COMMUNITY
Home Lenders Association, Inc.
2101 Wilson Boulevard, Suite 610
Arlington, VA 22201

June 8, 2022

The Honorable Merrick Garland
Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530

ICE Purchase of Black Knight

Dear Attorney General Garland:

The Community Home Lenders Association (CHLA)[1] is writing to request that the Justice Department undertake a comprehensive antitrust review of the proposed $13.1 billion purchase by Intercontinental Exchange ("ICE") of Black Knight ("BKI"). CHLA asks the Justice Department to take such actions as are necessary and appropriate (including merger denial or approval conditions) to prevent anti-consumer actions (e.g., tying or bundling) and to maintain the competitiveness of the market for mortgage services.

Since the 2008 housing crisis, mortgage origination and servicing have become more competitive. A large number of Independent Mortgage Banks (IMBs) have to a significant degree replaced what had been a more concentrated group of banks as the primary originators and servicers of mortgage loans.

IMBs now originate over 60% of all mortgage loans and over 90% of FHA loans (which dominate the market for home purchases by minority and other underserved borrowers). The number and diversity of IMB lenders has benefitted consumers, through increased competition and more personalized service.

However, with the effective end to paper and manual processes for manufacturing mortgage loans, software and related services have become an essential and increasingly important cost component. Therefore, mortgage market services dominance as a result of an ICE/Black Knight merger would have a significant detrimental impact on consumers that are buying a home or refinancing - since essential origination software and related services costs are generally passed along directly to the consumer.

The ICE/Black Knight proposed merger is also a major concern to IMBs, particularly the smaller IMBs that CHLA represents. Smaller IMBs would be particularly vulnerable to market concentration in this area, because smaller IMBs lack the loan volume and economies of scale to develop their own proprietary software products or to negotiate on fair terms with a dominant services provider over rates and terms.

Reduced competition could also reduce the competitive pressures for a combined ICE and Black Knight to innovate and develop new products and services – which would be detrimental to consumers. Finally, the accumulation of significant amounts of consumer data within one entity raises a myriad of concerns.

CHLA also asks the Consumer Financial Protection Bureau (CFPB) to undertake a review of a merger impact on consumers and asks the Federal Trade Commission (FTC) to review the proposed transaction.

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[1] CHLA is the only national trade association that exclusively represents independent mortgage bankers (IMBs). Our members are small and mid-sized IMBs whose sole business is originating and servicing mortgage loans. [**See communitylender.org**]

<u>Harm to Consumers</u>

This merger raises both serious horizontal and vertical antitrust concerns that adversely affect consumers.

The provision of mortgage origination software and related services **<u>can</u>** have a cost savings benefit to mortgage lenders – and in turn consumers - through the more efficient provision of services by a third party than many lenders can provide themselves through their own internal or proprietary development. However, such a benefit **<u>is dependent</u>** on there being a competitive market for such third-party services.

One mortgage services provider with a dominant market share could readily engage in a number of anti-competitive actions, particularly conditioning the provision of its services to the purchase of unwanted or unnecessary products through: (1) bundling, (2) tying, (3) anticompetitive licensing agreements, or (4) tacking on miscellaneous junk fees (so-called click fees) with no real consumer benefit. In fact, there is evidence that this may already be taking place.

The potential harm to consumers of the proposed ICE/Black Knight merger is simple. In an uncompetitive market, lenders would have no option except to pass these excessive costs along to consumers.

This is exacerbated by concerns about the compatibility of ICE/Black Knight software with that of their competitors - which limits lenders' ability to switch out software and services components.

These concerns are further exacerbated by the extent to which these mortgage origination services and systems play a critical, real-time role in executing and closing mortgage loans.

Contracts for provision of such mortgage services are typically for a stated period of time, e.g., one year. This leaves lenders, particularly smaller IMBs, particularly vulnerable to the threat of non-renewal. Even a short transition or changeover period to a new services provider could shut down mortgage loan closings for a lender, which would be very costly and could harm the lender's reputation for execution.

This is not just a question of switching mortgage origination software (LOS). Many critical functions, such as regulatory compliance, pricing, and training are built around these software systems. Following are examples of ICE/Black Knight products integrally tied to loan origination:

- Mavent – regulatory compliance
- Velocify – consumer mortgage loan leads
- PPP – product and pricing engine
- E-Close – allows consumers to e-sign documents and disclosures
- POS – Consumer Connect – controls consumer web applications and borrower portal

As a result, a combined ICE/Black Knight with a dominant market share could easily use leverage to demand significant and unwarranted price increases upon renewal. A smaller lender could have no practical option other than to accept the significant and unwarranted cost increases.

<u>Market Dominance in Mortgage Origination Services</u>

ICE became the leading provider of mortgage origination software services and systems, through its September 2020 acquisition of Ellie Mae, whose Encompass platform is being used for around 50% of all mortgage loans. ICE's largest competitor is Black Knight, whose market share exceeds 10% of the mortgage origination market. Therefore, the combined entity would now be in the estimated range of at least 60% of the entire mortgage origination market.

We also note estimates that as much as 25% of the market for mortgage origination services comes from proprietary systems developed by larger mortgage lenders. This may protect many of the big banks and big IMBs – but underscores the direct threat the ICE/Black Knight merger poses to smaller IMBs.

Moreover, when you exclude internal proprietary systems, the combined ICE/Black Knight market share for services provided to lenders as a product could easily exceed 80%.

Even this percentage may underestimate the true market share, since some of the proprietary systems may be for correspondent mortgage loan purchases by large aggregators of loans originated by smaller IMBs.

As noted, it is generally not economical for smaller IMBs to develop their own proprietary software and related origination systems. Moreover, concerns about compatibility and interoperability limit the ability of smaller IMBs to develop their own sub-components of such loan origination software systems.

The other option – purchasing services from large banks and large IMBs that have developed their own proprietary systems – puts smaller IMBs in the undesirable position of going hat in hand to their direct mortgage competitors to try to buy such services.

Market Dominance in Mortgage Servicing Services

Black Knight, through its MSP platform, already services 64% of all mortgages in the United States. MSP offers lenders' automation of servicing functions, such as setup and maintenance, escrow administration, account management, default management, and others.

ICE does not offer a competing servicing platform.

However, as noted the proposed merger would combine one firm with an already dominant share of mortgage origination software and related systems (ICE) with another firm (Black Knight) with an already dominant share of mortgage servicing software and related systems.

This raises concerns that the merger will create synergies to engage in anticompetitive practices with regard to tying software and systems between mortgage origination and servicing.

Thank you for consideration of these comments and requests.

Sincerely,

COMMUNITY HOME LENDERS ASSOCIATION

CC: Honorable Rohit Chopra
Director, Consumer Financial Protection Bureau

Honorable Lina M. Khan
Chair, Federal Trade Commission

Honorable Sandra Thompson
Director, Federal Housing Finance Agency

Honorable Julia Gordon
Commissioner, Federal Housing Administrator