

LPS, a publicly-traded company headquartered in Jacksonville, Florida, provides transaction services and technology solutions to the mortgage industry. LPS's transaction services include title insurance underwriting provided by its National Title Insurance of New York, Inc. ("NTNY") subsidiary.

Respondents own overlapping title plants in Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon. Fidelity and LPS are also partners in a title plant serving the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

III. Title Information Services

Lenders require assurance of title before issuing a mortgage loan, typically in the form of title insurance. Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title agent or abstractor must first conduct a title search. Title search is the due diligence process that enables title insurance underwriters to assess (and mitigate, if necessary) the risk of subsequent title challenges. The title agent or abstractor examines property-specific records to establish the chain of title and to identify any potential obstacles – such as liens or encumbrances – that might impair the transfer of title.

To facilitate the title search process, title agents and underwriters often utilize title plants. Title plants are privately-owned (either individually or jointly) databases of information detailing the title status of real property parcels. Title plants compile, normalize, and re-index county-level property records, which are often difficult to access or inefficient to search directly. Oregon law requires title insurers and title insurance producers, who are the sole users of title information services, to own an interest in a title plant in each county in which they issue policies. This law means that there are no alternatives to title plants in Oregon counties.

IV. The Complaint

The Commission's Complaint alleges that the acquisition agreement between Fidelity and LPS constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The Complaint further alleges that consummation of the agreement may substantially lessen competition in the provision of title information services in seven relevant markets in Oregon, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act.

The Complaint alleges that a relevant product market in which to analyze the effects of the Acquisition is the provision of title information services. "Title information services" means the provision of selected information, or access to information, contained in a title plant to a customer or user.

The Complaint alleges that the relevant geographic markets are local in nature. Title information is generated, collected, and used on a county (or county-equivalent) level. Therefore, geographic markets for title information services are highly localized and consist of each of the counties or other local jurisdictions covered by the title plants at issue. The geographic areas of concern outlined in the Complaint are Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon; and the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

The Complaint alleges, absent the proposed relief, that the Acquisition would increase the risk of coordinated anticompetitive effects in the relevant markets. In Clatsop, Columbia, Coos, and Tillamook counties, the Acquisition would reduce the number of independent title plant owners to two. In Josephine and Polk counties, the Acquisition would leave only three independent title plant owners. In each of these six counties, each title plant has a single owner that is also the title plant's sole user. In contrast, one jointly-owned title plant serves the Portland, Oregon, metropolitan area; each co-owner has full access to this title plant. The Acquisition would leave five joint owners of that joint title plant, but would reduce the number of owners necessary to expel other owners from the joint title plant.

The Complaint alleges that entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would be costly and time-consuming, requiring any potential entrant to assemble a complete and accurate index of historical property records.

V. The Proposed Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns resulting from the Acquisition in each of the relevant markets discussed above. Pursuant to the proposed Consent Agreement, Respondents must divest a copy of LPS's title plants serving Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon, to a Commission-approved acquirer. Respondents must complete these divestitures within five (5) months of the closing date of the Acquisition. The required divestitures will eliminate the competitive harm that otherwise would have resulted in these counties by restoring the number of independent title plant owners within each county to the pre-acquisition level.

The proposed Consent Agreement also requires Respondents to divest an ownership interest equivalent to LPS's share in the joint title plant that serves the Portland, Oregon, metropolitan area to a Commission-approved buyer. Respondents must complete this divestiture within five (5) months of the closing date of the Acquisition. The proposed Consent Agreement requires that the divestiture purchaser's interest in the joint title plant, when combined with Fidelity's post-merger interest, must not equal or exceed 70 percent. The divestiture will ensure that no two joint owners of the plant could coordinate to expel other members of the joint title plant in this relevant market. The proposed Consent Agreement further prohibits Fidelity from exercising its voting rights, or influencing others to exercise their voting rights, to expel the divestiture buyer from the joint title plant for failure to conduct an active title business for a period of three (3) months.

