UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

November 3, 2023

The Honorable Maxine Waters
United States House of Representatives
Committee on Financial Services
2129 Rayburn Office Building
Washington, D.C. 20515

RE: *In the Matter of Intercontinental Exchange, Inc., Docket No. 9413*

Dear Ranking Member Waters:

Thank you for commenting on the Federal Trade Commission's proposed consent order in the above-referenced proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the agency's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii).

The final consent order obtains relief that protects and preserves competition in the mortgage technology industry. The order ensures the divestiture of two businesses that provide critical services to the mortgage origination process, and it requires access to other products to ensure the strength and viability of these businesses in the hands of the divestiture buyer. We understand from your comment that you wish to ensure that the final consent order includes certain antitrust protections and community benefits, and that information gathered by the Commission in the course of its work is shared with the Financial Stability Oversight Council and its member agencies. The Commission appreciates your concerns and responds to them below.

Antitrust Protections

The order requires Intercontinental Exchange, Inc. ("ICE") to divest Black Knight, Inc.'s ("Black Knight") Optimal Blue business (including the Optimal Blue product, pricing, and eligibility engine), Empower loan origination system, and certain associated ancillary products and assets to Constellation Web Solutions, Inc. ("Constellation").

Your comment requests that Constellation be free from noncompete clauses and other contractual provisions that would limit it from integrating with other third parties in the mortgage technology market. The order does not limit either Constellation's ability to integrate products within the divested businesses with third-party products or Constellation's ability to acquire other companies. Your comment also requests that Constellation be free to merge with other players in the mortgage technology market. The order does not prohibit Constellation from entering into combinations with others. Rather, for three years, it must obtain prior approval from the Commission before selling any of the divested assets, and for another seven years, Constellation must obtain approval before selling the assets to an acquiring firm that operates a loan origination system or a product, pricing, and eligibility engine. This provision is standard in the Commission's consent orders involving divestitures and is designed to allow the Commission to ascertain whether a proposed buyer's incentives align with the remedial purpose of the Commission's order before allowing a sale to proceed.

In line with your comment regarding employee rights, the order prohibits ICE and Black Knight from enforcing any noncompete or non-solicit provision or agreement against any employee who seeks or obtains a position in the divested businesses during the term of the proposed order. It also requires ICE and Black Knight to facilitate Constellation's hiring of certain employees of the Black Knight divisions responsible for Empower and Optimal Blue to the extent the employees were not already included in the divestitures. The order further prohibits ICE and Black Knight from soliciting Constellation employees who came from Black Knight to work in the divested businesses for two years. Limiting noncompete provisions has been a priority of this Commission, and the order maintains this priority.

Your comment asks that the Commission account for how products are bundled and sold in the market and ensure the divestiture includes all products necessary for Constellation to be independent and competitive. The ancillary products related to the Empower business which are being divested to Constellation are listed in Appendix D to the order. In addition, Constellation is receiving a license to resell with Empower certain other Black Knight mortgage-related products and services which would be acquired by ICE. In reviewing any divestiture proposal, the Commission carefully considers whether the proposed buyers will have sufficient assets to continue providing the competitive intensity that currently exists between the merging parties. The Commission accepted the divestiture package of products in issuing the proposed order and making the proposed order final.

You propose that the consent agreement and divestiture should be monitored over a period of ten years. The term of the order, and its provision for an independent monitor being appointed to oversee compliance with the order, is ten years.

You request that the Commission conduct a retrospective review of the transaction two years from the closing date, and if harms to consumers or the market are found, force the sale of the Black Knight unit from ICE. The order addresses the competitive concerns described in the Commission's complaint and requires submission of regular compliance reports to the Commission. These reports must contain sufficient information and documentation to enable the Commission to determine independently whether ICE and Black Knight are complying with the order. As mentioned previously, the order also appoints an independent monitor to oversee compliance with the order. If the Commission finds that ICE and Black Knight have violated the terms of the order, the Commission has authority to address those violations.

Community Benefits and Financial Stability

Your comment raised additional requests that the Commission include in its relief provisions that would establish a Community and Stakeholder Advisory Board, require ICE to engage in community partnerships to support small businesses, direct ICE to invest in organizations promoting equity in homeownership, protect employee rights, and require profit sharing. The Commission's order addresses the competitive harms associated with the merger, which is our mandate under the antitrust laws.[1]

You also request that the Commission share information learned during its investigation with the Financial Stability Oversight Council ("FSOC") and its member agencies. Although the FTC is not a member agency to the FSOC, the Commissioners, senior leadership, and enforcement Bureaus interface with sister law enforcement where our interests overlap. To the extent allowable, our staff regularly work with federal and state agencies with overlapping law enforcement interests during our investigations to ensure that consumers reap the benefits of active antitrust and consumer protection enforcement.

The Commission welcomes public input on competition and consumer protection issues, including the comments submitted in this matter. After carefully considering your comment, along with the others submitted in this proceeding, we conclude that the public interest is best served by issuing the proposed order in this matter in final form without alteration. The final order and other relevant materials are available from the Commission's website at http://www.ftc.gov. It helps the Commission's analysis to hear from a variety of sources in its work, and we thank you again for your comment.

By direction of the Commission.

April J. Tabor
Secretary

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[1] We pursue the Commission's merger enforcement work with the objective of fulfilling our statutory mandate and protecting all Americans – including communities of color – from unlawful mergers. Consistent with that objective, the FTC issued an Equity Action Plan in April 2022 that lays out the FTC's work to meaningfully address barriers that underserved communities face in participating in and benefiting from a fair and thriving marketplace. *See* Federal Trade Commission Equity Action Plan, 4-5 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC%20Equity%20Action%20Plan%2C%20Final%20-%20For%20Release%204.14.22.pdf.