FIRST SUPPLEMENT TO MEMORANDUM 2025-21

Antitrust Law: Status Update (Public Comment and Presentation)

This supplement presents information about public comments received by the Commission.[1] The public comments are attached as Exhibits to this supplement.

The Internet Accountability Project (IAP) submitted a comment in response to Memorandum 2025-11.[2] The IAP's comment endorses "the common-sense, expert-grounded recommendations of [the Commission] staff, all of which sit squarely in the current bi-partisan consensus of reform thinking about antitrust law." The comment also addresses antitrust law generally.

According to the IAP's website:

> We are conservatives who are alarmed by the role Big Tech plays in our society. We are concerned by the political and economic harms Big Tech platforms such as Google, Facebook, and Amazon are inflicting on Americans. These harms include negative content, conservative bias, privacy violations, anticompetitive conduct, and employee abuses. We formed Internet Accountability Project in order to speak out against Big Tech before it is too late.
>
> The Internet Accountability Project (IAP) educates the public and advocates for policies that: (1) promote competition and innovation in the technology sector; (2) ensure online platforms provide a forum for diverse points of view; (3) ensure online privacy; (4) protect children and communities online; and (5) strengthen national security through the effective use of technology.

Eric Enson of Crowell & Moring, LLP submitted a comment on behalf of the California Chamber of Commerce (CalChamber) responsive to Memorandum 2025-11.[3]

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[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise. The Commission welcomes written comments at any time during its study process.

Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

[2] Memorandum 2025-11.

[3] *Id.*

The Chamber's comment states, in part:

> CalChamber thanks the California Law Revision Commission (the "CLRC") for the opportunity to comment further on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber looks forward to continuing to work with the CLRC in developing policies that ensure a strong and dynamic business environment that benefits all Californians. We write regarding the resolutions that were passed during the CLRC's January 23, 2025 meeting. In particular, CalChamber has significant concerns with the CLRC's decision to propose amending California's antitrust laws to outlaw single-firm "misuses of market power" and to create California-specific merger approval and premerger notification laws (the "Proposals"). In short, there is no independent analysis suggesting that these Proposals are necessary to protect Californians, there is no economic study measuring the costs these Proposals will inflict on California businesses and consumers, and both Proposals greatly risk stifling the competition and innovation that have grown California's economy into the fifth-largest in the world.

According to the CalChamber website, "[t]he California Chamber of Commerce is the largest broad-based business advocate to government in California, working at the state and federal levels for policies to strengthen California."

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director

23 January 2025

The Honorable Xochitl Carrion, Chairperson
The Honorable Richard Simpson, Vice-Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: Antitrust Law – Study B-750: Endorsement of Staff Report

Dear Chair Carrion and Honorable Commissioners:

The Internet Accountability Project, which was founded to lend a conservative voice to the calls for federal and state governments to rein in Big Tech before it's too late, write, first, to commend the staff of the California Law Revision Commission for eliciting so many and such a cross-section of views on antitrust law and reform and, second, to endorse the common-sense, expert-grounded recommendations of your staff, all of which sit squarely in the current bi-partisan consensus of reform thinking about antitrust law.

We write respectfully to spotlight just a few points raised by the staff recommendations.

The antitrust movement came about during the Robber Baron era in order to tackle companies like Standard Oil that were destroying competition and gouging consumers. Back then, Republicans like President Teddy Roosevelt and Senator John Sherman led the antitrust charge and were the original trust busters.

We are living in a new Gilded Age caused by the near-total failure of federal antitrust law to prevent the monopiles it was enacted to prevent from emerging. Today's Big Tech companies, for example, are even more powerful than the Robber Barons of old. They permeate every nook and cranny of our personal as well as commercial lives in a way that Standard Oil could only have dreamt of doing.

Indeed, in the past decades, Big Tech has used its astonishing and commercially impenetrable market power to repeatedly invade our privacy, cause the broadest and deepest child mental health crisis history has ever seen, facilitate child sex trafficking and the sale of illegal drugs, flout age verifications applicable to every brick-and-mortar store, destroyed the newspaper industry by using the stories written by reporters without

compensation to the outlets that employ them, and have even allowed themselves to be weaponized by malign state actors such as China.

When any possible competitor is, as is recently the case with Meta[1], can be effectively blocked and crippled or simply bought using the unimaginable wealth accumulated by what should be unlawful market dominance, market forces cannot currently succeed in offering consumers realistic alternatives to the offerings of the hegemons.

Thus, when your staff write, "[t]here is a convincing body of literature supporting the update of antitrust laws to counter the decades of federal jurisprudence informed by certain Chicago School precepts which time and scholarship have revealed to be unfounded," we could not agree more and experts all across the ideological spectrum echo this all-but-too-obvious conclusion.

