

Rather concentration is but one aspect of the inquiry aimed at better understanding post-merger incentives to compete. The predictive power of market share and market concentration data is informed by economic theory and available empirical evidence. There is no empirical evidence sufficient to establish a generally applicable presumption that mergers that reduce the number of firms to three or two are likely to harm competition.<sup>24</sup> Further, the Commission's reliance upon such shorthand structural presumptions untethered from empirical evidence subsidize a shift away from the more rigorous and reliable economic tools embraced by the *Merger Guidelines* in favor of convenient but obsolete and less reliable economic analysis.

This is not to say that evidence of changes in market structure cannot ever warrant such a presumption. It does when the evidence warrants as much. The Commission has in certain contexts found reason to believe competition would be substantially lessened based simply upon a reduction of firms in the relevant market. See *Actavis plc-Forest Laboratories*<sup>25</sup> and also *Akorn-Hi-Tech Pharmacal*,<sup>26</sup> which both involve generic pharmaceutical markets. The Commission was able to draw conclusions about the relationship between price and the number of firms in generic pharmaceutical markets because substantial research has been done to establish that such a relationship exists.<sup>27</sup> Indeed, the cases in the pharmaceutical industry are the exceptions that prove the rule that the Commission needs to do more than count the number of firms in a market to have reason to believe a substantial lessening of competition is likely. No

such research has been done in this market. Accordingly, unlike in generic pharmaceutical markets, we have no evidence to conclude that a simple reduction in the number of firms in this market is likely to lead to higher prices and lower output. Simply assuming such a relationship exists in this market without any evidence to suggest that it does harkens back to the bad old days of the first half of the 20th century, when the structure-conduct-performance paradigm was in vogue.

To summarize, there are three-to-two mergers that give rise to unilateral effects, and three-to-two mergers that give rise to coordinated effects. It is our burden to show that *this* three-to-two merger is likely anticompetitive. The Commission must find sufficient evidence to support an inference of likely economic harm to consumers. The heavy degree of reliance upon a structural presumption in this case is not sufficient to do so.

Finally, the Commission and Commissioner Ohlhausen each claim that the quantity, and presumably the quality, of the evidence is not the same for investigations truncated by remedy proposals compared to cases where a full phase investigation is completed or compared to a completed trial, respectively.<sup>28</sup> While this observation is an accurate description of the pragmatic reality of conducting law enforcement investigations, I do not agree with the implication that the quantum and quality of evidence needed to satisfy the "reason to believe" standard should turn on whether and when a remedy proposal is offered during an investigation. The idea is that we should "take into account the need for predictability and fairness for merging parties in these circumstances"<sup>29</sup> and considerations whether it is "appropriate to subject the parties to the added expense and delay of a full phase investigation."<sup>30</sup> I fully support the agency identifying opportunities to lower the administrative costs of antitrust investigations and believe there to be ample opportunity to do so. But attempts to operate a more efficient law enforcement system must satisfy the constraint, required by law, that there is reason to believe a transaction violates Section 7 of the Clayton Act. That standard sets a relatively low bar for the

minimum level of evidence required to substantiate a merger challenge. I reject the view that it should be a standard that should be relaxed because the merging parties offer a remedy.<sup>31</sup> The Commission is primarily a law enforcement agency, albeit one that largely conducts its business by entering into consents with merging parties. Making the consent process more efficient and predictable is a laudable goal; but we must not allow pursuit of a more efficient consent process to distort our evaluation of the substantive merits. To do so, as in my view we have here, risks in the long run reducing the institutional capital of the agency in magnitudes far greater than any potential cost savings from truncating an investigation.

For these reasons, I cannot join my colleagues in supporting the 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.

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## FEDERAL TRADE COMMISSION

[File No. 141 0129 ]

### Holcim Ltd. and Lafarge S.A.; Analysis of Proposed 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 to Aid Public Comment describes both the allegations in the draft 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 June 4, 2015.

**ADDRESSES:** Interested parties may file a comment at <https://ftcpublic.commentworks.com/ftc/holcimlafargeconsent> online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Holcim Ltd. and Lafarge

<sup>24</sup> See Statement of Commissioner Joshua D. Wright 3-5, *Holcim Ltd.*, FTC File No. 141-0129 (May 8, 2015).

<sup>25</sup> Analysis of Agreement Containing Consent Orders to Aid Public Comment 2, *Actavis plc*, FTC File No. 141-0098 (June 30, 2014) ("In generic pharmaceutical product markets, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market would likely have a direct and substantial anticompetitive effect on pricing.").

<sup>26</sup> Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, *Akorn Enterprises, Inc.*, FTC File No. 131-0221 (Apr. 14, 2014) ("In generic pharmaceuticals markets, price is heavily influenced by the number of participants with sufficient supply.").

<sup>27</sup> See David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 Rev. Econ. & Stat. 37 (2005). As an aside, given that we are now ten years removed from the publication of this important study and over twenty years removed from the sample period, it might be worth revisiting this question with fresher data if the Commission intends to continue relying upon inferences of competitive harm from market structure in the generic pharmaceutical market.

<sup>28</sup> See Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7; see also Separate Statement of Commissioner Maureen K. Ohlhausen 1, *ZF Friedrichshafen AG*, FTC File No. 141-0235 (May 8, 2015).

<sup>29</sup> Separate Statement of Commissioner Maureen K. Ohlhausen, *supra* note 28, at 2.

<sup>30</sup> Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7.

<sup>31</sup> That said, as I stated in *Holcim Ltd.*, I am not suggesting the "reason to believe" standard "requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request." See Statement of Commissioner Joshua D. Wright, *supra* note 24, at 11.

SA—Consent Agreement; File No. 141–0129” on your comment and file your comment online at <https://ftcpublish.commentworks.com/ftc/holcimlafargeconsent> by following the instructions on the web-based form. If you prefer to file your comment on paper, write “Holcim Ltd. and Lafarge SA—Consent Agreement; File No. 141–0129” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** James Southworth, Bureau of Competition, (202–326–2822), 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 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 May 4, 2015), on the World Wide Web, at <http://www.ftc.gov/os/actions.shtm>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before June 4, 2015. Write “Holcim Ltd. and Lafarge SA—Consent Agreement; File No. 141–0129” 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).<sup>1</sup> 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://ftcpublish.commentworks.com/ftc/holcimlafargeconsent> 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 “Holcim Ltd. and Lafarge SA—Consent Agreement; File No. 141–0129” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible,

<sup>1</sup> 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).

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 June 4, 2015. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <http://www.ftc.gov/ftc/privacy.htm>.

