# Memo

**Date:** February 20, 2014

**To:** Tax Files

**From:** Richard Cox, Executive Vice President and Chief Tax Officer

**Subject:** Certain U.S. Federal Income Tax Consequences of the Acquisition of Lender Processing Services, Inc. to Shareholders

This memorandum provides a summary of certain United States ("**U.S.**") federal income tax consequences resulting from the acquisition (the "**LPS Merger**") of Lender Processing Services, Inc. ("**LPS**") by Fidelity National Financial, Inc. ("**FNF**"). Specifically, this memorandum discusses the consequences of the LPS Merger to the former shareholders of LPS.

**Any tax advice included in this written communication was not intended or written to be used, and it cannot be used by you, for the purpose of avoiding any penalties that may be imposed on the taxpayer by any governmental taxing authority or agency.**

## I. Summary of Relevant Facts

On May 28, 2013, FNF, Lion Merger Sub, Inc. ("**Merger Sub**"), and LPS entered into the Agreement and Plan of Merger (the "**Merger Agreement**"), dated as of May 28, 2013, whereby FNF would acquire 100 percent of the stock of LPS by way of a reverse merger in a fully taxable transaction.

On January 2, 2014, FNF completed the acquisition of LPS pursuant to the Merger Agreement. Pursuant to the Merger Agreement, Merger Sub merged with and into, with LPS surviving as a subsidiary of FNF, and each outstanding share of common stock of LPS (other than shares owned by LPS, its subsidiaries, FNF or Merger Sub and shares in respect of which appraisal rights had been properly exercised and perfected under Delaware law) was automatically converted into the right to receive (i) $28.102 in cash and (ii) 0.28742 (the "**Exchange Ratio**") of a share of Class A common stock of FNF. The Exchange Ratio was calculated based on a formula that used the average volume weighted averages of the trading prices of FNF common stock during the ten trading day period ending on (and including) the third trading day prior to the closing of the LPS Merger, which was calculated as $31.459. In connection with the merger, FNF issued approximately 25.9 million shares of FNF common stock and paid approximately $2.535 billion in cash to former stockholders and equity award holders of LPS.

## II. Summary of Relevant Law and Analysis

### A. Rules Regarding Gain or Loss Determination and Basis

Section 1001 provides that, unless otherwise provided in the Code, the entire amount of the gain or loss from the sale or exchange of property is recognized.[1] The amount of gain or loss from the sale or exchange of property is equal to the difference between the amount realized from such sale or exchange and the adjusted basis, determined under section 1011, of such property.[2] Under section 1001(b), the amount realized from the sale or exchange of property is equal to the sum of any money received plus the fair market value of the other property received.

Section 1011(a) provides that the adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, is the basis (determined under section 1012 or other applicable provisions), as adjusted.

Section 1012(a) provides that the basis of property is the cost of such property, except as otherwise provided in subchapter C (relating to corporate distributions and adjustments) and other applicable provisions.

### B. Rules Regarding Gain or Loss Determination and Basis

As discussed in the Tax Opinion, we concluded that the LPS Merger should qualify as a qualified stock purchase under section 338 as a purchase under section 1001 of 100 percent of LPS's outstanding stock from LPS's former shareholders. Thus, each LPS shareholder should recognize gain or loss from the LPS Merger equal to the difference between the amount realized from the LPS Merger (*i.e.*, the fair market value of the FNF common shares and cash received in the LPS Merger) and the adjusted basis of the LPS stock in the hands of that shareholder. Under section 1012, each LPS shareholder should receive shares of FNF common stock with a basis equal to the fair market value of such shares when received.

As stated above, section 1012 generally provides that the basis of property received in an exchange is the cost of such property. In general, the courts have held that where a corporation acquires property in exchange for its stock, the cost basis of the property acquired is the value of the stock surrendered in the exchange.[3] The determination of fair market value, in turn, is generally defined for tax purposes as "the price at which property would change hands in a transaction between a willing buyer and a willing seller, neither being under compulsion to buy or to sell, and both being reasonably informed as to all relevant facts."[4] In the case of publicly-

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[1] Section 1001(c).

[2] Section 1001(a).

[3] *FX Systems Corp. v. Comm'r*, 79 T.C. 957, 963 (1982); *Pittsburgh Terminal Corp. v. Comm'r*, 60 T.C. 80, 87 (1973), *aff'd*, 500 F.2d 1400 (3d Cir. 1974).

[4] *Bankers Trust Co. v. United States*, 518 F.2d 1210, 1219 (Ct. Cl. 1975); *see also Palmer v. Comm'r*, 523 F.2d 1308, 1310 (8th Cir. 1975).

traded stock, the courts have held that the most accurate measure of fair market value is the average exchange price quoted on the date of the acquisition.[5]

An exception to this general rule, however, has been found where the parties have assigned a fair market value to the property exchanged in a binding agreement or contract.[6] Were a binding agreement as to the fair market value of the property subject to the exchange found to exist, the taxpayers generally would be bound to record the consequences of the transaction in accordance with the terms of their agreement absent certain exceptional circumstances.[7] Nonetheless, a binding agreement as to fair market value may not exist if the parties have not established the fair market value of the property at the time the agreement is adopted. That is, it appears that general assumptions or estimates of value in an agreement, absent terms representing an agreed upon value, may not amount to a mutual, binding agreement for purposes of fair market value such that value would be determined using the general rule discussed in the paragraph above.[8] It does not appear that there was any binding agreement to use any particular value here.

Thus, in general the LPS shareholders should have an amount realized and a basis in the FNF stock received equal to the fair market value of the FNF stock on January 2, 2014. Among other possible methods for valuing the FNF stock on January 2, 2014, the fair market value of the FNF stock could be calculated as the average exchange price on January 2, 2014, which based on market prices appears to be approximately $32.435 (averaging the high and low exchange price on such day). Alternatively, however, because the LPS Merger closed at 5pm on January 2, 2014, after the New York Stock Exchange had closed, the closing price of the FNF stock on January 2, 2014 ($32.25) may also be viewed as an accurate measure and/or reasonable approximation of fair market value. LPS shareholders should be urged to consult with their own tax advisors regarding the method for calculating the fair market value of the FNF stock received.

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[5] *See Amerada Hess Corp. v, Comm'r*, 517 F.2d 75 (3d Cir. 1975). *But cf. Pope & Talbot, Inc. v. Comm'r*, 162 F.3d 1236, 1241 (9th Cir. 1999) ("The rule in *Amerada Hess* applies to the valuation of stocks, not to the valuation of the underlying assets of a publicly traded entity. Furthermore, *Amerada Hess* qualifies the general rule relating to the valuation of stocks by noting that the 'assumption underlying the concept of the market as an index for valuing particular property is that the property to be valued is substantially similar to the property actually sold on the market.'" (citing *Amerada Hess*, 517 F.2d at 83)).

[6] *See, e.g.*, *Sullivan v. United States*, 618 F.2d 1001 (3d Cir. 1980); *Comm'r v. Danielson*, 378 F.2d 771 (3d Cir. 1967).

[7] *See, e.g.*, *Bankers Trust Co*, 518 F.2d 1210; *United States v. Daum*, 986 F. Supp. 1037 (W.D. Pa. 1997).

[8] *See, e.g.*, *Campbell v. United States*, 661 F.2d 209 (Ct. Cl. 1981); *Hospital Corp. of America v. Comm'r*, 72 T.C.M. (CCH) 1581 (1996).