interim monitor to assure that Akorn and Hi-Tech expeditiously comply with all of their obligations and perform all of their responsibilities pursuant to the Consent Agreement. In order to ensure that the Commission remains informed about the status of the transfer of rights and assets, the Consent Agreement requires Akorn and Hi-Tech to file reports with the interim monitor who will report in writing to the Commission concerning performance by the parties of their obligations under the Consent Agreement.

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 Order or to modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2014–08950 Filed 4–18–14; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

[Docket No. 9356]

Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain; Analysis of Agreement Containing Consent Orders 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 methods of competition. The attached Analysis of Agreement Containing Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 12, 2014.

ADDRESSES: Interested parties may file comments at *https://ftcpublic.commentworks.com/ftc/ardaghstgobainconsent* online or on paper, by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Ardagh Group S.A and Saint-Gobain Containers, Inc. and Compagnie de Saint-Gobain,—Consent Agreement; Docket No. 9356'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/ardaghstgobainconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comments 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: Catharine Moscatelli, Bureau of Competition, (202–326–2749), 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 3.25(f),16 CFR § 3.25(f), notice is hereby given that the above-captioned consent agreement containing consent orders 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 April 10, 2014), 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 May 12, 2014. Write ''Ardagh Group S.A and Saint-Gobain Containers, Inc. and Compagnie de Saint-Gobain,—Consent Agreement; Docket No. 9356'' 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 comment online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/ardaghstgobainconsent* by following the instructions on the web-based forms. 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 ''Ardagh Group S.A and Saint-Gobain Containers, Inc. and Compagnie de Saint-Gobain,—Consent Agreement; Docket No. 9356'' 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 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 May 12, 2014. You can find more information, including routine uses

[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).

permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') with Ardagh Group S.A. (''Ardagh''). The purpose of the Consent Agreement is to remedy the anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers, Inc. (''Saint-Gobain'') from Compagnie de Saint-Gobain. Under the terms of the Consent Agreement, Ardagh must divest six of its nine United States glass container manufacturing plants to an acquirer approved by the Commission. The Consent Agreement provides the acquirer the manufacturing plants and other tangible and intangible assets it needs to effectively compete in the markets for the manufacture and sale of glass containers to both beer brewers and spirits distillers in the United States. Ardagh must complete the divestiture within six months of the date it signs the Consent Agreement.

On January 17, 2013, Ardagh agreed to acquire Saint-Gobain from its French parent company, Compagnie de Saint-Gobain, for approximately $1.7 billion. This acquisition would concentrate most of the $5 billion U.S. glass container industry in two major competitors—Owens-Illinois, Inc. (''O–I'') and the combined Ardagh/Saint-Gobain. These two major competitors would also control the vast majority of glass containers sold to beer brewers and spirits distillers in the United States. On June 28, 2013, the Commission issued an administrative complaint alleging that the acquisition, if consummated, may substantially lessen competition in the markets for the manufacture and sale of glass containers to brewers and distillers in the United States in violation of 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.

The 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 a part of the public record. After 30 days, the Commission will review the Consent Agreement and comments received, and decide whether it should withdraw, modify, or make the Consent Agreement final.

II. The Parties

Ardagh, headquartered in Luxembourg, is a global leader in glass and metal packaging. Ardagh entered the United States glass container industry through two 2012 acquisitions—first acquiring a single-plant glass container manufacturer, Leone Industries, and then an eight-plant manufacturer, Anchor Glass Container Corporation (''Anchor''). Through the Anchor acquisition, Ardagh became the third-largest glass container manufacturer in the country, supplying glass containers for beer, spirits, non-alcoholic beverages, and food. Ardagh's nine glass container manufacturing plants are located in seven U.S. states.

Saint-Gobain is a wholly-owned U.S. subsidiary of Compagnie de Saint-Gobain, a French company which, among other businesses, manufactures and sells glass containers throughout the world. In the United States, Saint-Gobain is the second-largest glass container manufacturer, supplying beer, spirits, wine, non-alcoholic beverages, and food containers. Saint-Gobain operates 13 glass container manufacturing plants located in 11 U.S. states. Saint-Gobain, operates under the name ''Verallia North America'' or ''VNA.''