### **Analysis of Agreement Containing Consent Orders To Aid Public Comment**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from the proposed acquisition of Lafarge S.A (“Lafarge”) by Holcim Ltd. (“Holcim”). Under the terms of the proposed Consent Agreement, Lafarge is required to divest to Continental Cement Company (“Continental”) its Davenport cement plant and quarry located in Buffalo, Iowa along with cement terminals and associated distribution assets in Minneapolis and St. Paul, Minnesota; La Crosse, Wisconsin; Memphis, Tennessee; and Convent and New Orleans, Louisiana. The Consent Agreement also requires Holcim to divest its Skyway slag cement plant located in Chicago, Illinois to Eagle Materials Inc. (“Eagle”), its slag cement plant located in Camden, New Jersey and its terminal near Boston, Massachusetts to Essroc Cement Corporation (“Essroc”), and its cement terminals in Grandville and Elmira, Michigan and Rock Island, Illinois to Buzzi Unicem USA (“Buzzi”). Finally, the Consent Agreement requires Holcim to divest to a buyer or buyers approved by the Commission (1) Holcim’s Trident, Montana cement plant and two related terminals in Alberta, Canada, and (2) Holcim’s Mississauga cement plant located in Ontario, Canada and related cement terminals in Duluth, Minnesota; Detroit and Dundee, Michigan; Cleveland, Ohio; and Buffalo, New York.

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 part of the public record. After 30 days, the Commission will again review the Consent

Agreement and the comments received, and decide whether it should withdraw from the Consent Agreement, modify it, or make final the Decision and Order (“Order”).

### The Transaction

Pursuant to a Combination Agreement dated July 7, 2014, Holcim proposes to acquire 100 percent of the existing shares of Lafarge in a transaction valued at \$24.95 billion at that time. 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 substantially lessening competition in certain regional markets in the United States for the manufacture and sale of portland cement and slag cement. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the proposed acquisition.

### The Parties

Holcim is a Swiss-based, vertically integrated global building materials company. The company’s products include cement, clinker, concrete, lime, and aggregates. In the United States, Holcim currently operates nine portland cement and three slag grinding plants, as well as a large network of distribution assets.

Lafarge is a vertically-integrated global building materials company incorporated in France and headquartered in Paris. Lafarge primarily produces and sells cement, aggregates, and ready-mix concrete. In the United States, Lafarge currently operates six portland cement and three slag cement grinding plants as well as numerous distribution terminals.

### The Relevant Products and Structure of the Markets

In the United States, both parties manufacture and sell portland cement. Portland cement is an essential ingredient in making concrete, a cheap and versatile building material. Because portland cement has no close substitute and the cost of cement usually represents a relatively small percentage of a project’s overall construction costs, few customers are likely to switch to other products in response to a small but significant increase in the price of portland cement.

Both parties also manufacture and sell ground, granulated blast furnace slag (“slag cement”), a specialty cement product with unique characteristics that can serve as a partial substitute for

portland cement. Customers add slag cement to portland cement to enhance the physical properties of a concrete mixture. It is appropriate to treat slag cement as a separate relevant product because an insufficient number of purchasers would switch to other products in response to a small but significant increase in the price of slag cement to render such a price increase unprofitable.

The primary purchasers of portland and slag cement are ready-mix concrete firms and producers of concrete products. These customers usually pick up portland and slag cement from a cement company’s plant or terminal in trucks. Because portland and slag cement are heavy and relatively cheap commodities, transportation costs limit the distance customers can economically travel to pick up the products. The precise scope of the area that can be served by a particular plant or terminal depends on a number of factors, including the density of the specific region and local transportation costs.

Due to transportation costs, cement markets are local or regional in nature. The relevant geographic markets in which to analyze the effects of the proposed acquisition on portland cement competition are (1) the Minneapolis-St. Paul, Minnesota area; (2) the Duluth, Minnesota area; (3) western Wisconsin; (4) eastern Iowa; (5) the Memphis, Tennessee area; (6) the Baton Rouge, Louisiana area; (7) the New Orleans, Louisiana area; (8) the Detroit, Michigan area; (9) northern Michigan; (10) the Grand Rapids, Michigan area; (11) western Montana; and (12) the Boston, Massachusetts/ Providence, Rhode Island area. The proper geographic markets in which to analyze the effects of the proposed transaction on slag cement are (1) the Mid-Atlantic region and (2) the western Great Lakes region.

The relevant markets for portland cement and slag cement are already highly concentrated. For each of the relevant markets, the parties are either the only suppliers in the market, two of only three suppliers, or two of only four suppliers.

### Entry

Entry into the relevant portland cement and slag cement markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed transaction. The cost to construct a new portland cement plant of sufficient size to be competitive would likely cost over \$300 million and take more than five years to permit,

design, and construct while the expansion of an existing facility would likely cost hundreds of millions of dollars and take four or more years to complete. Building competitive cement distribution terminals is also difficult and time consuming. It can take more than two years to obtain the necessary permits and complete construction of a competitive terminal in the relevant markets. New entrants into slag cement markets face the additional hurdle of having to obtain a cost-effective source for the raw material. There are few domestic sources for granulated blast furnace slag because there are a limited number of active blast furnaces in the United States. Given the difficulties of entry, it is unlikely that any new entry could be accomplished in a timely manner in the relevant markets to defeat a likely price increase caused by the proposed acquisition.

### Effects of the Acquisition

Unless remedied, the proposed merger would likely result in competitive harm in each of the relevant portland and slag cement markets. The merger would eliminate substantial head-to-head competition between the parties in each of these markets and significantly increase market concentration. For many customers in these markets, the merger would combine the two closest competitors for their business, leaving the merged entity with the power to increase prices to these customers unilaterally. Further, because the merger would reduce the number of significant competitors to, at most, two or three in the relevant markets, it would enhance the likelihood of collusion or coordinated action between the remaining competitors by reducing impediments to reaching common terms of coordination and making it easier to monitor and retaliate against potential deviation from a coordinated scheme.

### The Consent Agreement

The proposed Consent Agreement eliminates the competitive concerns raised by Holcim’s proposed acquisition of Lafarge by requiring the parties to divest assets in each relevant market. Lafarge is required to divest a cement plant in Buffalo, Iowa and a network of distribution terminals along the Mississippi River in Louisiana, Tennessee, Wisconsin, and Minnesota to Continental. Continental, in turn, will sell its cement terminal located in Bettendorf, Iowa to Lafarge in order to eliminate the competitive overlap that would otherwise be created by its acquisition of Lafarge’s Davenport cement plant. Because Lafarge will be

able to supply the Bettendorf terminal at a comparable or lower cost than Continental, the transactions contemplated in the Consent Agreement will maintain the competitive status quo in the eastern Iowa market. Holcim is required to divest distribution terminals in Illinois and Michigan to Buzzi. Holcim is further required to divest a terminal in Massachusetts and a slag plant in New Jersey to Essroc and a slag plant in Illinois to Eagle. Each of the identified buyers possesses the experience and capability to become significant competitors in the relevant markets. The parties must accomplish the divestitures to these buyers within ten days after the proposed acquisition is accomplished.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the proposed acquisition. If the Commission determines that any of the identified buyers is not an acceptable acquirer, the proposed Order requires the parties to divest the assets to a Commission-approved acquirer within 90 days of the Commission notifying the parties that the proposed acquirer is not acceptable. If the Commission determines that the manner in which any divestiture was accomplished is not acceptable, the Commission may direct the parties, or appoint a divestiture trustee, to effect such modifications as may be necessary to satisfy the requirements of the Order.

