FIRST SUPPLEMENT TO MEMORANDUM 2025-30

Antitrust Law: Status Update (Public Comments and Pending Legislation)

This supplement presents public comments received by the Commission and pending legislation relevant to the Antitrust Law study.[1] The public comments are attached as Exhibits to this supplement.

[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.

Chamber of Progress

Chamber of Progress (Chamber) submitted two letters to the Commission this comment period. According to its website, Chamber "is supported by [its] corporate partners, but Chamber of Progress remains true to [its] stated principles even when [its] partners disagree. No partner companies sit on [its] board of directors or have a vote on our work."

The first, dated April 2, 2025, is responsive to Memorandum 2025-21 (draft Single Firm Conduct language). Chamber asserts that all three draft options in that memorandum would pose "significant risks to California innovative ecosystem and consumer welfare" and raises concerns about some of the draft findings and declarations. This comment is similar to concerns raised by other commenters, which are summarized in Memorandum 2025-30.[2]

With regard to the draft options, Chamber states:

> California's existing antitrust framework, encompassing both the federal Sherman Act and the state's Cartwright Act, provides a robust mechanism for addressing anticompetitive behavior. The Cartwright Act explicitly prohibits agreements that restrain trade, effectively complementing federal provisions. In contrast, the CLRC proposes a radical break from tried and true competition policy and precedent.
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> Options 1 and 2 suggest introducing a state-specific Single Firm Conduct (SFC) law by amending existing statues. Option 3 "uses new terminology and offers a different analytical framework." All three would harm California by chilling investment, slowing innovation, and introducing uncertainty as to what single firm conduct will draw the ire of regulators.
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> In California's technology-driven economy, such ambiguity could inadvertently target practices that benefit consumers. Consider services like Amazon Prime, which bundles streaming, expedited shipping, and grocery delivery. Under an overly broad single-firm conduct standard, such bundling could be deemed exclusionary, despite its clear consumer advantages. Similarly, Apple's App Store policies, which ensure security and streamlined payments, could be challenged under a vague monopolization standard, discouraging companies from maintaining quality control over their platforms.

With regard to the statement rejecting federal precedent,3 Chamber states:

> Under this topsy-turvy standard, the mere fact that a competitor would feel aggrieved by a firm's conduct would suffice. This is madness. In place of reasoned, statistical analysis rooted in impact on prices, the CLRC would have the legislature substitute subjectivity. Instead of facts, we get feelings.

[2] Memorandum 2025-30, pp. 5-8, 12-13.
[3] Memorandum 2025-30, pp. 19-22.

> This Option's lack of clarity will stifle investment, risk-taking and, and acquisitions - a key route to exit for startups, with no obvious benefit to consumers. It must be rejected.

Chamber also raises concerns about the language relating to exclusionary conduct, stating that "[t]his seemingly minor change would wreak havoc on all sides of the California economy." Chamber further points to the European Union's implementation of the Digital Markets Act (DMA)4 as a cautionary tale: "[t]he DMA's emphasis on preventing harm to competitors has led to regulatory measures that compel major tech companies to alter their products and services, often resulting in degraded user experiences and compromised security."

Finally, Chamber expresses concerns that "[m]oving away from consumer welfare risks diminishing product quality and innovation and increasing consumer costs." Chamber states:

> [We] urge you to consider a better approach rooted in traditional consumer welfare analysis. Existing state protections already go further than federal law; realizing those protections, however, may require the legislature to appropriate additional funding for enforcement staff. With additional resources from the general budget, the State could conduct more thorough investigations of conduct that actually harms consumers.

Chamber also submitted a public comment on April 18, 2025 expressing concerns about Assembly Bill 1345.[5]

AB 1345, authored by Assembly Member Bauer-Kahan, amends the Cartwright Act[6] to prohibit one or more persons from acting, causing, taking, or directing a measure, action, or event that either restrains trade or creates or attempts to create a monopoly or monopsony, as specified. The legislation is similar to the language presented as Option Two in the memorandum on Single Firm Conduct.[7] This is a two-year bill and is currently pending in the Assembly Judiciary Committee.[8] The author's staff indicated that the bill will likely be amended and that the author intends to move it forward in 2026.

Chamber expressed concern that AB 1345 would interfere with Commission's work and urged the Commission to join Chamber in opposing it. The staff explained to Chamber that the staff and Commissioners who are appointed by the Governor are prohibited by statute from taking a position on legislation concerning matters assigned to the

[4] Treaty on the Functioning of the European Union, Document 12008E102.
[5] AB 1345 (Bauer-Kahan).
[6] Bus. & Prof. Code, §§ 16700–16770.
[7] Memorandum 2025-30, p. 6.
[8] As a two-year bill, AB 1345 is subject to Rule 56 of the Joint Rules of the California Assembly and Senate for the 2025-26 Regular Session, and must be passed out of the Assembly by January 31, 2026.