In addition to the required divestitures, the proposed Consent Agreement obligates Respondents to provide the Commission with prior written notice of title plant acquisitions in any county in Oregon in three sets of circumstances: (1) if the acquisition would result in three or fewer title plants covering the county; (2) if the acquisition would result in three or fewer owners of a joint plant; and (3) if the acquisition would result in Fidelity controlling a 50 percent or greater share in a joint plant. Each of these circumstances would raise competitive concerns in the market for title information services, and could reduce competition in the market for title insurance underwriting in Oregon. These transactions likely would not come to the Commission's attention without the prior notification provision.

VI. The Order to Maintain Assets

The Decision and Order and the Order to Maintain Assets obligate Fidelity to continue to update and maintain the individual title plants, the Portland Tri-County Plant interest, and the Portland Tri-County Plant until the required divestitures are complete. This will ensure that the divested assets remain viable sources of title information to support the title insurance underwriting operations of the acquirer or acquirers. The Order to Maintain Assets explicitly requires Fidelity not to compromise these assets' ability and suitability to meet Oregon's requirements for title insurers and title insurance producers.

VII. Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the Consent Agreement and the comments received and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite and inform public comment on the Consent Agreement, including the proposed divestitures. This analysis is not intended to constitute an official interpretation of the Consent Agreement, nor is it intended to modify the terms of the Consent Agreement in any way.

Statement of the Federal Trade Commission

Today the Commission is taking remedial action with respect to the proposed acquisition of Lender Processing Services, Inc. by Fidelity National Financial, Inc. We believe Fidelity's acquisition of LPS, which would combine the two firms' title plants, among other assets, is likely to reduce competition that benefits title insurance consumers in nine counties in the state of Oregon. Our proposed remedy is tailored to counteract the likely anticompetitive effects of the proposed acquisition without eliminating any efficiencies that might arise from the combination of the two companies.

Fidelity is a leading provider of mortgage and other services to the mortgage industry and is the largest title insurance underwriter in the United States. LPS's underwriting activity is small by comparison, a complementary operation to LPS's key business as a leading provider of technology solutions, transaction services, and data and analytics to the mortgage and real estate industries.

Our competitive concerns arise from a limited aspect of the $2.9 billion combination of Fidelity and LPS: the title plant assets each company uses to support its title insurance underwriting activities in certain Oregon counties. Both Fidelity and LPS own title plants covering Oregon's Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties. Both firms are also joint owners of a title plant covering the tri-county Portland metropolitan area.

Title insurance underwriters require access to county-level title information contained in title plant databases. In Oregon, state law requires title insurance underwriters or their agents to own a title plant in each county in which they issue policies. As a result, any firm offering title insurance underwriting in Oregon must obtain an ownership interest in an existing title plant or build one from scratch. Fidelity and LPS compete for title insurance customers in the nine Oregon counties of concern. The proposed acquisition will eliminate one of only a few underwriters available in each relevant market,[1] and the Commission has reason to believe that no timely entrant is likely to replace the competition lost in these counties.

Although price competition in title insurance underwriting occurs at the state level, underwriters compete on the basis of service as well. For example, underwriters compete on the turnaround time from title order to settlement, enabling consumers to close on mortgage transactions more quickly. Moreover, the costs of entering the title insurance underwriting business are higher in Oregon because of the requirement that underwriters operating in the state own an interest in a title plant rather than merely purchase title information from a third-party provider. No

1 In Clatsop, Coos, Columbia, and Tillamook counties, only two title insurance underwriters will remain post-acquisition. In Josephine and Polk counties, three underwriters will remain. In the Portland tri-county area, the proposed acquisition will leave five competing title insurance underwriters as joint owners of the only title plant serving the Portland area. However, the transaction would reduce to two the number of joint owners with the ability to exclude all others from the plant.

other states where both Fidelity and LPS compete have a similar requirement. For these reasons, we have reason to believe that the proposed acquisition is likely to result in a loss of competition and harm title insurance customers.[2]