Finally, the proposed Consent Agreement requires Holcim to divest to a buyer or buyers approved by the Commission (1) a cement plant in Trident, Montana and two distribution terminals in Alberta, Canada (the "Trident Assets"), and (2) a cement plant in Mississauga, Ontario and cement terminals in Minnesota, Michigan, Ohio, and New York (the "Great Lakes Assets"). The divestiture of the Trident plant would eliminate the proposed merger's potential anticompetitive impact on purchasers of portland cement located in western Montana. The two Alberta terminals distribute cement produced at the Trident plant and are included in the Consent Agreement in order to preserve the viability and marketability of the Trident Assets. Holcim's Mississauga plant supplies portland cement into the United States both directly and via terminals located in Duluth; Detroit; Dundee, Michigan; Cleveland, Ohio; and Buffalo, New York. The divestiture of the Great Lakes Assets would remedy the proposed merger's anticompetitive effects in the Duluth and Detroit areas. The Cleveland and Buffalo terminals are included in the Consent Agreement in

order to preserve the viability and marketability of the Great Lakes Assets. The Trident Assets and Great Lakes Assets are also part of a larger group of Holcim assets located in Canada that the Respondents have agreed to divest in order to resolve competitive concerns raised by the Canadian Competition Bureau ("CCB"). Commission staff worked cooperatively with staff from the CCB to ensure that our respective proposed remedies would be consistent and effective.

The proposed Order provides that Holcim must find a buyer (or buyers) for the Trident Assets and the Great Lakes Assets, at no minimum price, that is acceptable to the Commission, no later than 120 days from the date on which the parties consummate the proposed acquisition. The Consent Agreement also contains an Order to Hold Separate and Maintain Assets, which will serve to ensure that these assets are held separate and operated independently from the merged company and protect the viability, marketability, and competitiveness of the divestiture asset packages until the assets are divested to a buyer or buyers approved by the Commission.

To ensure compliance with the proposed Order, the Commission has agreed to appoint an Interim Monitor to ensure that Holcim and Lafarge comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to appropriate purchasers.

The purpose of this analysis is to facilitate public comment on the 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.

By direction of the Commission, Commissioner Wright dissenting.

**Donald S. Clark,**  
*Secretary.*

**Statement of the Federal Trade Commission in the Matter of Holcim Ltd. and Lafarge S.A.**

The Federal Trade Commission has voted to accept a settlement to resolve the likely anticompetitive effects of Holcim Ltd.'s ("Holcim") proposed \$25 billion acquisition of Lafarge S.A. ("Lafarge"). We have reason to believe that, absent a remedy, the proposed acquisition is likely to substantially reduce competition in the manufacture and sale of portland cement and slag cement. As we explain below, we believe the proposed remedy, tailored to counteract the likely anticompetitive

effects of the proposed acquisition without eliminating any efficiencies that might arise from the combination of the two companies, is in the public interest.<sup>1</sup>

Holcim is a Switzerland-based, vertically integrated global building materials company, with products that include cement, clinker, concrete, lime, and aggregates. Lafarge is a France-based, vertically integrated global building materials company that primarily produces and sells cement, aggregates, and ready-mix concrete.

The merged company will be the world's largest cement manufacturer, with combined 2014 revenues of approximately \$35 billion and operations in more than 90 countries. Our competitive concerns pertain to specific geographic markets in the United States where Holcim and Lafarge each make significant cement sales. The proposed merger would likely harm competition for the distribution and sale of portland cement, an essential ingredient in making concrete, in 12 local or regional markets. It would also threaten to lessen competition for the distribution and sale of slag cement, a specialty cement product used in certain applications, in two other regional markets.

The merger would create a merger to monopoly in some of the challenged relevant markets, while in others at most three competitors would remain post-merger. Absent a remedy, the Herfindahl-Hirschman Index ("HHI") in each of these markets would exceed 3,400, making every market highly concentrated according to the 2010 Horizontal Merger Guidelines.<sup>2</sup> The increase in HHI in each market would exceed 900, well above the 200-point change necessary to trigger the Guidelines' presumption that the merger is "likely to enhance market power."<sup>3</sup> There is no evidence rebutting this presumption. If anything, the evidence suggests that the estimates of market concentration understate our concerns.

In each of the relevant markets at issue, there is evidence that unilateral anticompetitive effects are likely. Substantial evidence demonstrates that, for many customers in the relevant areas, the merging firms are their preferred suppliers and that customers have benefitted from substantial head-to-head competition between the parties

<sup>1</sup> Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeney join in this statement.

<sup>2</sup> See 2010 Horizontal Merger Guidelines § 5.3. The threshold at which a market is considered "highly concentrated" under the Guidelines is 2,500.

<sup>3</sup> *Id.*

in negotiating prices for portland and slag cement. Customers in every single one of the affected markets expressed concern that their inability to play the merging parties off each other would diminish their ability to obtain better prices or other favorable terms. As the Guidelines note, a combination of two competing sellers “can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.”<sup>4</sup> In addition, the evidence demonstrates that not all of the remaining suppliers in the relevant markets provide customers with practical alternatives to the merging parties for a variety of reasons, including capacity constraints, lack of distribution assets to supply new customers, and downstream vertical integration.<sup>5</sup>

The evidence also suggests that the proposed acquisition would increase the ability and incentives of the combined firm and other market participants to engage in coordinated behavior that would result in harm to consumers. The relevant markets have characteristics that make them susceptible to coordination. They are highly concentrated; the products are homogeneous; overall market elasticity is low; customer switching costs are low; and sales are relatively small, frequent, and usually not made pursuant to long-term contracts. There is also a high degree of transparency in these markets. Competitors are aware of each other’s production capacities, costs, sales volumes, prices, and customers. Our concern about the potential for coordinated effects in these markets is heightened by evidence that cement suppliers, including the same global firms that compete in these markets, have expressly colluded in other geographic markets with similar characteristics.<sup>6</sup> By reducing the

number of significant competitors to only two or three, the proposed merger would make it easier for the remaining firms to coordinate, monitor compliance with, and retaliate against potential deviation from, a coordinated scheme. We therefore have reason to believe that the merger may enhance the vulnerability to coordinated effects that already exists in the relevant markets.<sup>7</sup>