Commission for study.[9]

Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) submitted public comment responsive to the Commission's work on Single Firm Conduct and Misuse of Market Power expressing concerns about reforms. According to its website:

> CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.

Multi-Party

The California Chamber of Commerce (CalChamber), CalBroadband, California Association of REALTORS®, California Life Sciences, Carlsbad Chamber of Commerce, Chino Valley Chamber of Commerce, Civil Justice Association of California, Computer and Communications Industry Association, Garden Grove Chamber of Commerce, Greater Coachella Valley Chamber of Commerce, Greater High Desert Chamber of Commerce, International Franchise Association, La Cañada Flintridge Chamber of Commerce, Livermore Valley Chamber of Commerce, Los Angeles Area Chamber of Commerce, Los Angeles County Business Federation, Mission Viejo Chamber of Commerce, Motion Picture Association, Murrieta/Wildomar Chamber of Commerce, National Retail Federation, Orange County Business Council, Palm Desert Area Chamber of Commerce, Palos Verdes Peninsula Chamber of Commerce, Paso Robles and Templeton Chamber of Commerce, Rancho Mirage Chamber of Commerce, Redondo Beach Chamber of Commerce, San Juan Capistrano Chamber of Commerce, Santa Maria Valley Chamber of Commerce, Silicon Valley Leadership Group, Software Information Industry Association, South Bay Association of Chambers of Commerce, Southwest California Legislative Council, U.S. Chamber of Commerce, and Wilmington Chamber of Commerce submitted a comment that is responsive to the Commission's work on Single Firm Conduct and in

[9] Gov't Code § 8288(a) provides:

> No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor. An employee or member of the commission appointed by the Governor shall not advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in that person's official capacity as an employee or member.

support of CalChamber's May 23, 2025 public comment.[10]

PENDING LEGISLATION RELATING TO ANTITRUST

The staff is monitoring the following legislation relating to antitrust law, which is summarized below.

SB 25 (Umberg), as amended May 27, 2025: Premerger Notification

SB 25 is the Uniform Antitrust Premerger Notification Act sponsored by the Uniform Law Commission. SB 25 requires any person who is required to file a notification pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976[11] to additionally file a copy of the federal form with the Attorney General if the person has its principal place of business in California or has a specified amount of annual net sales of goods or services in California. The bill also prohibits the Attorney General from disclosing the filed information and authorizes the Attorney General to impose a civil penalty for a violation of the filing requirement. Its provisions only apply to premerger notifications filed on or after January 1, 2026. SB 25 is currently pending in the Assembly Appropriations Committee.

SB 295 (Hurtado), as amended May 5, 2025: California Preventing Algorithmic Collusion Act of 2025

SB 295 enacts the California Preventing Algorithmic Collusion Act of 2025, which requires a person, upon request of the Attorney General, to provide information related to pricing algorithms, certified for accuracy by specified company officers and subject to civil penalties. It prohibits a person from using or distributing any pricing algorithm if the person has actual knowledge that the pricing algorithm uses or incorporates competitor data and from distributing a pricing algorithm, or making recommendations based on the use of a pricing algorithm that uses, incorporates, or was trained with, competitor data, if the person has actual knowledge that the pricing algorithm uses or incorporates competitor data. The bill declares that a contract that violates these provisions is void to that extent. SB 295 was referred to the Assembly Committees on the Judiciary and Privacy and Consumer Protection.

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[10] See Memorandum 2025-30, EX 11-25, which summarizes and discusses CalChamber's letter.
[11] 15 U.S.C. § 18a.

SB 763 (Hurtado), as amended May 23, 2025: Conspiracy against trade: punishment

SB 763 increases the existing criminal penalties in the Cartwright Act and permits the Attorney General or a district attorney to seek civil penalties of up to $6 million. SB 763 was referred to the Assembly Committees on Judiciary and Public Safety.

AB 325 (Aguiar-Curry), as amended June 19, 2024: Cartwright Act: violations

AB 325 amends the complaint requirements for any violation of the Cartwright Act, declaring it is sufficient for the complaint to contain factual allegations demonstrating that the existence of a contract, combination in the form of a trust, or conspiracy to restrain trade or commerce is plausible. It also provides that a complaint for any violation of the Cartwright Act is not required to allege facts tending to exclude the possibility of independent action. The bill also makes it unlawful for a person to use or distribute a common pricing algorithm as part of a contract, combination in the form of a trust, or conspiracy to restrain trade or commerce. It also makes it unlawful for a person to use or distribute a common pricing algorithm if the person coerces another person to set or adopt a recommended price or commercial term for the same or similar products or services in California. AB 235 was referred to the Assembly Judiciary Committee.