III. The Manufacture and Sale of Glass Containers to Brewers and Distillers in the United States

Absent the remedy, Ardagh's acquisition would harm competition in two relevant lines of commerce: the manufacture and sale of glass containers to (1) beer brewers, and (2) spirits distillers in the United States. Currently, only three firms—Owens-Illinois, Inc., Saint-Gobain, and Ardagh—manufacture and sell most glass containers to brewers and distillers in the United States. Collectively, these three firms control approximately 85 percent of the United States glass container market for brewers, and approximately 77 percent of the market for distillers.

The Commission often calculates the Herfindahl-Hirschman Index (''HHI'') to assess market concentration. Under the Federal Trade Commission and Department of Justice Horizontal Merger Guidelines, markets with an HHI above 2,500 are generally classified as ''highly concentrated,'' and acquisitions ''resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.'' In this case, both relevant product markets are already concentrated and the acquisition would increase the HHIs substantially. Absent the proposed remedy, the acquisition would increase the HHI by 782 points to 3,657 for glass beer containers, and by 1,072 points to 3,138 for glass spirits containers. With the proposed remedy, however, Ardagh's acquisition of Saint-Gobain will result in no increase in HHI in the glass container market for beer brewers and a 33 point HHI increase in the glass container market for distillers.

The relevant product markets in which to analyze the effects of the acquisition do not include other packaging materials, such as aluminum cans for beer or plastic bottles for spirits for several reasons. First, Ardagh and Saint-Gobain routinely identify each other and O–I as their most direct competitors, focusing their business strategies, market analysis, and pricing on glass container competition. Indeed, glass container pricing is not responsive to the pricing of other types of containers. Second, although brewers and distillers use aluminum and plastic packaging, respectively, for their products, these customers solicit and evaluate glass container bids independently of their can and plastic procurement efforts. Third, brewers and distillers demand glass so that they may maintain a premium image and brand equity and meet their consumers' expectations. Thus, brewers and distillers cannot easily or quickly substitute their glass container purchases with other packaging materials without jeopardizing the sale of their own products. Finally, Ardagh and Saint-Gobain distinguish glass containers from containers made with other materials based on qualities including oxygen impermeability, chemical inertness, and glass' ability to be recycled.

The United States is the appropriate geographic market in which to evaluate the likely competitive effects of the acquisition. Ardagh and Saint-Gobain each maintain geographically diverse networks of plants that manufacture and sell glass containers to brewers and distillers throughout the country. Most U.S. brewers and distillers have similar competitive glass container alternatives from which to choose, regardless of their geographic location. The relevant geographic market is no broader than the United States because product weight and logistics constraints limit brewers' and distillers' ability to purchase significant volumes of glass containers from outside the country.

IV. Effects of the Acquisition

Absent relief, the acquisition would result in an effective duopoly likely to cause significant competitive harm in the markets for the manufacture and sale of glass containers to brewers and distillers. The glass container industry is a highly consolidated, stable industry, with low growth rates and high barriers to entry. The acquisition would increase the ease and likelihood of anticompetitive coordination between the only two remaining major suppliers. The acquisition would also eliminate direct competition between Ardagh and Saint-Gobain. Thus, the acquisition would likely result in higher prices and a reduction in services and other benefits to brewers and distillers.

V. Entry

Entry into the markets for the manufacture and sale of glass containers to brewers and distillers would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the likely competitive harm from the acquisition. The glass container industry in the United States enjoys significant barriers to entry and expansion including the high cost of building glass manufacturing plants, high fixed operating costs, the need for substantial technological and manufacturing expertise, and long-term customer contracts. For these reasons, entry by a new market participant or expansion by an existing one, would not deter the likely anticompetitive effects from the acquisition.

VI. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the acquisition by requiring Ardagh to divest six of its nine glass container manufacturing plants in the United States to an acquirer within six months of executing the Consent Agreement. In addition, the Consent Agreement requires Ardagh to transfer all customer contracts currently serviced at those six plants to an acquirer through an agreement approved by the Commission.