In his dissent, Commissioner Wright takes issue with our decision to seek a remedy in six markets, going to great lengths to argue that we are improperly relying solely on the increase in market concentration to justify our action, that we are creating new presumptions of harm, that we lack a “credible basis” on which to conclude that the merger may enhance the vulnerability of the relevant markets to coordination, and that our action is otherwise inconsistent with the Guidelines. We respectfully disagree with Commissioner Wright’s various characterizations of the Commission’s statement in this matter. The Guidelines make clear that a substantial increase in concentration caused by a merger continues to be a significant factor in merger analysis because highly concentrated markets with only two or three large firms are more likely to lead to anticompetitive outcomes.<sup>8</sup> Economic theory and empirical research bear this out.<sup>9</sup> As a result, we view the evidence

*article/2013/08/31/belgium-cement-idUSL6NOGW05U20130831* (reporting EUR 14.7 million in fines levied by the Belgian Competition Council on Holcim and others for collusion); Press Release, Polish Office of Competition and Consumer Protection, UOKiK Breaks Cement Cartel, Dec. 12, 2013, available at [https://uokik.gov.pl/news.php?news\\_id=10754&news\\_page=1](https://uokik.gov.pl/news.php?news_id=10754&news_page=1) (announcing decision of Poland’s Court of Competition and Consumer Protection to impose fines of PLN 339 million (~\$93 million) on cement suppliers for collusion involving Lafarge and others); see generally Merger Guidelines § 7.2.

<sup>7</sup> See Merger Guidelines § 7.1.

<sup>8</sup> *Id.* § 2.1.3 (“Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.”). See also Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 *Antitrust L.J.* 701, 708 (2010) (explaining that the Guidelines’ flexible approach “certainly does not mean that they reject the use of market concentration to predict competitive effects, as can be seen in Sections 2.1.3 and 5,” that the Guidelines “recognize that levels and changes in market concentration are more probative in some cases than others,” and that “the Agencies place considerable weight on HHI measures in cases involving coordinated effects”) (emphasis in original).

<sup>9</sup> See, e.g., Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), available at <http://scholarship.law.georgetown.edu/facpub/1304> (“[V]arious theories of oligopoly conduct—both static and dynamic models

in a merger that reduces the number of firms in a relevant market to two or three differently from a merger that only reduces the number of firms to six or seven. Where, as here, a proposed merger significantly increases concentration in an already highly concentrated market, a presumption of competitive harm is justified under both the Guidelines and well-established case law.<sup>10</sup>

Moreover, despite Commissioner Wright’s assertion to the contrary, our investigation went beyond consideration of market concentration and application of the Guidelines presumption of competitive harm and, as noted above, produced additional evidence supporting our belief that the effect of the proposed acquisition would be to substantially lessen competition and harm cement customers in the relevant markets. On coordinated effects, we found numerous characteristics of the market making it vulnerable to collusion. It is particularly troubling that existing cement suppliers have expressly colluded in other geographic markets with similar characteristics. We also examined whether other market factors, such as the possibility of entry or expansion, might alleviate our competitive concerns. The evidence demonstrates the presence of high barriers to entry for both portland cement and slag cement, including significant capital costs and regulatory requirements. Entry sufficient to deter or counteract the likely harm from the proposed transaction would thus be neither timely nor likely.

of firm interaction—are consistent with the view that competition with fewer significant firms on average is associated with higher prices. . . . Accordingly, a horizontal merger reducing the number of rivals from four to three, or three to two, would be more likely to raise competitive concerns than one reducing the number from ten to nine, *ceteris paribus*.”); Steffen Huck, et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 *J. Econ. Behavior & Org.* 435, 443 (2004) (testing the frequency of collusive outcomes in Cournot oligopolies and finding “clear evidence that there is a qualitative difference between two and four or more firms”); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 *J. Pol. Econ.* 977, 1006 (1991) (finding, in a study of tire prices, that “[m]arkets with three or more dealers have lower prices than monopolists or duopolists,” and noting that, “while prices level off between three and five dealers, they are higher than unconcentrated market prices”).

<sup>10</sup> See Merger Guidelines § 2.1.3; *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (“Typically, the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition.”); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger to duopoly creates a rebuttable presumption of anticompetitive harm through direct or tacit coordination).

<sup>4</sup> *Id.* § 6.2.

<sup>5</sup> For instance, ready-mix concrete producers are often unwilling to purchase cement from their rivals.

<sup>6</sup> See, e.g., Press Release, European Commission, The Court of Justice Upholds in Substance the Judgment Delivered by the Court of First Instance in 2000 Concerning the Cement Cartel, Jan. 7, 2004, available at [http://europa.eu/rapid/press-release\\_CJE-04-2\\_en.htm](http://europa.eu/rapid/press-release_CJE-04-2_en.htm) (announcing fines of EUR 100 million on cement suppliers for collusion); Press Release, German Federal Cartel Office, Highest fine in Bundeskartellamt History is Final, April 10, 2013, available at [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/10\\_04\\_2013\\_BGH-Zement.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/10_04_2013_BGH-Zement.html) (announcing fines of EUR 380 million on Lafarge, Holcim, and others for collusion); Philip Blenkinsop, *Belgian Competition Regulator Fines Cement Groups*, Aug. 31, 2013, available at <http://www.reuters.com/>

In the face of our competitive concerns, based on what we had learned about the nature and conditions of the relevant markets, the parties proposed divestitures to remedy our concerns in each of those markets. The parties did not comply with our Second Requests. While continued investigation may have produced more evidentiary support for our complaint, including those markets for which Commissioner Wright dissents, we do not think such a course would have been justified. We have ample evidence to support our allegations of anticompetitive harm and had no reason to burden the parties with the expense and delay of further inquiry for the sole purpose of obtaining additional, cumulative evidence. Nor would further inquiry have been a good use of Commission resources.

Merger analysis is necessarily predictive. The evidence in this case provides us with sufficient reason to believe that the proposed acquisition is likely to substantially reduce competition, and there is no evidence of countervailing efficiencies that weigh against the remedy. We believe that the public interest is best served by remedying the competitive concerns as set forth in our proposed consent order.

**Statement of Commissioner Joshua D. Wright, Dissenting in Part and Concurring in Part in the Matter of Holcim Ltd. and Lafarge S.A.**

The Commission has voted to issue a Complaint and a Decision & Order against Holcim Ltd. (“Holcim”) and Lafarge S.A. (“Lafarge”) to remedy the allegedly anticompetitive effects of the proposed merger of the two companies. I dissent in part from and concur in part with the Commission’s decision because the evidence is insufficient to provide a reason to believe the proposed transaction is likely to substantially lessen competition, in violation of Section 7 of the Clayton Act, in several of the portland cement markets identified in the Complaint.<sup>1</sup>

The Commission articulates coordinated effects and unilateral effects theories of harm arising from the proposed transaction in all of the fourteen relevant geographic markets defined in the Complaint (the “Relevant Markets”).<sup>2</sup> Additionally, and

untethered to these two theories of harm articulated in the 2010 *Horizontal Merger Guidelines* (“*Merger Guidelines*”), the Commission asserts that mergers, such as the proposed transaction, that reduce the number of competitors to three or fewer are likely to harm competition. The Commission’s structural presumption is economically unfounded and inappropriate in the vast majority of Relevant Markets. Furthermore, there is insufficient evidence to support a coordinated effects theory in any Relevant Market and insufficient evidence to support a unilateral effects theory in several of the Relevant Markets.