AB 1345 (Bauer-Kahn) as amended April 7, 2025: Cartwright Act: restraint of trade

As noted above, AB 1345 amends the Cartwright Act[12] to prohibit one or more persons from acting, causing, taking, or directing a measure, action, or event that either restrains trade or creates or attempts to create a monopoly or monopsony, as specified. The legislation is similar to the language presented as Option Two in the memorandum on Single Firm Conduct.[13] This is a two-year bill and is currently pending in the Assembly Judiciary Committee.[14]

Respectfully submitted

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director

[12] Bus. & Prof. Code, §§ 16700–16770.
[13] Memorandum 2025-30, p. 6.
[14] As a two-year bill, AB 1345 is subject to Rule 56 of the Joint Rules of the California Assembly and Senate for the 2025-26 Regular Session, and must be passed out of the Assembly by January 31, 2026.

CHAMBER OF PROGRESS

April 2, 2025

The Honorable Xochitl Carrion,
Chair, California Law Revision Commission
295 L Street, Suite 275
Sacramento, CA 95814

Re: Proposals to regulate single firm conduct in California

Dear Chair Carrion and Members of the California Law Review Commission:

On behalf of Chamber of Progress – a tech industry association supporting public policies to build a more inclusive society where all people benefit from technological advancements – I write regarding Memorandum 2025-21, *Draft Language for Single Firm Conduct Provision*[1]. Each recommendation poses significant risks to California's innovation ecosystem and consumer welfare.

Implementing a California-Specific Single Firm Conduct Law will Harm Consumers

California's existing antitrust framework, encompassing both the federal Sherman Act and the state's Cartwright Act, provides a robust mechanism for addressing anticompetitive behavior. The Cartwright Act explicitly prohibits agreements that restrain trade, effectively complementing federal provisions. In contrast, the CLRC proposes a radical break from tried and true competition policy and precedent.

Options 1 and 2 suggest introducing a state-specific Single Firm Conduct (SFC) law by amending existing statues. Option 3 "uses new terminology and offers a different analytical framework." All three would harm California by chilling investment, slowing innovation, and introducing uncertainty as to what single firm conduct will draw the ire of regulators.

In California's technology-driven economy, such ambiguity could inadvertently target practices that benefit consumers. Consider services like Amazon Prime, which bundles streaming, expedited shipping, and grocery delivery. Under an overly broad single-firm conduct standard, such bundling could be deemed exclusionary, despite its clear consumer advantages. Similarly, Apple's App Store policies, which ensure security and streamlined payments, could be challenged under a vague monopolization standard, discouraging companies from maintaining quality control over their platforms.

[1] *See* Draft Language for Single Firm Conduct Provision, https://www.clrc.ca.gov/pub/2025/MM25-21.pdf

Moreover, California's economy thrives on startups and venture capital investment. A stricter single-firm conduct law risks discouraging acquisitions and partnerships that fuel innovation. If large tech firms face ambiguous liability for acquiring smaller companies, venture capitalists may hesitate to fund startups without a clear path to exit, ultimately reducing the number of disruptive new entrants to the market.

In short, a California-specific single-firm conduct law would create problems without clearly solving any cognizable consumer harm.

Proposals to Overturn the *Ohio v. American Express Co.* and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* decisions will introduce needless confusion

The Memorandum includes a section titled "Statement rejecting federal precedent," which suggests "rejecting particularly consequential federal precedent by nullifying the principles of three of the most misused or criticized federal decisions *Brooke, Trinko,* and *Amex*[2]" by making a clear statement that core tenets of competition policy no longer apply in California.

This is both unrealistic and unwise. To take one example of the many flawed suggestions: the proposed language includes "*(e) The risk of harming competition presented by the conduct or any resulting actual harm must be quantified or proven with quantitative evidence;*[3]"

Under this topsy-turvy standard, the mere fact that a competitor would feel aggrieved by a firm's conduct would suffice. This is madness. In place of reasoned, statistical analysis rooted in impact on prices, the CLRC would have the legislature substitute subjectivity. Instead of facts, we get feelings.

This Option's lack of clarity will stifle investment, risk-taking and, and acquisitions - a key route to exit for startups, with no obvious benefit to consumers. It must be rejected.

