indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 24, 2013.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *First Okmulgee Corporation,* Okmulgee, Oklahoma, Coffeyville Bancorp, Inc., and Community State Bank, both in Coffeyville, Kansas; to acquire 100 percent of the voting shares of, and merge with Coffeyville Financial Corporation, Omaha, Nebraska, and thereby indirectly acquire voting shares of Condon Bank & Trust, Coffeyville, Kansas.

Board of Governors of the Federal Reserve System, September 24, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–23590 Filed 9–26–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 131 0058]

Nielsen Holdings N.V., a Corporation and Aribtron Inc., a Corporation; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before October 21, 2013.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/nielsenarbitronconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Nielsen Arbitron, File No. 131 0058'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/nielsenarbitronconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Catherine M. Sanchez (202–326–3326), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for September 20, 2013), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before October 21, 2013. Write ''Nielsen Arbitron, File No. 131 0058'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which . . . is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/nielsenarbitronconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home*. you also may file a comment through that Web site.

If you file your comment on paper, write ''Nielsen Arbitron, File No. 131 0058'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before October 21, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Analysis of Agreement Containing 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 [2] 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 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.

[2] 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.

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 [3]

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.[4] 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

[3] 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.

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

''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, 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.[5]

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.[6] 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.

[5] 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.

[6] 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.

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

Donald S. Clark,

Secretary.

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.[7] 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. 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.[8] 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.[9] Although all 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.[10] 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.[11] 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.[12] 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.[13] For example, when parties seek to show that a 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.[14] 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.'' [15] Likewise, to prove a failing firm defense successfully, the parties must show

[7] 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. . . .'').

[8] Complaint ¶ 10, Nielsen Holdings N.V., FTC File No. 131–0058 (Sept. 20, 2013).

[9] 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 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).

[10] *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).

[11] *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).

[12] 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].

[13] 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) (''[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.'').

[14] 2010 Merger Guidelines, *supra* note 6, at § 10.

[15] *Id.* at § 9.

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.[16]

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.[17] 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. 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.[18] 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 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.[19] 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

[16] *Id.* at § 11.

[17] *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.*

[18] 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.

[19] 2010 Merger Guidelines, *supra* note 6, § 10 n. 14.

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.

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.[20] 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.[21] 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 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.[22] 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.[23]

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[20] *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).

[21] *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.*

[22] *See* Ginsburg & Wright, *supra* note 14, at 179.

[23] 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/110407roschconsentdecrees.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'').

GENERAL SERVICES ADMINISTRATION

[Notice-MG–2013–02; Docket No: 2013–0002; Sequence 26]

Leased Asset Energy and GHG Reporting Interpretive Guidance

AGENCY: Office of Government-Wide Policy, U.S. General Services Administration (GSA).

ACTION: Notice.

SUMMARY: This notice announces guidance on estimating and voluntarily reporting leased asset energy use and greenhouse gas (GHG) emissions data. The guidance contains a practical set of guidelines and best practices for agencies developing their own policies and processes for leasing, energy data collection and estimation, and GHG reporting and may be found at *www.gsa.gov/hpgb.* It is not federal policy for energy reporting or GHG accounting.

DATES: September 27, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Kinga Porst, Office of Federal High Performance Green Buildings (MG), Office of Government-Wide Policy, GSA, at 202–501–0762 or via email at *kinga.porst@gsa.gov.* Please cite Notice-MK–2013–02.

SUPPLEMENTARY INFORMATION: This notice announces guidance on estimating and voluntarily reporting leased asset energy use and greenhouse gas (GHG) emissions data. The guidance contains a practical set of guidelines and best practices for agencies developing their own policies and processes for leasing, energy data collection and estimation, and GHG reporting and may be found at *www.gsa.gov/hpgb.* It is not federal policy for energy reporting or GHG accounting.

Dated: September 23, 2013.

Kevin Kampschroer,

Federal Director, Office of Federal High Performance Green Buildings, Office of Government-wide Policy.

[FR Doc. 2013–23581 Filed 9–26–13; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier HHS–OS–20584–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit a new Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting that ICR to OMB, Office of the Secretary, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before November 26, 2013.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier HHS–OS–20584–60D for reference. *Information Collection Request Title:* Survey on