In those markets in which I conclude the record evidence supports neither a coordinated nor a unilateral effects theory, the Commission relies upon little more than the change in market structure to support each of its allegations. Without particularized evidence substantiating a unilateral effects or coordinated effects theory of harm arising from the proposed transaction, a structural theory alone cannot provide a sufficient basis to establish reason to believe a transaction violates the Clayton Act. It follows, in my view, that the Commission should refrain from imposing a remedy in the markets for which the evidence is insufficient to support either a coordinated effects theory or a unilateral effects theory.

**I. The Commission’s Structural Theory and Presumption Are Unsupported by Economic Evidence**

The Commission argues mergers that reduce the number of competitors in a relevant market to three or two are unique in the sense that they warrant a presumption of competitive harm and illegality,<sup>3</sup> but it cannot defend its structural presumption upon the basis of economic evidence or accumulated empirical knowledge.

The Commission cites in support of its structural theory and presumption three academic articles written by economists.<sup>4</sup> Only two offer economic evidence, and the proffered substantiation fails to support the claim. The first is an important early entrant into the static entry literature examining the relationship between market size and the number of entrants in a market,

focusing upon isolated rural markets.<sup>5</sup> It strains credulity to argue that Bresnahan and Reiss’s important analysis of the impact of entry in markets involving doctors, dentists, druggists, plumbers, and tire dealers in local and isolated areas, where they find the competitive benefits of a second competitor are especially important, apply with generality sufficient to support a widely applicable presumption of harm based upon the number of firms. Indeed, the authors warn against precisely this interpretation of their work.<sup>6</sup>

The second article is a laboratory experiment and does not involve the behavior of actual firms and certainly cannot provide sufficient economic evidence to support a presumption that four-to-three and three-to-two mergers in real-world markets will result in anticompetitive coordination.<sup>7</sup> Once again, the authors warn against such an interpretation.<sup>8</sup>

Finally, the Commission cites a draft article, authored by Steve Salop, in support of its view that economic evidence supports a presumption that four-to-three and three-to-two mergers are competitively suspect.<sup>9</sup> The article does not purport to study or provide new economic evidence on the relationship between market structure and competition. Thus, it cannot

<sup>5</sup> Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. Pol. Econ. 977 (1991). While Bresnahan and Reiss is an important early contribution to the static entry literature, it cannot possibly bear the burden the Commission wishes to place upon it. Abstracting from the complexities of market definition was necessary for the researchers to isolate entry decisions. This is possible when studying the effects of entry by a second dentist in a town with a population of less than 1,000, but not in most real-world antitrust applications. The authors of the study make this point themselves, noting that “whether this pattern appears in other industries remains an open question.” *Id.* at 1007.

<sup>6</sup> In earlier research using similar empirical techniques and data—namely, small rural markets—Bresnahan and Reiss plainly reject the notion that the findings should inform views of market structure and competition generally: “We do not believe that these markets ‘stand in’ for highly concentrated industries in the sectors of the economy where competition is national or global.” Timothy F. Bresnahan & Peter C. Reiss, *Do Entry Conditions Vary Across Markets*, 3 Brookings Papers Econ. Activity 833, 868 (1987).

<sup>7</sup> Steffen Huck et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. Econ. Behavior & Org. 435 (2004).

<sup>8</sup> *Id.* at 436 (“The number of firms is not the only factor affecting competition in experimental markets. This implies that there exists no unique number of firms that determines a definite borderline between non-cooperative and collusive markets irrespective of all institutional and structural details of the experimental markets.”).

<sup>9</sup> Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), available at <http://scholarship.law.georgetown.edu/facpub/1304/>.

<sup>1</sup> As I explain below, I concur with the Commission as to the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/ Providence, the Mid-Atlantic region, and the western Great Lakes region; I dissent with the Commission as to eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids.

<sup>2</sup> See Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, Holcim Ltd., FTC File No. 141–0129 (May 4, 2015) (“For many

customers in these markets, the merger would . . . leav[e] the merged entity with the power to increase prices . . . unilaterally. Further, . . . it would enhance the likelihood of collusion or coordinated action between the remaining competitors.”).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 3 n.9.

support the Commission's proposition.<sup>10</sup>

There is simply no empirical economic evidence sufficient to warrant a *presumption* that anticompetitive coordination is likely to result from four-to-three or three-to-two mergers. Indeed, such a presumption would be inconsistent with modern economic theory and the analysis endorsed by the *Merger Guidelines*, which deemphasize inferences of competitive harm arising from market structure in favor of greater reliance upon particularized evidence of changes in post-merger incentives to compete.<sup>11</sup>

To the contrary, this approach is inconsistent with Agency practice and the letter and spirit of the more economically sophisticated approach adopted in the *Merger Guidelines*.<sup>12</sup>

<sup>10</sup> Nevertheless, to the extent Salop argues in favor of legal presumptions in merger analysis, he clarifies that they "obviously should be based on valid economic analysis, that is, proper economic presumptions," which should be updated "based on new or additional economic factors besides market shares and concentration." *Id.* at 37, 48. I agree. Additionally, Salop explains that "[c]ontemporary economic learning suggests that concentration be considered when undertaking competitive effects analysis—in conjunction with other factors suggested by the competitive effects theory—but not treated as the sole determinant of post-merger pricing." *Id.* at 13–14. Notably, Salop does not endorse a distinction between four-to-three mergers or three-to-two mergers and mergers in less concentrated markets that justifies a presumption that the former are anticompetitive; rather, he merely observes that empirical evidence and economic theory do not warrant "ignoring market shares and concentration in merger analysis." *Id.* at 12 (emphasis in original).

<sup>11</sup> See Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 701, 707–08 (2010) (acknowledging the role of market concentration in the analysis endorsed in the *Merger Guidelines* and observing that they place less weight upon market concentration and market shares, instead emphasizing the importance of direct evidence of changes in post-merger incentives to compete and competitive effects). To the extent the Commission relies upon Shapiro's caveat that "changes in market concentration are more probative in some cases than others," Statement of the Federal Trade Commission 3 n.8, *Holcim Ltd.*, FTC File No. 141–0129 (May 8, 2015), they fail to explain why, nor have I been provided any evidence attempting to establish that, markets for portland or slag concrete fit within the subset of cases for which it has been established that there is a reliable relationship between market structure and competition. I do not quarrel with the notion that such markets exist. We identify them over time using economic analysis, empirical evidence, and accumulated learning. For example, substantial research has identified empirical regularities in the relationship between structure and price in generic pharmaceutical markets. See David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 Rev. Econ. & Stat. 37 (2005).