The CLRC misunderstands multi-sided markets, exclusionary conduct

The *American Express* ruling recognized the complexities inherent in two-sided markets, where platforms serve two distinct but interdependent groups of users. The Supreme Court emphasized the necessity of evaluating both sides of a platform to assess competitive effects, acknowledging that benefits can offset potential harms on the other. The CLRC proposes explicitly reversing the *American Express* decision under California law.

This seemingly minor change would wreak havoc on all sides of the California economy. The Golden State is home to some of the most innovative multi-sided platforms, including

[2] *Id.*
[3] *Id.*

Airbnb, Lyft, and DoorDash. Californians of all stripes have benefited from these platforms as consumers, as vendors, and as independent contractors. Competition policy ought to acknowledge the equities on all sides of those platforms, but this proposal would lead to simplistic analyses and misguided judgments against platforms.

The *Trinko* decision underscores the importance of distinguishing between competitive and anticompetitive behaviors, cautioning against imposing duties on firms that could deter procompetitive conduct. The Supreme Court recognized that compelling companies to share proprietary infrastructure or technologies could reduce incentives for investment in new developments. Overturning this precedent may compel companies to share proprietary technologies, disincentivizing innovation.

Rooting competition policy in market power is not "centrist"

In discussing an exclusionary conduct proposal, the Memorandum alludes to previous work by the Single Firm Conduct Working Group that considered the merits of the consumer welfare standards as well as other reformist proposals. The Working Group appeared to reject traditional consumer welfare analysis, as well as the most extreme Neo-Brandesian proposals, settling on the accumulation of market power as a key test:

> "This centrist approach would reject claims that harm to a competitor, by itself, is sufficient to vindicate an antitrust claim. The harm must be based on the creation, increase, or abuse of market power and must be guided by soundly reasoned precedent and economic analysis.[4]"

Notwithstanding the Working Group's assertions, nothing is "centrist" about focusing on market power. Instead, it is a thinly veiled proxy for Neo-Brandesian big-is-bad thinking—under this standard, a smaller company will always be able to cite market power in their complaints against the largest tech companies. This approach amounts to a thumb on the scale for smaller rivals in every case. California tech company employees, investors, and consumers will all suffer.

Lessons from the Digital Markets Act (DMA) in Europe

The European Union's implementation of the Digital Markets Act (DMA) provides a cautionary tale. The DMA's emphasis on preventing harm to competitors has led to regulatory measures that compel major tech companies to alter their products and services, often resulting in degraded user experiences and compromised security.

For instance, under the DMA, Google was required to modify its search engine results to reduce the prominence of its own services, such as Google Maps. This led to the removal of clickable map links in search results, forcing users to perform additional searches to

[4] *See* Memorandum 2024-33. https://www.clrc.ca.gov/pub/2024/MM24-33.pdf

access mapping services. This change not only inconvenienced users but also failed to boost the adoption of competing mapping services significantly. A study by Télécom Paris researchers found that while searches for "maps" and "google maps" increased by 25% and 18% respectively, indicating user frustration, there was no substantial increase in the use of alternative mapping services[5]. This suggests that the DMA's interventions did not achieve their intended effect of promoting competition but instead diminished user experience.

Moreover, these regulatory changes have compelled companies to invest significant resources into compliance efforts that do not necessarily translate into consumer benefits. For example, Google's compliance with the DMA involved removing useful features from its search results, such as detailed information about flights, hotels, and local businesses. This removal has made it more difficult for consumers to access accurate information quickly, thereby increasing search costs and reducing overall consumer welfare. Google reported that these changes have led to increased traffic to a small number of intermediary services but significantly less engagement with a wide range of businesses, including airlines, hotels, and local merchants. citeturn0search0

Impact on California's most vulnerable

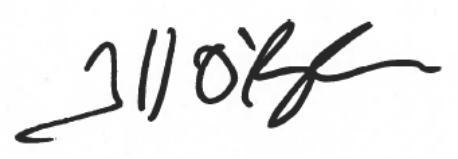
Moving away from consumer welfare risks diminishing product quality and innovation and increasing consumer costs. The virtuous cycle of venture capital investment, entrepreneurship and innovation will come to a grinding halt. Although doing so might benefit a handful of medium-sized competitors, it would harm most vulnerable members of California society: the tech sector grows California tax revenue by $2.6 billion annually and is a major contributor to the state's generous social safety net.

For decades, consumer welfare has been the North Star of competition policy. Any departures from that time-tested standard must meaningfully improve over the current policy mix, which has made the California innovation economy the envy of governments worldwide. Each of these proposals fails that most basic test. For these reasons, we urge you to reject all three single firm conduct proposals.