Under the proposed Consent Agreement, Ardagh will divest six of the manufacturing plants that it acquired when it purchased Anchor in 2012, along with Anchor's corporate headquarters, mold and engineering facilities. The six plants produce glass containers for brewers and distillers and are located in: Elmira, NY; Jacksonville, FL; Warner Robins, GA; Henryetta, OK; Lawrenceburg, IN; and Shakopee, MN. Anchor's corporate headquarters, mold and engineering facilities are located in Tampa, FL, Zanesville, OH, and Streator, IL, respectively. Other assets that Ardagh will divest include customer contracts, molds, intellectual property, inventory, accounts receivable, government licenses and permits, and business records. In addition, the Consent Agreement limits Ardagh's use of, and access to, confidential business information pertaining to the divestiture assets.

Through the proposed Consent Agreement, the acquirer of these assets will be the third-largest glass container manufacturer in the United States. These assets replicate the amount of glass containers for beer and spirits that the third largest supplier offers today. The acquirer will own plants that span a broad geographic footprint, offer a well-balanced product mix, and have flexible manufacturing capabilities. Its presence will preserve the three-way competition that currently exists in the relevant markets and moderate the potential for coordination.

Ardagh must complete the divestiture within six months of signing the Consent Agreement. Pending divestiture, Ardagh is obligated to hold the divestiture assets separate and to maintain the viability, marketability and competitiveness of the assets. With the hold separate in place, the divested assets, under the direction of an experienced senior management team, will be in a position to compete in the glass industry, independent from Ardagh. A hold separate monitor will supervise the management of the divestiture assets until Ardagh completes the divestiture.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and 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 [2]

In June 2013, the Commission issued a complaint alleging that Ardagh Group, S.A.'s proposed $1.7 billion acquisition of Saint-Gobain Containers, Inc. would reduce competition in the U.S. markets for glass containers for beer and spirits. Specifically, the Commission alleges that the acquisition would have eliminated head-to-head competition between the parties and resulted in a near duopoly in markets already vulnerable to coordination. If the Commission had not challenged the deal, the merged firm and its only remaining significant competitor, Owens-Illinois would have controlled more than 75 percent of the relevant markets. The Commission staff developed evidence to prove at trial that the acquisition would likely have substantially lessened competition in violation of Section 7 of the Clayton Act. After the start of litigation, the parties chose to settle the matter by divesting six of the nine U.S. plants currently owned by Ardagh. The Commission has now accepted the proposed consent order for public comment and believes it addresses the competitive issues here, as well as the widespread customer concerns expressed by brewers and distillers who depend on a steady and competitively-priced supply of glass containers. We outline below our concerns with this deal and the benefits of the proposed consent.

The 2010 Merger Guidelines explain that the Commission will likely challenge a transaction where ''(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct . . . ; and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.'' [3] We have reason to believe each of these factors is present here. The transaction would have dramatically increased concentration in already highly-concentrated markets. The glass container markets for beer and spirits are vulnerable to post-acquisition coordination, exhibiting features such as low demand growth, tight capacity, high and stable market shares, and high barriers to entry that typify markets that have experienced coordination. The existing three major glass manufacturers already have access to a wealth of information about the markets and each other, including plant-by-plant production capabilities, profitability, the identities of each other's customers, and details regarding each other's contracts and negotiations with customers. Customers, industry analysts, public statements, and distributors all serve as conduits for market information. The Commission found evidence that companies in this industry understand their shared incentives to keep capacity tight, avoid price wars, and follow a ''price over volume'' strategy. We believe this transaction would have made it easier for the remaining two dominant manufacturers to coordinate with one another on price and non-price terms to

[2] Chairwoman Ramirez and Commissioners Brill and Ohlhausen join in this statement.

[3] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 7.1 (2010) [hereinafter 2010 Horizontal Merger Guidelines], *available at http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.*

achieve supracompetitive prices or other anticompetitive outcomes.