<sup>12</sup> Comments of the ABA Section of Antitrust Law on the Horizontal Merger Guidelines Revision Project (June 4, 2010), available at [https://www.ftc.gov/sites/default/files/documents/public\\_comments/horizontal-merger-guidelines-review-project-proposed-new-horizontal-merger-guidelines-548050-00026/548050-00026.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-proposed-new-horizontal-merger-guidelines-548050-00026/548050-00026.pdf) (urging the

Section 2.1.3 of the *Merger Guidelines* does, as the Commission observes, state that "mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power."<sup>13</sup> The *Merger Guidelines* insure against reverting to naked structural analysis by making clear that the role of market shares and market concentration is "not an end in itself," but rather "one useful indicator of likely anticompetitive effects," and that market concentration is not to be used to "provide a rigid screen to separate competitively benign mergers from anticompetitive ones," but rather to provide one way to distinguish competitively benign mergers from those that warrant closer scrutiny.<sup>14</sup> To the extent these passages evince an ambiguity in the *Merger Guidelines* with respect to the minimum evidentiary burden that must be satisfied to support a merger challenge, the Commission should embrace the interpretation more consistent with a modern economic approach rather than with the obsolete and discredited structural analysis of a prior era.

Rather than relying upon economic evidence to defend the Commission's structural presumption, the Commission highlights case law supporting a presumption of illegality for mergers to duopoly or that substantially increase concentration.<sup>15</sup> As a preliminary matter, case law that endorses a wholly structural approach to merger analysis—an approach clearly rejected by the *Merger Guidelines*—does not constitute relevant economic evidence. Judicial opinions adopting this approach are orthogonal to the proposition in need of *economic substantiation*: that mergers resulting in three- or two-firm markets are likely to result in coordination. Indeed, one can find a variety of economically dubious propositions adopted in antitrust case law blessed by no less a legal authority than the Supreme Court.<sup>16</sup> But courts'

agencies to "remove the presumption of illegality keyed to the level and increase in the HHI" because "[t]he presumption does not reflect how the Agencies conduct investigations [and] is not theoretically warranted").

<sup>13</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 7.1 (2010) [hereinafter *Merger Guidelines*].

<sup>14</sup> *Id.* §§ 4, 5.3.

<sup>15</sup> Statement of the Federal Trade Commission, *supra* note 11, at 3 (citing *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) and *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001)).

<sup>16</sup> For example, well-established case law endorses the economic proposition that mergers that result in post-merger shares of greater than 30% are likely to harm competition. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364–65

observations about the relationship between market structure and competition are not relevant to the Commission's adoption of a structural presumption in this case.

I therefore find any reliance upon structural changes alone to be economically untenable and insufficient to give me reason to believe the proposed transaction will violate Section 7 in the vast majority of Relevant Markets.

## II. Coordinated Effects Are Unlikely in Any Relevant Market

The *Merger Guidelines* describe the conditions under which the antitrust agencies will challenge a proposed merger on the basis that it is likely to result in anticompetitive coordination. Specifically, the *Merger Guidelines* articulate three necessary conditions that must *each* be satisfied to support a coordinated effects theory: (1) A significant increase in concentration, leading to a moderately or highly concentrated market, (2) a market vulnerable to coordinated conduct, and (3) a credible basis for concluding the transaction will enhance that vulnerability.<sup>17</sup> Thus, the *Merger Guidelines* establish clearly that a highly concentrated market that is already vulnerable to coordinated conduct is necessary but not sufficient to support a coordinated effects theory. Critically, the Commission must also have evidence sufficient to provide a credible basis to conclude the transaction will *enhance* the market's vulnerability to coordinated conduct. Such evidence must evince a change in the post-merger competitive market dynamics and, in particular, post-merger incentives to engage in coordinated pricing. The *Merger Guidelines* provide the elimination of a maverick firm as an illustrative example of the type of evidence that would satisfy the third condition and warrant a presumption of adverse coordinated effects.<sup>18</sup> Importantly, the *Merger Guidelines* explain evidence that a merger will eliminate a maverick is given weight precisely because it

(1963), and that mergers resulting in post-merger shares of less than 10% harm competition when coupled with a trend toward concentration, *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

<sup>17</sup> *Merger Guidelines*, *supra* note 13, § 7.1; see also Dissenting Statement of Commissioner Joshua D. Wright 3, Fidelity National Financial, Inc., FTC File No. 131–0159 (Dec. 23, 2013) [hereinafter Wright, *Fidelity Dissent*].

<sup>18</sup> *Merger Guidelines*, *supra* note 13, § 7.1.

changes post-merger incentives to coordinate.<sup>19</sup>

The first and second elements of the *Merger Guidelines*' coordinated effects analysis are not at issue in this case. The Commission's investigation revealed evidence supporting a conclusion that the Relevant Markets are already highly concentrated and the proposed transaction will increase concentration.<sup>20</sup> Furthermore, the evidence supports a conclusion that the markets are vulnerable to coordinated conduct.<sup>21</sup> Nevertheless, the investigation failed to uncover any evidence to suggest the proposed transaction will increase post-merger incentives to coordinate—that is, there is no record evidence to provide a credible basis to conclude the merger alters the competitive dynamic in any Relevant Market in a manner that enhances its vulnerability to coordinated conduct.

The Commission asserts that the facts that the market is highly concentrated, that it is vulnerable to coordination, and that the merger reduces “the number of significant competitors to only two or three”<sup>22</sup> jointly satisfy the third necessary element that “the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.”<sup>23</sup> The Commission's analysis can be read in one of two ways. Each is tantamount to the application of a structural presumption for coordinated effects claims involving markets with three or two firms, each is problematic because it adopts an outdated and obsolete structural approach to coordinated effects, and each is in significant tension with the economic approach to coordinated effects embodied in the *Merger Guidelines*.

The first interpretation is that the satisfaction of the first and second elements of the *Merger Guidelines* analysis—and particularly the demonstration that the merger significantly increases concentration in an already concentrated market—is sufficient to simultaneously satisfy the third element that the merger enhance post-merger incentives to coordinate. This interpretation renders the third element of Section 7.1 entirely superfluous. The more logical explanation of the third element is that

<sup>19</sup> *Id.* § 2.1.5.

<sup>20</sup> See Analysis of Agreement Containing Consent Orders to Aid Public Comment, *supra* note 2, at 2.

<sup>21</sup> See Statement of the Federal Trade Commission, *supra* note 11, at 2 (describing the characteristics of the Relevant Markets that render them vulnerable to coordination).

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Merger Guidelines*, *supra* note 13, § 7.1.

a crucial, additional type of information is required to illuminate how the merger changes the merged firm's incentives to coordinate. The Commission's application completely overlooks the economic relevance of the third element.