Instead, we urge you to consider a better approach rooted in traditional consumer welfare analysis. Existing state protections already go further than federal law; realizing those protections, however, may require the legislature to appropriate additional funding for enforcement staff. With additional resources from the general budget, the State could conduct more thorough investigations of conduct that actually harms consumers.

[5] *See Is Competition Only One Click Away? The Digital Markets Act Impact on Google Maps* https://www.cesifo.org/DocDL/cesifo1_wp11226.pdf

Sincerely,



Todd O'Boyle
Vice President of Technology Policy

EX 5

CHAMBER OF PROGRESS

April 18, 2025

The Honorable Xochitl Carrion,
Chair, California Law Revision Commission
295 L Street, Suite 275
Sacramento, CA 95814

Re: AB 1345

Dear Chair Carrion and Members of the California Law Revision Commission:

In 2022, the California State Legislature directed your Commission to undertake a comprehensive study of the state's antitrust laws and make considered recommendations to the Legislature on new laws to adopt.

Over the past two years, the Commission has undertaken this mission conscientiously and collaboratively. Your working groups have sought input from civil society, taken submissions from academics, commissioned experts to present, and interviewed competitors of all sizes. Your approach has been thorough, and we trust that your final recommendations to the legislature will reflect the thoughtfulness of your work.

Unfortunately, new legislation from Assemblymember Rebecca Bauer-Kahan could undermine and bypass the CLRC's ongoing review process. As the CLRC debates potential changes to the state's single-firm conduct standard, AB 1345 would codify one of several options currently under consideration by the Commission.

This legislation represents an effort to undermine and bypass the CLRC's ongoing review process. Allowing this bill to advance would subvert the integrity of the CLRC's process. We therefore call on the Commission to formally oppose AB 1345 as an attempt to end-run the CLRC's ongoing review.

AB 1345 short-circuits the legislative-directed work of the CLRC.

The CLRC recently published *Draft Language for Single Firm Conduct Provision*[1], which tentatively proposed three potential "Options" to update California competition policy. Chamber of Progress noted shortcomings with all three; in short, we believe that existing federal and state policy are mutually-reinforcing, but California lacked sufficient staffing capacity to enforce the Cartwright Act. However, in sharing our feedback, we trusted that the CLRC process was ongoing and that the proposed Options were not final.

[1] *See* https://www.clrc.ca.gov/pub/2025/MM25-21.pdf

Unfortunately, AB 1345 puts an end to your deliberations by copying verbatim your Option 2:

> ***SEC. 2.*** *Section 16720.1 is added to the Business and Professions Code, to read:*
>
> ***16720.1.*** *(a) It is unlawful for one or more persons to act, cause, take, or direct a measure, action, or event that is either of the following:*
>
> *(1) In restraint of trade or to attempt to restrain the free exercise of competition or the freedom of trade or production.*
>
> *(2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.*

Join us in opposing AB 1345

While we have disagreed on occasion, Chamber of Progress consistently finds the CLRC to be a thoughtful partner who has welcomed dialogue. We appreciate the years of effort you have devoted to your current policy review.

We urge you to join us in opposing AB 1345 so that you can finish the critical work the Legislature directed you to do.

Sincerely,

Robert Singleton
Senior Director of Policy and Public Affairs, California and US West

June 13, 2025

California Law Revision Commission
Attn: Sharon Reilly, Executive Director
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: California Law Revision Commission - Study B-750 (Antitrust Law), Draft Single Firm Conduct Provision Memorandum

Dear Executive Director Reilly and Members of the California Law Revision Commission:

On behalf of the Computer & Communications Industry Association (CCIA)[1], I write in response to the California Law Revision Commission's ongoing work pursuant to Study B-750 (Antitrust Law). CCIA has long advocated for sound and evidence-based competition policy and enforcement. CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms. Therefore, proposed regulations on the interstate provision of digital services may have a significant impact on CCIA members. We appreciate the opportunity to provide input to the Commission's ongoing study of antitrust law, and acknowledge the Commission's continued effort to analyze the state's best approach towards antitrust regulation.

As the Commission continues its series of meetings focused on specific areas of antitrust law, we write to offer comments in response to the published Memorandum 2025-21: Draft Language for Single Firm Conduct Provision.[2] CCIA is grateful for the opportunity to expand on our prior feedback[3] and looks forward to the Commission's upcoming meeting on June 26.