Moreover, it is bizarre that California – with its history of domination by the "Big Three" railroad titans, is unable under its own laws to protect its citizens from anticompetitive behaviors of a single monopolist unlike so many of its sister states. Which is why we wholeheartedly agree with your staff when it writes: "[t]here is a broad consensus of the academic and enforcement communities that California should adopt legislation reaching single firm conduct. California is one of only a few states with antitrust laws that do not address single firm conduct, and thus the state can only pursue anticompetitive single firm conduct under the Sherman Act in federal court. Adopting a single firm conduct provision would allow California state courts to adjudicate California antitrust claims and reduce its reliance on federal enforcers who have their own resource constraints and enforcement priorities."

There is no public policy argument that supports Californians enjoying fewer protections against single corporate hegemons than the residents of other states.

But, critically, such an enactment will prove as feckless as federal law has proven – will be a useless enactment -- if California simply and unthinkingly "downloads" existing federal jurisprudence on single firm monopolist and monopsonist conduct into state law. Jurisprudentially, the prevailing federal case law interpreting Section 2 of the Sherman Act has almost exclusively been the brainchild of and been imposed upon the nation by unelected federal judges acting as policymakers and their judge-made policies have over the years become entirely untethered to any faithful reading of the history of Section 2 of the Sherman Act.

Worse, those policies have manifestly failed to protect against the emergence of the most powerful monopolies the nation has ever seen; exactly the unhappy result the Section 2 of the Sherman Act was enacted to prevent. Thus, we again wholeheartedly agree with your

[1] https://www.engadget.com/social-media/meta-admits-it-deleted-links-to-decentralized-instagram-competitor-pixelfed-194624098.html

staff when it correctly observes: “Multiple expert reports cautioned against California adopting Section 2 [jurisprudence] in its entirety. By so doing, California would effectively import the decades of federal jurisprudence that has diluted Section 2’s original scope and strength. Accordingly, many have recommended that California adopt single firm conduct provisions that selectively distinguish themselves from federal law and the many federal jurisprudential limitations that can undermine effective enforcement.”

On this score, we particularly and at minimum endorse the laudable enforcement-facilitating proposal (quoting your staff) to “deem specific conduct presumptively unlawful or establish principles against which actions can be measured.” Not only would such a list facilitate enforcement, it would laudably provide the kind of advance notice and certainty about what conduct will or will not be unlawful that is fairly owed to every person and business. We encourage the Commission to embrace the list in your single firm conduct report for immediate consideration by the Legislature while taking additional time to puzzle through harder drafting challenges.

In sum, antitrust is the great American solution to the problem of undue political and market power. Rather than impose regulations on every company in a sector using a regulatory hammer, antitrust goes after only those companies that are distorting markets using a scalpel. As conservatives, we believe that antitrust is a better approach to take than heavy-handed regulation. Your staff has done a superb, thoughtful, thoroughly researched and soundly justified job. We commend their work and their work to you and urge that you approve the recommendations so the California Legislature can this year consider such measures informed by your studied and sensible suggestions.

Sincerely,

Mike Davis
Founder & President
Internet Accountability Project

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March 18, 2025

Xochitl Carrion, Chairperson
and Honorable Commissioners
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Sacramento, California 95814

Re: Antitrust Law – Study B-750 – Public Comment On Behalf Of The California Chamber of Commerce

Dear Chairperson Carrion and Commissioners:

We write as counsel for the California Chamber of Commerce ("CalChamber").[1] CalChamber is a non-profit business association with more than 14,000 members, both individual and corporate, representing twenty-five percent of the State's private-sector workforce and virtually every economic interest in California. While CalChamber represents several of the largest corporations in California, seventy percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

CalChamber thanks the California Law Revision Commission (the "CLRC") for the opportunity to comment further on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber looks forward to continuing to work with the CLRC in developing policies that ensure a strong and dynamic business environment that benefits all Californians. We write regarding the resolutions that were passed during the CLRC's January 23, 2025 meeting. In particular, CalChamber has significant concerns with the CLRC's decision to propose amending California's antitrust laws to outlaw single-firm "misuses of market power" and to create California-specific merger approval and premerger notification laws (the "Proposals"). In short, there is no independent analysis suggesting that these Proposals are necessary to protect Californians, there is no economic study measuring the costs these Proposals will inflict on California businesses and consumers, and both Proposals greatly risk stifling the competition and innovation that have grown California's economy into the fifth-largest in the world.

[1] CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with BRG.