As noted in the 2010 Merger Guidelines, the Commission will also likely challenge a transaction producing harmful unilateral effects. For instance, this could occur where the merged firm would no longer have to negotiate against other competitors for customer supply contracts, or where the transaction would eliminate a competitor that otherwise could have expanded output in response to a price increase.[4] The Commission charges that Ardagh's acquisition of Saint-Gobain would have eliminated head-to-head competition between the two merging firms, which are the second- and third-largest U.S. glass container manufacturers in the relevant product markets. Brewers and distillers have reaped substantial benefits from the rivalry between the two, often playing one against the other in supply negotiations.

Once a prima facie showing of competitive harm is made, the Commission will consider evidence from the parties of verifiable, merger-specific efficiencies that could offset this harm.[5] In highly concentrated markets with high barriers to entry, as here, the parties can rebut the evidence of harm only with evidence of ''extraordinary efficiencies.'' [6] Efficiencies represent an important aspect of the Commission's merger analysis, with a recent study showing that over a ten-year period 37 of 48 closed investigations involved internal staff memoranda examining efficiencies.[7] Similarly, a recent survey analyzing evidence considered by Commission staff prior to issuing second requests concluded that staff credited parties' detailed efficiency claims ''[i]n most cases,'' even if they proved insufficient to offset competitive concerns about the transaction.[8]

In this matter, many of Ardagh's proffered synergies were not merger-specific and could have been achieved absent the acquisition. For instance, the parties claimed the merger would allow them to reduce overhead within the Saint-Gobain organization. However, this claim related to the staffing of the current Saint-Gobain organization alone and is separate from any additional savings to be reaped from eliminating staff positions made redundant by the combination of Ardagh and Saint-Gobain. Thus, the claim is not merger specific. In addition, Ardagh made broad claims of additional operational efficiencies, and likely would have achieved some. However, the parties put forward insufficient evidence showing that the level of synergies that could be substantiated and verified would outweigh the clear evidence of consumer harm.

For these reasons, we respectfully disagree with Commissioner Wright's conclusion that there is no reason to believe the transaction violates Section 7 of the Clayton Act. We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims here and believe he overlooks several important points in his analysis. We are mindful of our responsibility to weigh appropriately all evidence relevant to a transaction and, moreover, understand our burden of proof before a trier of fact.

Commissioner Wright expresses concern that competitive effects are estimated whereas efficiencies must be ''proven,'' potentially creating a ''dangerous asymmetry'' from a consumer welfare perspective.[9] We disagree. Both competitive effects and efficiencies analyses involve some degree of estimation. This is a necessary consequence of the Clayton Act's role as an incipiency statute. In addition, while competitive effects data and information tends to be available from a variety of sources, the data and information feeding efficiencies calculations come almost entirely from the merging parties. Indeed, the 2010 Merger Guidelines observe that ''[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms.'' [10] The need for independent verification of this party data animates the requirement that, to be cognizable, efficiencies must be substantiated and verifiable.

Courts have repeatedly emphasized that, ''while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable.'' [11] This is for good reason. Indeed, ''if this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act.'' [12] The merger analysis the Commission undertook in this case is thus entirely consistent with the 2010 Horizontal Merger Guidelines and established case law.

Finally, we also believe the proposed consent order addresses the competitive concerns we have identified. The proposed order requires Ardagh to sell six manufacturing plants and related assets to a single buyer within six months, thereby creating an independent third competitor that fully replaces the competition that would have been lost in both the beer and spirits glass container markets had the merger proceeded unchallenged. In sum, we have ample reason to believe that the proposed merger was anticompetitive and without appropriate efficiency justification, and that the proposed remedy will maintain competition in the market for glass containers for beer and spirits. We commend and thank Commission staff for their hard work on this matter.