CCIA is concerned with the memorandum's recommendation that California adopt an approach modeled on the Competition and Antitrust Law Enforcement Reform Act (CALERA) and New York State's "Twenty-First Century Anti-Trust Act." As previously shared[4] with the Commission, CCIA believes that this would not serve as a good model for California. It risks creating significant uncertainty surrounding a new state-specific "abuse of dominance" standard, for which there is no existing federal U.S. precedent. Such proposals could harm competition, while providing little to no benefit to workers and consumers.

CCIA advises against approaches to antitrust law that seem to abandon evidence-based enforcement that has protected competition and consumers for decades. The memorandum acknowledges the difficulty in distinguishing between anticompetitive conduct

[1] For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.
[2] California Law Revision Commission, *MEMORANDUM 2025-21: Draft Language for Single Firm Conduct Provision* (Mar. 24, 2025), https://clrc.ca.gov/pub/2025/MM25-21.pdf.
[3] *CCIA Letter to California Law Revision Commission Re: Single Firm Conduct Report*, (May 1, 2024), https://ccianet.org/library/ccia-letter-to-california-law-revision-commission-re-single-firm-conduct-report/.
[4] California Law Revision Commission, *FIRST SUPPLEMENT TO MEMORANDUM 2024-13 Antitrust Law: Status Update (Public Comment)* (Apr 10, 2024), at p. 46, http://www.clrc.ca.gov/pub/2024/MM24-13s1.pdf.

EX 8

from competition on the merits.[5] It is important to identify and stop anticompetitive conduct without impairing or preventing business practices that ultimately result in lower prices, greater choice, or better quality for consumers. However, as noted in the memorandum, these considerations are inherently complex because courts have identified conduct that may weaken competition amongst rivals yet also provide benefits to trading partners. Traditionally, federal and California state law have tackled this conundrum by relying on rigorous, evidence-based analysis using *ex-post* enforcement of antitrust rules. Under this framework, judges decide on the legality of conduct based on the evidence of the positive and negative effects of a business' practice. This approach is critical in ensuring that only relevant economic factors are considered, thereby avoiding changing social and political influences that could harm competition and consumers.

CCIA encourages the Commission to refrain from adopting experimental, untested changes to the law. The memorandum recommends that California adopt an approach that explicitly departs from federal statute and established jurisprudence. Adopting a new and untested antitrust *ex-ante* framework, as used in Europe, based on prohibiting ill-defined "exclusionary conduct," would replace this *ex-post* tradition. Because the *ex-ante* approach does not rely as heavily on economic evidence to guide a thorough assessment, and by the memorandum's recommendation, instead focuses on "the conduct's degree of impact to market power," it risks applying broad and sweeping bans that could prohibit procompetitive conduct when applied in the wrong context,[6] with negative consequences for both consumers and workers. For example, *ex-ante* rules could focus merely on company size, which is not an assured predicate for anticompetitive conduct, and they may not consider other beneficial effects such as lower prices or streamlined provision of goods and services to the consumer.

As the memorandum further acknowledges,[7] adopting experimental and untested changes to the law that depart from established precedent can lead to an increase in allegations of anticompetitive conduct for otherwise procompetitive or competitively neutral behavior. Such an uncertain legal environment can chill competition and stifle innovation, as businesses will be unwilling to pursue new ventures that may risk baseless allegations from competitors seeking to gain an advantage.

In Europe, where the Digital Markets Act (DMA) has been fully in force for a little over a year now, the first impression of this digital regulation is that innovation in Europe has not improved, continuing to widen the gap between Europe and the United States and China.[8] In his recent report "The Future of European Competitiveness," former Italian Prime Minister and European Central Bank President Mario Draghi highlights that Europe's problem is not a lack of ideas or ambition, but rather that innovation is blocked by burdensome regulations.[9] As stated in the report, Europe is "failing to translate innovation into commercialization, and innovative

[5] *Supra* n. 2, at 8.
[6] *See* Kay Jebelli, "The DMA's Missing Presumption of Innocence", *Truth on the Market* (Mar 5, 2024), https://truthonthemarket.com/2024/03/05/the-dmas-missing-presumption-of-innocence/.
[7] *Supra* n. 2, at 7.
[8] MARCUS, J. Scott, ROSSI, Maria Alessandra, Strengthening EU digital competitiveness: stoking the engine, EUI, RSC, Research Project Report, Centre for a Digital Society (2024), https://cadmus.eui.eu/entities/publication/89984220-249e-5f7b-9603-25ac1f7f2ae1.
[9] European Commission, The Draghi report on EU competitiveness, Part A, at 6 (Sep. 9, 2024), https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en.