The Proposals Are Not Supported By A Finding That California's Antitrust Laws Need To Be Revised Or That The Possible Benefits Of Doing So Outweigh Potential Costs

Robust enforcement of California's antitrust laws benefits all who live and work in the State. Indeed, California's economy has thrived under California's existing antitrust regime, spurring growth and innovation all while protecting businesses and consumers from unlawful, anticompetitive conduct.

The key shortcoming of the Proposals is that there has been no study showing that California's antitrust laws are failing. That is, the Proposals are not supported by any finding that California consumers or businesses are suffering from reduced competition, higher prices or lessened innovation because of holes in California law. Quite the opposite, competition and innovation in California's economy are thriving under California's current antitrust laws as evidenced by increased employment, new entry and new innovative products, services and technologies.

We raised this very concern in our April and August 2024 submissions to the Commission, yet the Proposals are only supported by personal opinions and anecdotes regarding competition in California:

- For instance, the January 13, 2025 Staff Recommendation to the CLRC ("Staff Recommendation"), which underlies the Proposals, states that "[t]here is a convincing body of literature supporting the update of antitrust laws to counter the decades of federal jurisprudence . . .," but the Staff Recommendation merely cites to a single presentation by a UC Law San Francisco law professor who is also a long-time antitrust prosecutor.[2]

- Likewise, the Staff Recommendation claims that "[t]here is a broad consensus of the academic and enforcement communities that California should adopt legislation reaching single firm conduct."[3] In support of this claim, however, the Staff Recommendation relies only on the Single-Firm Conduct Working Group Report, which was authored by three economists and two law professors, as well as a submission from the American Economic Liberties Project concerning purported "market concentration" in the technology sector.[4]

- The Staff Recommendation also claims that "many have recommended that California adopt single firm conduct provisions that selectively distinguish themselves from federal law and the many federal jurisprudential limitations that can undermine effective enforcement."[5] To support this claim, Staff cites to the Consumer Welfare Standard, the Technology Platforms and the Single-Firm Conduct Working Group Reports.[6] Yet the Consumer Welfare Standard Working Group and the Technology Platforms Working Group did not recommend anything, let alone

[2] Antitrust Law: Initial Recommendations for ACR 95 Questions ("Staff Recommendation") at 3, n.13.
[3] *Id*. at 4.
[4] *Id*. at 4, n. 28.
[5] *Id.* at 5.
[6] *Id*. at 5, n. 32.

abandoning federal standards,[7] and the approach suggested by the Single-Firm Conduct Working Group was not followed by the Staff Recommendation, for some reason.[8]

- Even more, the Staff Recommendation asserts that "federal courts have made it more difficult to successfully challenge a merger . . .," but only relies on the Single-Firm Conduct Working Group Report, which says nothing about merger challenges, and a group of law journal articles written by lawyers debating whether California should adopt a merger law or not.[9]

While the personal views of this handful of lawyers and economists, many of whom are aligned with the plaintiffs' side of antitrust litigation,[10] may be good intentioned and informative, they are not an actual measure of whether California's current laws are failing Californians. We urge the CLRC to not take action unless and until it is clear – through an independent study or analysis – that something is broken with existing California law. Sound public policy demands as much.

Another major shortcoming with the Proposals is that they do not rely on a cost-benefit analysis of the effects and costs – both economically beneficial and economically harmful – that are likely to result from revising California's antitrust laws, as we noted in our April and August submissions. Inherent in antitrust policy making is the recognition that regulation has tradeoffs. On the one hand, antitrust regulation can deter and punish anticompetitive conduct, which benefits the marketplace, but, on the other hand, antitrust regulation can chill aggressive competition and innovation, which also harms the marketplace. The potential for market harm is particularly strong when antitrust enforcement actions do not closely target conduct that harms competition. Stifling pro-competitive conduct can harm consumers and the overall economy in the same manner as anticompetitive conduct, and there is no reasonable basis to ignore the detrimental effects of new regulation. This is why it is

[7] *See generally* Consumer Welfare Standard Report; Technology Platforms Report. In fact, a representative of the Consumer Welfare Standard Working Group suggested that California should not have a different standard. *See* Consumer Welfare Standard Transcript at 6 ("And again, when you look at these cases, and I have not analyzed the data set of all the cases in which it happened, I think at the start what we are likely to see, whether it's good or bad, my inclination is that we should have one approach. It will never be precise. We are making progress, but if we break down the definition of what is harm to competition across jurisdictions within the United States, I think it just will create more noise in the court system."). And the Technology Platforms Working Group could not reach a consensus on a recommended approach. *See* Technology Platforms Transcript at 1 ("And the key question that our group was tasked with was, should California enact antitrust legislation focused on big tech, specifically, big tech. And we did not come to a, you know, a consensus resolution on the question . . . .").