By direction of the Commission, 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 Ardagh Group (''Ardagh'') to remedy the allegedly anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers Inc. and Compagnie de Saint-Gobain (jointly, ''St. Gobain''). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Ardagh's acquisition will substantially lessen competition in glass containers manufactured and sold to beer brewers and spirits distillers in the United States, in violation of Section 7 of the Clayton Act. FTC staff and their economic expert should be commended for conducting a thorough investigation of this matter, working diligently to develop and analyze a substantial quantity of documentary and empirical evidence, and providing thoughtful analyses of the transaction's potential

[4] *See* 2010 Horizontal Merger Guidelines §§ 6, 6.2–6.3.

[5] *See id.* § 10.

[6] *Fed. Trade Comm'n* v. *Heinz,* 246 F.3d 708, 720 (D.C. Cir. 2001); *In re Polypore Int'l, Inc.,* Initial Decision, No. 9327, 2010 WL 866178, at *184–85 (FTC Mar. 1, 2010).

[7] Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997–2007* 14 n.31 (2009), *available at http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf.*

[8] Darren S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC,* 78 Antitrust L.J. 591, 602 (2013).

[9] Dissenting Statement of Commissioner Wright at 5.

[10] 2010 Horizontal Merger Guidelines § 10.

[11] *United States* v. *H&R Block, Inc.,* 833 F. Supp. 2d 36, 46 (D.D.C. 2011); *see also* 2010 Horizontal Merger Guidelines § 10 (noting that it is ''incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify [them] by reasonable means.'').

[12] *H&R Block,* 833 F. Supp. 2d at 46.

competitive effects. Indeed, I agree with the Commission that there is evidence sufficient to give reason to believe the proposed transaction would likely result in unilateral price increases. After reviewing the record evidence, however, I concluded there is no reason to believe the transaction violates Section 7 of the Clayton Act because any potential anticompetitive effect arising from the proposed merger is outweighed significantly by the benefits to consumers flowing from the transaction's expected cognizable efficiencies. 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 write separately today to explain my reasoning for my vote in the matter and to highlight some important issues presented by this transaction relating to the burden of proof facing merging parties seeking to establish cognizable efficiencies.

I. Potential Anticompetitive Effects Are Small at Best Relative to Cognizable Efficiencies

The Commission alleges both unilateral and coordinated price effects will arise from the proposed transaction. The economic logic of the unilateral effects theory is straightforward: If the merger combines the two glass manufacturers who are the most preferred for a set of customers, there is the potential for a price increase arising from the loss of competition between those two firms. This is because sales previously diverted to the next closest competitor in response to a price increase will now be internalized by the post-merger firm. When analyzing the potential for unilateral price effects, the 2010 Merger Guidelines indicate the Agencies will consider ''any reasonably available and reliable information,'' including ''documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys.'' [1] The Merger Guidelines also contemplate a number of quantitative analyses to facilitate the analysis of potential unilateral effects including calculating diversion ratios and the value of diverted sales. Where sufficient data are available, the Merger Guidelines indicate ''the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger.'' [2] In my view, the totality of record evidence supports an inference—though a fragile one—that the merger is likely to result in very modest unilateral price effects at best.

With respect to the potential coordinated price effects, I find successful coordination in this market highly unlikely.[3] However, even if coordination was a more plausible concern, I am not persuaded record evidence is probative of the effects that would arise as a result of *this* merger. My view and analysis of the record evidence relied upon to assess the magnitude of any potential coordinated effects is that it is suspect and cannot identify price differences attributable to changes in post-merger incentives to coordinate that would result from the proposed transaction rather than other factors. In addition, even if coordinated effects were likely, any estimated expected effect would need to be discounted by a probability of successful coordination that is less than one.

In summary, given the totality of the available evidence, I am persuaded that the proposed transaction is likely to generate, at best, small unilateral price effects.