The second plausible interpretation of the Commission's analysis is that the reduction in the number of competitors in a market is itself sufficient evidence to provide a credible basis that a merger will enhance a market's vulnerability to coordination and thus satisfy the third element of the *Merger Guidelines*' coordinated effects analysis. Under this reading, the Commission relies upon the fact that the proposed transaction reduces the number of competitors in each Relevant Market by one firm, either from four to three or from three to two.<sup>24</sup> For example, the Majority Statement asserts that the proposed transaction might enhance the likelihood of coordination by “mak[ing] it easier for the remaining firms to coordinate, monitor compliance with, and retaliate against potential deviation from, a coordinated scheme.”<sup>25</sup> These are generic observations that are true of any merger that reduces the number of firms in a market; they are not particularized to the proposed transaction or to any Relevant Market nor do they establish a credible basis to conclude that post-merger incentives to coordinate will increase. The observation that a market with N firms will, after the merger, have N–1 firms is simply insufficient without more to establish the required credible basis. This is true even when a merger reduces the number of firms from four to three or from three to two. The Commission offers no explanation as to why the *Merger Guidelines* would go through the trouble of requiring a credible basis to believe a merger will change the market's competitive dynamics that *enhances* the market's vulnerability to coordinated conduct, *in addition to* an increase in market concentration, in order to substantiate a coordinated effects merger challenge if the latter were considered sufficient to satisfy both elements.

As I have stated previously, “there is no basis in modern economics to conclude with any modicum of reliability that increased concentration—without more—will increase post-merger incentives to coordinate.”<sup>26</sup> Janusz Ordovery, in a

<sup>24</sup> See Statement of the Federal Trade Commission, *supra* note 11, at 2 (taking the view that a reduction of competitors to three or two firms in the relevant market justify a presumption of competitive harm).

<sup>25</sup> *Id.* at 2.

<sup>26</sup> Wright, *Fidelity Dissent*, *supra* note 17, at 3.

leading treatment of the economics of coordinated effects, similarly explains that “[i]t is now well understood that it is not sufficient when gauging the likelihood of coordinated effects from a merger to simply observe that because the merger reduces the number of firms, it automatically lessens the coordination problem facing the firms and enhances their incentives to engage in tacit collusion; far from it.”<sup>27</sup> Without particularized evidence that the proposed transaction will enhance incentives to coordinate post-merger, I am unable to conclude there is reason to believe it is likely to substantially lessen competition in violation of Section 7.

### III. Unilateral Effects Are Unlikely in Some of the Relevant Markets

The Commission alleges the proposed transaction is likely to result in unilateral price effects in the Relevant Markets. Unilateral effects arise when the reduction in direct competition between merging firms is sufficient to create post-merger market power. The *Merger Guidelines* articulate a variety of potential unilateral effects theories, including merger to monopoly, merger of firms producing very close substitutes in a differentiated products market, merger of sellers competing in bargaining and auction markets, and mergers in homogeneous goods markets making post-merger output suppression strategies more profitable.<sup>28</sup> The unifying theme of the unilateral effects analysis contemplated by the *Merger Guidelines* is that a particularized showing that post-merger competitive constraints are weakened or eliminated by the merger is superior to relying solely upon inferences of competitive effects drawn from changes in market structure.<sup>29</sup>

The potential unilateral effects theories in this case fall broadly within one of three categories. The first category involves straightforward merger-to-monopoly markets. In these markets, the theory of harm is that Holcim and Lafarge are the only two meaningful suppliers for all customers in the Relevant Market. The second

<sup>27</sup> Janusz A. Ordovery, *Coordinated Effects*, in 2 Issues in Competition Law and Policy 1359, 1367 (ABA Section of Antitrust Law 2008) (“It is quite clear . . . that a reduction in the number of firms and concomitant increases in concentration do not necessarily make collusion inevitable or even more likely, stable, or complete.”).

<sup>28</sup> *Merger Guidelines*, *supra* note 13, § 6.

<sup>29</sup> See Shapiro, *supra* note 11, Part III (explaining the *Merger Guidelines*' unilateral effects analysis, the types of evidence that support such analysis, and the relative analytical weakness of inferences of competitive harm drawn from changes in market structure).



category involves markets in which Holcim and Lafarge face some competition, but the proposed transaction will result in a merger to monopoly for a substantial subset of customers and will allow the merged entity to unilaterally increase market prices. The third category includes markets where the proposed transaction will reduce the number of competitors in the Relevant Market to three or two, and the remaining competitors will be unable or unwilling to compete for market share—for example, because of capacity constraints, leaving the merged entity with the ability to unilaterally raise prices. Each of these theories requires particularized evidence sufficient to establish reason to believe the proposed transaction violates Section 7 of the Clayton Act. I conclude the available evidence is sufficient to do so in some Relevant Markets and insufficient in others.

Unilateral price effects are “most apparent in a merger to monopoly in a relevant market.”<sup>30</sup> Basic economic theory provides a robust and reliable inference that a merger to monopoly or near monopoly is likely to result in anticompetitive effects. A rational firm with little or no competitive constraints will set prices or choose output to maximize its profits; it can be expected that a rational firm acquiring such monopoly power will adjust prices and output accordingly. No further economic evidence is required to substantiate an enforcement action based upon likely unilateral price effects and to establish reason to believe a merger to monopoly or near monopoly is likely to violate Section 7 of the Clayton Act. This analysis applies to at least one of the Relevant Markets.

The analysis is necessarily more nuanced for theories falling within the second category of theories of unilateral price effects. These theories involve Relevant Markets where the proposed transaction would reduce the number of competitors from four to three or three to two, and the market share for the merged entity would not be large enough to infer it would have the power to raise market prices unilaterally. In these markets, particularized evidence is required to establish reason to believe the merged firm will gain unilateral pricing power. In many Relevant Markets, staff was successful in uncovering the required evidence. For example, in some Relevant Markets, there was evidence of a significant subset of customers for whom a sole market participant would be the only remaining acceptable supplier, due

either to physical proximity or to some other preference rendering alternatives an unacceptable source of portland or slag cement. The Commission’s example of ready-mix concrete producers,<sup>31</sup> a relevant subset of customers, is an illustrative example here. In some Relevant Markets, the evidence supports a finding that such customers would continue to find their vertically integrated rivals to be an unacceptable source of portland cement, even if the sole remaining vertically unintegrated portland cement producer raised its prices after the merger. In the Relevant Markets for which credible evidence of this type is available, I find it sufficient to create reason to believe the merger is likely to result in competitive harm. Several other Relevant Markets fall into this category.

