[24] Statement of Commissioner Joshua D. Wright 3–5, Holcim Ltd., FTC File No. 141–0129 (May 8, 2015).

[25] 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.'').

[26] 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.'').

[27] David Reiffen & Michael R. Ward, , 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.

[28] Statement of the Federal Trade Commission, note 9, at 3 n.7; Separate Statement of Commissioner Maureen K. Ohlhausen 1, ZF Friedrichshafen AG, FTC File No. 141–0235 (May 8, 2015).

[29] Separate Statement of Commissioner Maureen K. Ohlhausen, note 28, at 2.

[30] Statement of the Federal Trade Commission, note 9, at 3 n.7.

[31] That said, as I stated in ., I am not suggesting the ''reason to believe'' standard ''requires access to every piece of relevant information and a full and complete economic

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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,

[illegible].

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.[1]

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.[2] 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.''[3] 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

[1] Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeny join in this statement.

[2] [illegible] 2010 Horizontal Merger Guidelines § 5.3. The threshold at which a market is considered ''highly concentrated'' under the Guidelines is 2,500.

[3] [illegible].

[4] [illegible]. § 6.2.

[5] For instance, ready-mix concrete producers are often unwilling to purchase cement from their rivals.

[6] [illegible], 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, [illegible] ://[illegible] / [illegible] / [illegible] - [illegible] _ [illegible] 04 2_[illegible] .

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[10] 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.'' . 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.'' . 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 '' market shares and concentration in merger analysis.'' . at 12 (emphasis in original).

[11] Carl Shapiro, *2010* , 77 Antitrust L.J. 701, 707–08 (2010) (acknowledging the role of market concentration in the analysis endorsed in the 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 a 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. David Reiffen & Michael R. Ward, , 87 Rev. Econ. & Stat. 37 (2005).

[12] Comments of the ABA Section of Antitrust Law on the Horizontal Merger Guidelines Revision Project (June 4, 2010), :// *548050-00026/548050-00026.* (urging the 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'').

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

[14] . §§ 4, 5.3.

[15] Statement of the Federal Trade Commission, note 11, at 3 (citing . v. , 534 F.3d 410, 423 (5th Cir. 2008) and v. ., 246 F.3d 708, 716 (D.C. Cir. 2001)).

[16] 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, v. *P* , 374 U.S. 321, 364–65 (1963), and that mergers resulting in post-merger shares of less than 10% harm competition when coupled with a trend toward concentration, v. *V* ., 384 U.S. 270 (1966); v. *P* ., 384 U.S. 546 (1966).

[17] Merger Guidelines, note 13, § 7.1; .,

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.'' [30] 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,[31] 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.[32]

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.[33] 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 - and pos T* (coor exists whenan that suchwill

[30] Merger Guidelines, note 13, § 6.

[31] Statement of the Federal Trade Commission, note 11, at 2 n.5.

[32] 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.

[33] 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.

unsupported by modern economics and at odds with the