[8] *See* Single-Firm Conduct Report at 14 (rejecting an "abuse of dominance" standard similar to the one advocated for in the Staff Recommendation).

[9] Staff Recommendation at 10, n. 64.

[10] Probably the best example of this is seen in the report entitled Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets ("Concentration Report"), which was authored by a working group made up of five individuals all aligned with the plaintiffs' side in antitrust matters. The Concentration Report does not empirically study business concentration in California, but instead provides "case studies" in four, national sectors – labor, agriculture, healthcare and pharmaceuticals, and entertainment – of various competitive concerns that have arisen in these industries. The Motion Picture Association, Inc., however, presented testimony and an expert economist report refuting the Concentration Report's claims as to the entertainment industry, explaining that, "[t]he empirical evidence supports the conclusion that the audiovisual industry is dynamic and exhibits signs of being highly competitive, providing numerous benefits to consumers of audiovisual content." *See* Motion Picture Association, Inc., October 3, 2024 Public Comment.

imperative to utilize a cost-benefit methodology to determine whether the Proposals – on balance – are likely to improve economic performance and efficiency at a cost the State is willing to bear.

For this reason, we urge the CLRC to not take action unless and until there is an independent economic study indicating that the trade-offs associated with the Proposals are – on balance – beneficial to California businesses, consumers and workers. Again, sound public policy demands as much.

The Proposals Envision Significant Changes To California Law That May Have The Unintended Consequences Of Chilling Competition And Innovation

The concerns about a lack of need for change and the absence of an analysis of policy choices, as described above, are compounded by the fact that the Proposals are not small adjustments of existing California law, but rather are a sea change in both substantive antitrust law and enforcement. Moreover, in some cases, these changes are not necessary given federal antitrust law and pending California law.

Take the Proposal to create a new law prohibiting the "misuse of market power," for instance. While the CLRC was right to reject the "abuse of dominance" standard suggested in the Staff Recommendation as too ambiguous and unworkable in California, the "misuse of market power" framework likely suffers from the same flaws, depending on ultimate drafting. The "misuse of market power" is a novel legal standard that has never been interpreted or analyzed by a court in the United States. The sheer novelty of this term may stifle innovation and aggressive competition due to its newly-minted terms and standards as well as a fear of lawsuits from rivals that have lost the competitive battle. This kind of new law is also likely to drive increased litigation that will result in inconsistent rulings among courts, making doing business in California more expensive, riskier, and less desirable, all of which will work to the detriment of California consumers and workers.

Moreover, a law that prohibits "misuses of market power," presumes that there are lawful uses of market power. But it is unclear how the CLRC can draw a defining line between lawful and unlawful uses of market power. In fact, the Single-Firm Conduct Working Group, which recommended a different approach, underscored this point in explaining that "[t]he fundamental challenge is where and how to draw the line between conduct that is welcomed as a legitimate form of competition and conduct that is anticompetitive and significantly enhances market power."[11] This concern is heightened by the fact that many of the reports and recommendations leading to this proposal called for the rejection of federal precedent designed over a century to aid courts in identifying truly anticompetitive conduct,[12] thereby threatening the type of aggressive competition that the antitrust laws were designed to promote. For example, if the CLRC were to adopt a "misuse of market power" standard and also abandon federal requirements regarding the definition of relevant antitrust markets and market share thresholds, there would be multiple, different interpretations of what single-firm conduct actually violates the law. And without some market share threshold for application of the law, such as the 50% to 60% market share threshold found in federal monopolization law, the "misuse of market power" standard could apply to all businesses, large and small, operating in what are otherwise competitive industries.

[11] Single-Firm Conduct Working Group Report at 1.
[12] *Id*. at 17.

This level of uncertainty and the risk of misinterpretation is likely to hinder competition and lead to increased litigation. Even the Staff Recommendation recognized as much:

> generating a unique set of standards that totally rejects federal law presents a formidable drafting challenge, as evidenced by the lack of consensus in the Commission's expert working groups. A new, untested antitrust framework could be risky and invite uncertainty, which could chill innovation and business growth. Further, antitrust provisions without precedents might also pose a significant challenge to courts, particularly when they are instructed to not follow federal law or draw on federal experience.[13]

The Proposal to create a California-specific merger approval and premerger notification laws also contemplates a radical departure from today's antitrust environment. The questions the CLRC should be asking is whether the creation of a California-specific merger review regime is necessary and whether such a regime would, on balance, be good for California. The answer to both questions is no.