The key question in determining whether the proposed transaction is likely to violate Section 7 of the Clayton Act is thus whether any cognizable efficiencies ''likely would be sufficient to reverse the merger's potential to harm customers in the relevant market.'' [4] The 2010 Merger Guidelines and standard cost-benefit principles teach that efficiencies should matter most when competitive effects are small.[5] The Commission's view of the record evidence is apparent in the Complaint, which alleges that ''nearly all'' of the efficiencies proffered by the parties are non-cognizable.[6] However, my own review of the record evidence leads me to disagree with that conclusion. In fact, I find that given reasonable assumptions, cognizable efficiencies are likely to be substantial and more than sufficient to offset any anticompetitive price increase. While reasonable minds can differ with respect to the magnitude of cognizable efficiencies in this case, I do not find the allegation of zero or nearly zero efficiencies plausible. Indeed, my own analysis of the record evidence suggests expected cognizable efficiencies are up to six times greater than any likely unilateral price effects. The relative magnitude of the expected cognizable efficiencies set forth is dispositive of the matter under my own analysis.

II. When is there an efficiencies defense at the FTC?

I would like to highlight some important issues presented by this transaction as they relate to how the Commission analyzes parties' efficiencies claims, and in particular, whether the burden of proof facing parties seeking to establish cognizable efficiencies is or should be meaningfully different than the burden facing the agency in establishing that a proposed merger is likely to substantially lessen competition.

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.1 (2010), *available at http://www.justice.gov/atr/public/guidelines/hmg-2010.html* [hereinafter Merger Guidelines].

[2] *Id.*

[3] Although coordinated effects may be more likely with two rather than three key competitors, I do not find evidence sufficient to conclude coordination is likely. For example, I find that prices are individually negotiated and not particularly transparent, and the incentive to cheat without detection would likely undermine a collusive outcome. In the ordinary course of business, competitive firms collect information and monitor one another's behavior. There is no evidence that the information collected by firms in the glass container market is accurate or that coordination based upon that information has taken place to date.

[4] Merger Guidelines § 10.

[5] Merger Guidelines § 10 (''In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great.''). It is sometimes argued, pointing to language in the Merger Guidelines that ''efficiencies almost never justify a merger to monopoly or near-monopoly,'' that the Merger Guidelines rule out or render the burden facing merger parties practically insurmountable in the case of mergers to monopoly or ''three-to-two'' situations. In my view, this is a misreading of the Merger Guidelines in letter and spirit. The sentence prior notes that ''efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great.'' The Merger Guidelines' reference to mergers to monopoly or near-monopoly are illustrations of cases in which likely adverse effects might be large. The Merger Guidelines themselves do not rule out an efficiencies defense when a merger with small anticompetitive effects, with any market structure, generates cognizable efficiencies that are sufficient to prevent the merger from being anticompetitive. Nor do the Merger Guidelines suggest that a merger in a market with many firms that exhibits significant unilateral price effects should face a less serious burden in order to establish an efficiencies defense. The Merger Guidelines' more general shift toward effects over market structure is also consistent with this analysis and undermines the logic of a position that the comparison of anticompetitive harms to cognizable efficiencies should be conducted differently depending upon the number of firms in the relevant market. To the extent the Commission believes the judicial decisions cited in note 5 of their statement endorse the notion that extraordinary efficiencies are required to justify a merger to monopoly or duopoly even when the anticompetitive effects from that merger are small, this is the analytical equivalent of allowing the counting of the number of firms within a market to trump analysis of competitive effects. The Commission should reject that view as inconsistent with the goal of promoting consumer welfare.

[6] *See, e.g.* Complaint, In the Matter of Ardagh Group S.A., F.T.C. Docket No. 9356 (June 28, 2013), *available at http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf.*

My view is that the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity to that faced by the parties with respect to efficiencies. I recognize that this view is at least superficially in tension with the 2010 Merger Guidelines, which appear to embrace an asymmetrical approach to analyzing harms and benefits. Indeed, the 2010 Merger Guidelines declare that ''the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies.'' [7] This tension is easily resolved in the instant case because the efficiencies substantially outweigh the potential harms, but it merits greater discussion.