companies that want to scale up in Europe are hindered at every stage by inconsistent and restrictive regulations." In other words, overregulation is hindering European innovation.[10]

Additionally, despite being fully operational for under a year, the experience with the EU's DMA suggests that rigid ex-ante regulations, which do not adequately consider their impact on consumers, can lead to worse user experiences and diminished access to beneficial digital services.[11] The implementation of such regulation has not only affected consumer access to information but has also harmed smaller businesses by, in some cases, redirecting traffic away from them.[12]

CCIA is concerned that certain memorandum recommendations could unintentionally harm competition and consumers. The memorandum suggests that the Commission consider recommending bill language that favors overdeterrence and rejects federal law, "favor[ing] the risk of over-enforcement of antitrust laws over the risk of under-enforcement."[13] As previously noted, the *ex-post* framework that currently governs U.S. antitrust enforcement helps to ensure that judges carefully consider the evidence and follow the facts. Mandating that judges consider certain factors over others, or prefer over-enforcement of antitrust law, would likely complicate the ability to reach correct antitrust judgments, particularly if other political dynamics are considered in lieu of evidence.

Moreover, a recent study has shown how the overenforcement of antitrust laws from mid-2021 through 2024 over-deterred acquisitions, significantly impacting venture-backed startups and venture capital investors.[14] Additionally, this led to a sharp decline in acquisitions of small and medium-sized companies that depended on acquisitions as an exit strategy, as they did not have an IPO as a viable option. As a result, there were reduced exit multiples, increased shutdowns, and constrained venture capital returns. This dynamic undermines innovation, particularly in AI startups, which comprised a third of venture capital deals in 2023,[15] and risks broader economic and security risks from impaired U.S. tech leadership.

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[10] *Id*.
[11] *See*, e.g., Paola Talavera, Competitive Enterprise Institute, "EU's Digital Markets Act: An obstruction to AI innovation?" (Jul. 30, 2024), https://cei.org/blog/eus-digital-markets-act-an-obstruction-to-ai-innovation/; Bloomberg, Samuel Stolton and Mark Gurman, "Apple Won't Roll Out AI Tech In EU Market Over Regulatory Concerns" (Jun. 21, 2024), https://www.bloomberg.com/news/articles/2024-06-21/apple-won-t-roll-out-ai-tech-in-eu-market-over-regulatory-concerns?embedded-checkout=true; Lauren Feiner, CNBC, "Threads, Meta's Twitter competitor, is not yet available in the EU due to regulatory concerns" (Jul. 6, 2023), https://www.cnbc.com/2023/07/06/metas-threads-not-available-in-the-eu-due-to-legal-complexity.html; Jess Weatherbed, The Verge, "Meta won't release its multimodal Llama AI model in the EU" (Jul. 18, 2024), https://www.theverge.com/2024/7/18/24201041/meta-multimodal-llama-ai-model-launch-eu-regulations; Nanna-Louise Linde, Microsoft EU Policy Blog, "Microsoft announces changes to Microsoft 365 and Office 365 to address European competition concerns" (Aug. 31, 2023), https://blogs.microsoft.com/eupolicy/2023/08/31/european-competition-teams-office-microsoft-365/.
[12] See, e.g., Javier Delgado, Mirai, "DMA implementation sinks 30% of clicks and bookings on Google Hotel Ads" (May 7, 2024), https://www.mirai.com/blog/dma-implementation-sinks-30-of-clicks-and-bookings-on-google-hotel-ads/; Adam Cohen, Google The Keyword, "New Competition Rules Come With Trade-Offs" (Apr. 5, 2024), https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs/.
[13] *Supra* n. 2, at 11.
[14] Susan E. Woodward, CCIA Research Center, "Antitrust Enforcement Over-deters Acquisitions, Squeezing Smaller Startups and Venture Capital Investors" (Jan. 24, 2025), https://ccianet.org/research/reports/antitrust-enforcement-over-deters-acquisitions-squeezing-smaller-startups-and-venture-capital-investors/.

[15] *Id*.

CCIA encourages the Commission to review these suggestions in the memorandum with skepticism. While CCIA primarily focuses on promoting competition in the technology sector, our experience tells us that sweeping regulations may impact the business community writ large. We strongly advise against adopting broad new policy changes that will likely lead to unintended consequences for all business sectors, including the tech sector that has grown to be a huge economic driver in California.

