**Statement of the Federal Trade Commission**
**In the Matter of Fidelity National Financial, Inc. and Lender Processing Services, Inc.**
**File No. 131-0159**
**December 23, 2013**

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 other states where both Fidelity and LPS compete have a similar requirement. For

[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.

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 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

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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).

[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.

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.