To begin with, it is important to define which issues are up for discussion and which are not with some precision. The issue is not whether the burden-shifting framework embedded within Section 7 of the Clayton Act is a useful way to structure economic and legal analysis of complex antitrust issues.[8] It is. Nor is the pertinent question whether the parties properly bear the burden of proof on efficiencies. They do.[9]

The issues here are twofold. The first issue is whether the magnitude of the burden facing merging parties attempting to demonstrate cognizable efficiencies *should* differ from the burden the Commission must overcome in establishing the likelihood of anticompetitive effects arising from the transaction *in theory.* The second is whether the magnitudes of those burdens differ *in practice.* The Commission appears to answer the first question in the negative.[10] With respect to the second question, the Commission points to some evidence that the Agency does in fact consider efficiencies claims when presented in many investigations. There is little dispute, however, that the Commission gives some form of consideration to efficiency claims; the relevant issue is over precisely *how* the Commission considers them. More specifically, must merging parties overcome a greater burden of proof on efficiencies in practice than does the FTC to satisfy its prima facie burden of establishing anticompetitive effects? This question, in my view, merits greater discussion.

Even when the same burden of proof is applied to anticompetitive effects and efficiencies, of course, reasonable minds can and often do differ when identifying and quantifying cognizable efficiencies as appears to have occurred in this case. My own analysis of cognizable efficiencies in this matter indicates they are significant. In my view, a critical issue highlighted by this case is whether, when, and to what extent the Commission will credit efficiencies generally, as well as whether the burden faced by the parties in establishing that proffered efficiencies are cognizable under the Merger Guidelines is higher than the burden of proof facing the agencies in establishing anticompetitive effects. After reviewing the record evidence on both anticompetitive effects and efficiencies in this case, my own view is that it would be impossible to come to the conclusions about each set forth in the Complaint and by the Commission—and particularly the conclusion that cognizable efficiencies are nearly zero—without applying asymmetric burdens.

Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

There is ample discretion in the 2010 Merger Guidelines to allow for this outcome in practice. For example, the merger-specificity requirement could be interpreted narrowly to exclude any efficiency that can be recreated with any form of creative contracting. While the Merger Guidelines assert that Agencies ''do not insist upon a less restrictive alternative that is merely theoretical,'' there is little systematic evidence as to how this requirement is applied in practice. Verifiability, on the other hand, could be interpreted to impose stricter burden of proof than the agency is willing to accept when it comes to predictions, estimates, presumptions, or simulations of anticompetitive effects. There is little guidance as to how these provisions of the Merger Guidelines ought to be interpreted.[11] Neither is further guidance likely forthcoming from the courts given how infrequently mergers are litigated. None of this, of course, is to say that parties should not bear these burdens in practice. Efficiencies, like anticompetitive effects, cannot and should not be presumed into existence. However, symmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.

There are legitimate and widespread concerns that this has not been the case. Academics, agency officials, and practitioners have noted that although efficiencies are frequently a significant part of the business rationale for a transaction, receiving credit for efficiencies in a merger review is often difficult.[12] Professor Daniel Crane has analyzed the perceived asymmetries between competitive effects analysis and efficiencies discussed above and their implications for competition systems and consumer welfare.[13] Others have pointed out that recent court cases reveal that ''the efficiency defense faces an impossibly high burden.'' [14] Moreover, testimony from senior agency officials recognize the potential costs of imposing an unnecessarily high burden of proof to demonstrate cognizable efficiencies and states that symmetrical treatment of the evidence as they related to efficiencies versus competitive effects is warranted.

Placing too high a burden on the parties to quantify efficiencies and to show that they are merger-specific risks prohibiting transactions that would be efficiency-enhancing. On the other hand, we are not

[7] Merger Guidelines § 10.

[8] *See, e.g.*, United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990).

[9] *See* Merger Guidelines § 10.

[10] Statement of the Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131–0087 (April 11, 2014) (''We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims'').

[11] The 2006 Merger Guidelines Commentary provides some guidance on efficiencies, but offer little guidance on the interpretation of these provisions and the type of substantiation required. U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (Mar. 2006), *available at http://www.justice.gov/atr/public/guidelines/215247.htm#44.*

[12] *See, e.g.,* Michael B. Bernstein & Justin P. Hedge, *Maximizing Efficiencies: Getting Credit Where Credit Is Due,* Antitrust Source, Dec. 2012, *available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_hedge_12_20f.authcheckdam.pdf.*

[13] Daniel A. Crane, *Rethinking Merger Efficiencies,* 110 Mich. L. Rev. 347, 386–87 (2011). Professor Crane argues that ''as a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies,'' *id.* at 348, and rejects a variety of justifications for asymmetrical treatment of merger costs and benefits.