We respectfully disagree with Commissioner Wright that our action is based solely on the fact that the merger will decrease the number of underwriters operating in the relevant markets and that it is inconsistent with the 2010 Horizontal Merger Guidelines. Substantial increases in concentration caused by a merger play an important role in our analysis under the Guidelines because highly concentrated markets with two or three large firms are conducive to anticompetitive outcomes. The lens we apply to the evidence in a merger that reduces the number of firms in a market to two or three is, and should be, different than the lens we apply to a merger that reduces the number of firms to six or seven. In the former case, as in the merger here, a presumption of competitive harm is justified, under both the express language of the Guidelines and well-established case law.[3]

However, we did not end our analysis there. We also considered whether other market factors, such as the possibility of entry, might alleviate our competitive concerns. In most of the markets we considered, even where the merger would reduce the number of title plant operators from three to two, we concluded that the transaction was unlikely to lessen competition because the evidence demonstrated that alternative sources of title information

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2 We note that, in deciding whether to issue a complaint, the relevant standard for the Commission is whether we have "reason to believe" a merger violates Section 7 of the Clayton Act, not whether a violation has in fact been established. 15 U.S.C. § 45(b).

3 2010 HORIZONTAL MERGER GUIDELINES § 2.1.3 ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."); *see also Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) ("Typically, the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger to duopoly creates a rebuttable presumption of anticompetitive harm through direct or tacit coordination).

beyond proprietary title plants existed. That is not the case in Oregon. We are also not persuaded that price regulation in Oregon is sufficient to address our concerns about potential competitive harm. The evidence showed that competition between underwriters occurs on nonprice dimensions, supporting our view that the transaction was likely to harm competition in the identified nine counties.

Consistent with the approach the Commission has taken in previous merger enforcement actions involving title plants,[4] the proposed consent order addresses these competitive concerns by requiring divestiture of a copy of LPS's title plants in each of the affected counties and an ownership interest equivalent to that of LPS in the tri-county Portland-area joint plant. With the divested assets, the acquirer or acquirers will have the title plant ownership interest necessary to overcome the most significant legal impediment to compete in underwriting, thereby preserving the competition that would be lost as a result of the acquisition. There is no evidence that the proposed consent order would eliminate any efficiencies resulting from the transaction or otherwise burden the parties.

Merger analysis is necessarily predictive and requires us to make a determination as to the likely effects of a transaction. Where, as here, we have reason to believe that consumers are likely to suffer a loss of competition, and there are no countervailing efficiencies weighing against the remedy, we believe the public interest is best served by remedying the competitive concerns.

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4 *See, e.g.*, Complaint, *Fidelity Nat'l Fin., Inc.*, FTC Dkt. No. C-4300 (Sept. 16, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2010/09/100916fidelitycmpt.pdf; Complaint, *Fidelity Nat'l Fin., Inc.*, FTC Dkt. No. C-3929 (Feb. 25, 2000), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2000/02/fidelitycmp.pdf; Complaint, *Commonwealth Land Title Ins. Co.*, FTC Dkt. No. C-3835 (Nov. 12, 1998), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1998/11/ftc.gov-9810127cmp.htm; Complaint, *LandAmerica Fin. Grp., Inc.*, FTC Dkt. No. C-3808 (May 27, 1998), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1998/05/ftc.gov-9710115.cmp_.htm.

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order against Fidelity National Financial, Inc. ("FNF") to remedy the allegedly anticompetitive effects of FNF's proposed acquisition of Lender Processing Services, Inc. ("LPS"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe FNF's acquisition will substantially lessen competition for title information services in the Oregon counties identified in the Complaint in violation of Section 7 of the Clayton Act. I commend staff for their hard work in this matter. Staff has worked diligently to collect and analyze a substantial quantity of evidence related to numerous product and geographic markets within the U.S. mortgage lending industry. Based upon this evidence, I concluded there is no reason to believe the proposed transaction is likely to lessen competition in the Oregon counties identified in the Complaint. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I. Mortgage Lending Industry Background

Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title insurance underwriter must evaluate the risk that a subsequent title challenge will be made against the property. Title plants are privately owned repositories of real estate records that help underwriters examine property-specific title information in order to establish chain of title and identify any potential obstacles—such as liens or encumbrances—that could impair the transfer of title. In recent years, third-party title information services have begun to offer an alternative to title plants by providing access to the necessary data and records on a transactional or subscription basis. However, in Oregon, state law requires all title insurance underwriters to own an interest in a title plant in each county in which it issues policies. This law therefore effectively precludes a market in third-party provision of title information services.[1]

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1 It is important to note at the outset that Oregon's vertical integration requirement creates a scenario in which there is no relevant market for title

II. Coordinated Effects Analysis Under the Horizontal Merger Guidelines

The Commission's theory of anticompetitive harm in this matter is based solely upon a structural analysis. In other words, the Commission seeks to satisfy its prima facie burden of production to demonstrate the merger will substantially lessen competition based exclusively upon a tenuous logical link between the reduction in the number of firms that own title plants in each of the Oregon counties identified in the Complaint and a presumption that the merger between FNF and LPS will increase the likelihood of collusion or coordinated interaction among the remaining competitors for the sale of title information services.[2]

It is of course true that a reduction in the number of firms in a relevant market, all else equal, makes it easier for the remaining firms to coordinate or collude.[3] However, this is true of any reduction of firms, whether it be from seven to six or three to two, and therefore that proposition alone would have us condemn all mergers. The pertinent question is whether and when a reduction

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information services in Oregon. As a result, any competitive concerns arising from increased concentration in title plant ownership must be based upon anticompetitive effects in the downstream title insurance underwriting market in Oregon. The Commission does not allege, and there is no evidence to support the conclusion, that the merger will result in a substantial lessening of competition in the title insurance underwriting market in Oregon.

2 The Complaint appears to allege that the proposed transaction also may result in unilateral effects by stating the proposed merger will substantially lessen competition "by eliminating actual, direct, and substantial competition between Respondents Fidelity and LPS in the relevant markets." Complaint ¶ 16(a), Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). I have seen no evidence to support a unilateral effects theory of harm in either the title insurance services or title insurance underwriting markets. Nor does the Commission's Analysis to Aid Public Comment discuss the potential for a unilateral effects theory in this matter. *See* Analysis of the Agreement Containing Consent Order to Aid Public Comment § 4, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). Moreover, the merger cannot possibly result in unilateral effects in the title insurance services market because no such market exists in Oregon as a result of the state's vertical integration requirement.

3 *See generally* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

in the number of firms, without more, gives reason to believe an acquisition violates the Clayton Act.[4] The Horizontal Merger Guidelines ("Guidelines") clarify that the focus of modern coordinated effects analysis is not merely upon the number of firms but rather "whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction."[5] The key economic issue underlying coordinated effects analysis is to understand how the merger changes incentives to coordinate, or, as the Guidelines explain, to examine "how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct."[6] Consistent with the focus on changes in post-merger incentives to coordinate rather than mere structural analysis, the Guidelines declare the federal antitrust agencies are not likely to challenge a merger based upon a coordinated effects theory of harm unless the following three conditions are satisfied: (1) "the merger would increase concentration and lead to a moderately or highly concentrated market"; (2) "the market shows signs of vulnerability to coordinated conduct"; and (3) "the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[7]

Although market structure is relevant to assessing the first and second conditions, the Guidelines require more than the observation that the merger has decreased the number of firms to satisfy the third condition. This is the correct approach. And it is no less correct for mergers that reduce the number of firms from three to two. Of what relevance is market structure if the Commission does not allege or otherwise describe the relevance

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4 One reason to disfavor an approach that assesses the likelihood of anticompetitive effects based solely upon the number of firms in a market is that the approach is sensitive to the market definition exercise and requires great faith that we have defined the relevant market correctly.

5 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [hereinafter 2010 Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

6 *Id.*

7 *Id.*

of the reduction in the number of firms to post-merger incentives to coordinate? There is no basis in modern economics to conclude with any modicum of reliability that increased concentration -- without more -- will increase post-merger incentives to coordinate.[8] Thus, the Guidelines require the federal antitrust agencies to develop additional evidence that supports the theory of coordination and, in particular, an inference that the merger increases incentives to coordinate.