First, state regulators, in particular the California Attorney General, have repeatedly used federal law to challenge mergers and acquisitions that may negatively affect competition in their state.[14] In fact, California's Attorney General recently applauded a strengthening of the federal Merger Guidelines, which have been treated by courts as persuasive guidance on merger law, and he confirmed the Attorney General's ability to use existing federal law to challenge mergers that the federal government may not.[15] Notably, DOJ and FTC officials have confirmed that the updated Merger Guidelines will remain in effect during the Trump Administration as the agencies' framework for evaluating mergers.[16] Moreover, as the CLRC is aware, SB 25 (Umberg, 2025) proposes to enact the Uniform Law Commission ("ULC") Uniform State Pre-merger Notification Act that would give State Attorneys General access to the same information the federal government receives about significant mergers and acquisitions. The uniform process proposed by the ULC and Senator Umberg addresses the concerns that California does not have sufficient information to evaluate and ultimately challenge transactions that may impact California.

Second, creating a California-specific merger review regime, particularly one with lower standards than federal law, will increase the costs, complexity and uncertainty associated with transactions and risks chilling pro-competitive or competitively-neutral transactions. In fact, the

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[13] Staff Recommendation at 7.

[14] As an example, after the U.S. Department of Justice reached a settlement to address its competition concerns with the T-Mobile and Sprint merger, in 2019, California Attorney General Xavier Becerra opposed the settlement and separately filed suit in federal court to enjoin the transaction. Ultimately, California settled with T-Mobile and Sprint to require certain commitments and recover costs. *See* Press Release, State of Calif. Dept. of Just., Attorney General Becerra: States Remain Opposed to T-Mobile/Sprint Megamerger, *available at* https://oag.ca.gov/news/press-releases/attorney-general-becerra-states-remain-opposed-t-mobilesprint-megamerger; *see also* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

[15] Public Comments of Attorneys General of 19 States and Territories in Response to the July 29, 2023 Request for Comments on the Draft Merger Guidelines, *available at* https://oag.ca.gov/system/files/attachments/press-docs/2023.09.18%20Comments%20from%20State%20Attorneys%20General%20-%20FINAL.pdf

[16] Memorandum from Chairman Andrew N. Ferguson to FTC Staff Regarding Merger Guidelines, February 18, 2025, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf; Memorandum from Acting AAG Omeed Assefi to DOJ Antitrust Division Staff Regarding Use of the 2023 Merger Guidelines, February 18, 2025, *available at* https://www.justice.gov/atr/media/1389861/dl?inline.

Mergers and Acquisitions Working Group Report recognized that "[b]usinesses would bear the costs of another set of merger laws" with a California merger control process that overlaps with the federal process because it would "allow California judges to develop legal standards that differ from the federal standards" and that "California courts would produce different merger decisions, even with an identically-worded statute"[17] It is critical to keep in mind that most mergers and acquisitions are pro-competitive and are an important part of a healthy economy. Diverging merger control processes and decisions will discourage these transactions through increased costs and uncertainty, all of which is unnecessary given existing federal law.

And while the Staff Recommendation repeatedly claims that federal courts have created precedents "that hinder successful merger enforcement,"[18] the reality is, as the Mergers and Acquisitions Working Group recognized, that "[t]he significant majority of antitrust litigated cases in the past 20 years have resulted in government victories to enjoin mergers . . . ."[19] In fact, recently, the federal government and cooperating State Attorneys General have successfully blocked proposed mergers between JetBlue and Spirit Airlines (relating to air transportation), IQVIA and Propel (relating to health care data), Illumina and Grail (relating to cancer-detection tests), Novant Health and CHS (relating to two hospitals), Tapestry and Capri (relating to handbags) and Kroger and Albertson's (relating to grocery stores).

Conclusion

Robust antitrust enforcement and sound competition policy are critical components of a well-functioning economy. The Proposals, however, are not supported by a finding that there is a need to revise California's antitrust laws and the sweeping changes contemplated in the Proposal are not underpinned by a cost-benefit analysis suggesting the revisions are good for California. The prospect of unintended consequences is very real in that the Proposals may have a major impact on competition and innovation in California. We urge the CLRC to refrain from proposing any revisions to California's antitrust laws unless there is a demonstrated need for such revisions and an independent cost-benefit analysis has been performed that suggests the revisions are, on balance, good for California.

Sincerely,

Eric P. Enson

Eric Enson

[17] Mergers and Acquisitions Working Group Report at 17, 18.
[18] Staff Recommendation at 12.
[19] Mergers and Acquisitions Working Group Report at 20.