In other Relevant Markets, the allegation that there will remain only one acceptable supplier for a significant subset of customers after the proposed transaction lacks evidentiary support. Specifically, in these markets, the record evidence does not indicate that a material number of customers view Holcim and Lafarge as closest supply alternatives or that they view other potential suppliers as unacceptable supply sources and would continue to do so in the face of a post-merger unilateral price increase.<sup>32</sup>

The final category of potential unilateral effects theories, like the second category, also involves Relevant Markets where the proposed transaction would reduce the number of competitors from four to three or three to two, but the post-merger market share would not be large enough to infer it would have the power to raise market prices unilaterally. However, unlike the second category, in these Relevant Markets, it is not customer preference that limits the number of available competitors to one. Rather, in these Relevant Markets, the proposed transaction is effectively a merger to monopoly or near monopoly because alternative suppliers would be unwilling or unable to compete with the merged entity in the face of a price increase. In some Relevant Markets, the investigation uncovered particularized evidence sufficient to establish a reason

to believe such unilateral effects are likely, including evidence that other competitors are experiencing, or soon will experience, capacity constraints, rendering them unable or unwilling to compete for market share, or that other suppliers will not constrain the merged entity’s prices. Several Relevant Markets fall into this third category.

Relevant Markets where the “reason to believe” standard is not satisfied lacked record evidence necessary to corroborate any of these three theories.<sup>33</sup> Indeed, with respect to the Relevant Markets for which I dissent from the Commission’s decision, it is my view that the investigation failed to adduce particularized evidence to elevate the anticipated likelihood of competitive effects from “possible” to “likely” under any of these theories. Without this necessary evidence, the only remaining factual basis upon which the Commission rests its decision is the fact that the merger will reduce the number of competitors from four to three or three to two. This is simply not enough evidence to support a reason to believe the proposed transaction will violate the Clayton Act in these Relevant Markets.

#### IV. Conclusion

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. A presumption that such reason to believe exists when a merger decreases in the number of competitors in a market to three or two is misguided. Additionally, when the Commission alleges coordinated or unilateral effects arising from a proposed transaction, this standard requires more than a mere counting of pre- and post-merger firms. In particular, reason to believe a proposed transaction is likely to result in coordinated effects requires evidence—absent from the record here—that the merger will *enhance* a market’s vulnerability to coordinated pricing, and not just that it takes place in a market that is already concentrated. In the absence of such a particularized showing, the Commission’s approach to coordinated effects here reduces to a strict structural presumption

<sup>31</sup> See Statement of the Federal Trade Commission, *supra* note 11, at 2 n.5.

<sup>32</sup> The role of ready-mix customers in the competitive analysis is again illustrative. In some Relevant Markets the available evidence indicates there are some ready-mix customers that purchase from rivals and others that do not, but the totality of the evidence fails to establish the existence of a significant set of customers that view vertically integrated suppliers as unacceptable or would continue to do so in the face of a post-merger unilateral price increase.

<sup>33</sup> One other potentially plausible theory is that customers refuse to sole source their product, and therefore that two or more competitors are necessary to prevent post-merger unilateral effects. There is insufficient record evidence to indicate customers would be unwilling to switch from dual- to single-sourced supply in the event of a post-merger price increase.

<sup>30</sup> Merger Guidelines, *supra* note 13, § 6.

unsupported by modern economics and at odds with the *Merger Guidelines*.

Similarly, substantiating a unilateral effects theory requires particularized evidence—also absent from the record here in some Relevant Markets—that a merger will reduce or eliminate competitive constraints, permitting the merged entity to increase prices. Without such evidence, a unilateral effects theory reduces to little more than a complaint about market structure coupled with speculation about the circumstances under which unilateral effects might occur in a post-merger world. The *Merger Guidelines* contemplate a more rigorous analysis.

This is not to suggest the “reason to believe” standard requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request. Rather, the standard requires only evidence sufficient to establish that competitive harm is likely. Such evidence, although quite minimal—indeed, a handful of facts in most instances—is indeed available in some Relevant Markets in this matter, and it is in those markets that I concur with the Commission’s decision. While I appreciate the practical complications of requesting additional information during the course of a merger investigation, as well as the desire to conduct efficient investigations, these important pragmatic considerations do not trump the Commission’s primary obligation to collect evidence sufficient to establish reason to believe the merger will harm competition before issuing a complaint and accepting a consent.

For the reasons I explain above, I find reason to believe the proposed transaction is likely to result in unilateral price effects, and thus violate the Clayton Act, in the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/ Providence, the Mid-Atlantic region, and the western Great Lakes region. I conclude there is no reason to believe the proposed transaction will violate Section 7 in eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids; it follows that I believe the Commission should refrain from imposing a remedy in these markets.

[FR Doc. 2015-11724 Filed 5-14-15; 8:45 am]

BILLING CODE 6750-01-P

## GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090-0205; Docket 2015-0001; Sequence 12]

### General Services Administration Acquisition Regulation (GSAR); Information Collection; Environmental Conservation, Occupational Safety, and Drug-Free Workplace

**AGENCY:** Office of Acquisition Policy, General Services Administration (GSA).

**ACTION:** Notice of request for comments regarding the extension of a previously existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding Environmental Conservation, Occupational Safety, and Drug-Free Workplace.

**DATES:** Submit comments on or before: July 14, 2015.

**ADDRESSES:** Submit comments identified by Information Collection 3090-02085 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link “Submit a Comment” that corresponds with “Information Collection 3090-0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “Information Collection 3090-0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace” on your attached document.

• *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Ms. Flowers/IC 3090-0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace.

*Instructions:* Please submit comments only and cite Information Collection 3090-0205, Environmental Conservation, Occupational Safety, and Drug-Free Workplace, in all correspondence related to this collection. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

## FOR FURTHER INFORMATION CONTACT:

Kevin Funk, Procurement Analyst, General Services Acquisition Policy Division, GSA, at telephone 215-446-4860 or via email to [kevin.funk@gsa.gov](mailto:kevin.funk@gsa.gov).

## SUPPLEMENTARY INFORMATION:

### A. Purpose

The Federal Hazardous Substance Act and Hazardous Material Transportation Act prescribe standards for packaging of hazardous substances. To meet the requirements of the Acts, the General Services Administration Regulation prescribes provision 552.223-72, Hazardous Material Information, to be inserted in solicitations and contracts that provides for delivery of hazardous materials on an f.o.b. origin basis.

This information collection will be accomplished by means of the provision which requires the contractor to identify for each National Stock Number, the DOT Shipping Name, DOT Hazards Class, and whether the item requires a DOT label. Contracting Officers and technical personnel use the information to monitor and ensure contract requirements based on law and regulation.

Properly identified and labeled items of hazardous material allows for appropriate handling of such items throughout GSA’s supply chain system. The information is used by GSA, stored in an NSN database and provided to GSA customers. Non-Collection and/or a less frequently conducted collection of the information resulting from provision 552.223-72 would prevent the Government from being properly notified. Government activities may be hindered from apprising their employees of; (1) All hazards to which they may be exposed; (2) Relative symptoms and appropriate emergency treatment; and (3) Proper conditions and precautions for safe use and exposure.

### B. Annual Reporting Burden

*Respondents:* 563.  
*Responses per Respondent:* 3.  
*Total Responses:* 1689.  
*Hours per Response:* .67.  
*Total Burden Hours:* 1132.

### C. Public Comments

Public Comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the