For example, the Guidelines observe that "an acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects."[9] In short, the Guidelines correctly, and consistent with

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8 The Commission touts legal authority rooted in a long ago established legal presumption that disfavors mergers that create concentrated markets. Statement of the Commission, Fidelity National Financial, Inc., FTC File No. 131-0159, n. 2. (Dec. 23, 2013) (citing to authority); *see also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (creating the so-called "structural presumption" that shifts the burden of proof away from the federal antitrust agencies and towards defendants in cases where the government challenges certain mergers resulting in concentrated markets). Significantly, however, modern economic learning and evidence no longer supports the foundations for the structural presumption upon which the Commission relies today. *See* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets, Remarks at the 2013 Georgetown Global Antitrust Symposium Dinner (Sept. 24, 2013), *available at* http://www.ftc.gov/sites/default/files/ documents/public_statements/ftc%E2%80%99s-role-shapi ng-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsym posium.pdf. And although *Philadelphia National Bank* remains good law in that it has not been overruled by the Supreme Court, it should not be the basis for the Commission's decision if the economic foundations upon which the legal proposition was built no longer hold. The Commission has correctly taken a similar approach with other disavowed but not yet overturned precedent, such as, for instance, *United States v. Von's Grocery Co.*, 385 U.S. 270 (1966).

9 *See* 2010 Guidelines, *supra* note 5, § 7.1. The Guidelines define a maverick as a firm "that plays a disruptive role in the market to the benefit of customers," and provide a number of examples. *See id*. § 2.1.5. Each example has in common the acquisition of a firm that imposes a particularized constraint upon successful coordination before the merger. *See* Jonathan B. Baker, *Mavericks, Mergers and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U.L. REV. 135 (2002); Taylor M. Owings, *Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor*, 66 VAND. L. REV. 323 (2013).

the modern economics of collusion, require the Commission to do more than point to a reduction in the number of firms to generate inferences of likely competitive harm. Although the acquisition of a maverick is not necessary for a coordinated effects theory, a theory consistent with the Guidelines must include a specific economic rationale explaining why—above the mere reduction in the number of firms attendant to all mergers—the acquisition of this rival is likely to eliminate or reduce a constraint upon successful coordination and thus lead to increased incentives to coordinate, or alternatively, some evidence supporting structural inferences in the context of the specific transaction.

III. Insufficient Evidence to Conclude an Increased Likelihood of Coordination Exists Post-Merger

In my view, the Commission's coordinated effects theory and the evidence to support it do not provide a credible basis for concluding the merger between FNF and LPS will enhance incentives to coordinate. There is no evidence beyond the mere increase in the concentration of title plants in the Oregon counties identified in the Complaint that provides a reason to believe that the merger will increase the likelihood or coordination or collusion for title insurance underwriting and thereby substantially reduce competition for the same.

Significantly, because insurance rates are generally set at the state level and also because Oregon is a "prior approval" state in which underwriters must request specific rates that the regulator then approves or amends, it is unlikely that concentration in title plant ownership at the county level can increase the likelihood of collusion or coordinated interaction and thereby result in an increase in price.[10] There also is no evidence that FNF's acquisition of LPS will eliminate a maverick that is currently a constraint upon successful coordination. Furthermore, there is no

10 Notably absent from the Commission's statement is any explanation of how the proposed transaction will increase the parties' incentives to coordinate on non-price terms post-merger. Such analysis is fundamental to modern merger analysis under the Guidelines. *See* 2010 Guidelines, *supra* note 5, § 7.1 ("The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction.").

evidence that title insurance underwriters can effectively coordinate on non-price factors, such as service and turnaround time. Lastly, there is no empirical evidence demonstrating that similar levels and changes in concentration in other title information service markets have resulted in a reduction in price or non-price competition.

Section 7 of the Clayton Act requires that the Commission first find that a merger likely will substantially lessen competition prior to agreeing to enter into a consent agreement with merging parties. Because there is insufficient evidence to conclude that the proposed transaction will substantially lessen competition, I respectfully dissent and believe the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

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