[14] Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View,* 13 Sup. Ct. Econ. Rev. 230 (2005).

able simply to take the parties' word that the efficiencies they have identified will actually materialize. Ultimately, we evaluate evidence related to efficiencies under the same standard we apply to any other evidence of competitive effects.[15]

The lack of guidance in analyzing and crediting efficiencies has led to significant uncertainty as to what standard the Agency applies in practice to efficiency claims and led to inconsistent applications of Section 10 of the Merger Guidelines, even among agency staff.[16] In my view, standard microeconomic analysis should guide how we interpret Section 10 of the 2010 Merger Guidelines, as it does the rest of the antitrust law. To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare.[17] Application of a more symmetric standard is unlikely to allow, as the Commission alludes to, the efficiencies defense to ''swallow the whole of Section 7 of the Clayton Act.'' A cursory read of the cases is sufficient to put to rest any concerns that the efficiencies defense is a mortal threat to agency activity under the Clayton Act. The much more pressing concern at present is whether application of asymmetric burdens of proof in merger review will swallow the efficiencies defense.

III. Conclusion

There are many open and important questions with respect to the treatment of efficiencies at the Agencies. While the Agencies' analytical framework applied to diagnosing potential anticompetitive effects got an important update with the 2010 Merger Guidelines, there remains significant room for improvement with respect to the aligning agency analysis of efficiencies with standard principles of economic analysis. Primary among these important questions is whether the burden of proof required to establish cognizable efficiencies should be symmetrical to the burden the Agencies must overcome to establish anticompetitive effects. In my view, issues such as out-of-market efficiencies and the treatment of fixed costs also warrant further consideration.[18]

For the reasons set forth in this statement, I conclude that the harms from the transaction are small at best and, applying a symmetric standard to assessing the expected benefits and harms of a merger, the expected cognizable efficiencies are substantially greater than the expected harms. Accordingly, I believe the merger as proposed would have benefitted consumers. As such, I cannot join my colleagues in supporting today's consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

[FR Doc. 2014–08951 Filed 4–18–14; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: State Plan Child Support Collection.

OMB No.: 0970–0017.

Description: The Office of Child Support Enforcement has approved a IV–D state plan for each state. Federal regulations require states to amend their state plans only when necessary to reflect new or revised federal statutes or regulations or material change in any state law, organization, policy, or IV–D agency operations. The requirement for submission of a state plan and plan amendments for the Child Support Enforcement program is found in sections 452, 454, and 466 of the Social Security Act.

Respondents: State IV–D Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Plan	54	4	0.50	108
OCSE–21–U4	54	4	0.25	54

Estimated Total Annual Burden Hours: 162.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this

[15] Statement of Kenneth Heyer on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), *available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Heyer.pdf.*

[16] In a recent study examining agency analysis of efficiencies claims, an FTC economist and attorney found significant disparities. Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission: 1997–2007 (2009), *available at http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf.* Coate and Heimert find that ''BE staff endorsed 27 percent of the claims considered, while BC accepted significantly fewer (8.48 percent) of the claims considered during the studied period.'' The disparity also applies to rejection of efficiencies claims. The Bureau of Economics rejected 11.9 percent of the claims, while the Bureau of Competition rejected a significantly higher 31.9 percent of claims. *Id.* at 26.

[17] For example, Professor Crane explains that ''[i]f the government and merging parties were held to the same standard of proof—preponderance of the evidence, for example—then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof.'' In addition, ''[i]f probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle.'' Crane, *supra* note 11, at 387–88.

[18] *See, e.g.*, Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market,* in 2 William E. Kovacic: An Antitrust Tribute—Liber Amicorum (2014) (forthcoming), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270;* Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption,* 39 Rev. Indus. Org. 145 (2011).