As CCIA has previously noted,[16] courts have continued to use the *ex-post* antitrust framework even in the midst of the rapidly evolving technology space. As also evidenced in the D.C. Circuit's landmark 2001 ruling holding Microsoft liable for unlawful monopolization, courts have persisted in applying the "rule of reason" balancing analysis, deciding whether illegal monopolization has harmed competitors with "no procompetitive justification."[17] Courts have relied on this framework and precedent to judge anticompetitive enforcement actions in other dynamic markets. Thus, this analytical framework has proven repeatedly that it is well-suited to protect consumers as well as the ability of firms to innovate to improve their products.

Many leading antitrust scholars continue to support an *ex-post* enforcement framework, emphasizing that it remains a vital and flexible method for assessing competitive harms. Rather than replacing *ex-post* enforcement with rigid *ex-ante* regulation, which risks harming businesses, consumers, and innovation, competition authorities should instead strengthen and modernize existing enforcement tools. According to Professor Daniel Sokol at the University of Southern California Gould School of Law, *ex-post* review can improve enforcement decisions by providing agencies with greater information, thereby allowing enforcers to target specific anticompetitive harms, and avoid unintended consequences of overregulation.[18]

For these reasons, we urge the Commission not to advance any recommendations that would dilute the current *ex-post* framework that has consistently guided sound decisions and allowed competition to flourish while addressing anticompetitive behavior. This helps ensure that antitrust enforcement remains based on evidence and facts, and ultimately works to uphold consumers' welfare.

* * * * *

We appreciate your consideration of these comments. We look forward to continuing to participate in the Commission's ongoing study process and hope the Commission will consider CCIA as a resource as these discussions progress.

Sincerely,
Aodhan Downey
State Policy Manager, West Region
Computer & Communications Industry Association

[16] *The Enduring Potency of the Microsoft Decision*, CCIA (Apr. 2020), https://ccianet.org/wp-content/uploads/2020/04/CCIA_Paper_MSFT_Decision_8.5x11-1.pdf.
[17] *U.S. v. Microsoft Corp.,* 253 F. 3d 34, 72 (D.C. Cir. 2001).
[18] D. Daniel Sokol & Abraham Wickelgren, *Ex Post Review: An Under-used Tool in the Antitrust Enforcement Toolkit,* CPI Antitrust Chronicle, at 3 (Nov. 27, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4644984.

June 24, 2025

California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Submitted electronically to: Sharon Reilly at sreilly@clrc.ca.gov

SUBJECT: ANTITRUST LAW – STUDY B-750 – PUBLIC COMMENT

Dear Chairperson Carrion and Commissioners:

We write on behalf of California's businesses and employers to comment on the work the California Law Revision Commission (the "CLRC") is doing regarding California's antitrust laws, Study B-750. As the backbone of California's economy s, we believe that the robust enforcement of California's antitrust laws benefits all who live and work in the State. Indeed, California's economy has thrived under the existing antitrust laws, spurring growth and innovation all while protecting businesses and consumers from anticompetitive conduct. But we have serious concerns about the CLRC Staff's March 24, 2025, Memorandum 2025-21 ("Staff Memo") containing options for a single-firm conduct provision to be added to California law. It is our view that the CLRC should refrain from proposing amendments to California's antitrust laws based on the Staff Memo's proposals for several reasons.

- The key shortcoming we see with the proposals contained in the Staff Memo, and the idea of revising California law generally, is that we have not seen any evidence that California's antitrust laws are failing to protect businesses and consumers. While we understand that the CLRC has heard voices seeking revisions, none of them have made the case, based on evidence, that Californians are suffering from higher prices or lessened innovation and competition because of deficiencies in California law.

- Another major shortcoming we see with the proposals in the Staff Memo is that no one has measured the costs associated with revisions to California's antitrust laws and whether those costs will be offset by benefits to California businesses and consumers. We know that new regulations, particularly new regulations that depart from existing law, like those proposed in the Staff Memo, come with costs due to uncertainty and increased litigation. Uncertainty and litigation risks associated with a new antitrust law regime in California will chill pro-competitive practices and stifle innovation. The trade-offs associated with amending California's antitrust laws must be measured and considered by the CLRC before proposing any revisions.

- Our concerns about a lack of need and the absence of an analysis of policy trade-offs are made worse by the fact that the Staff Memo proposes major changes in both substantive antitrust law and its enforcement. As we understand the proposals, they could be interpreted to outlaw common business practices that are viewed as being good for competition and consumers, including standard licensing agreements, exclusive dealing arrangements and even discounts aimed at beating competition. This is particularly the case if the CLRC adopts the recommendation in the Staff Memo to disregard the decades of federal precedents that have guided courts and businesses in determining what is lawful and what is not.

Attached to this letter is the California Chamber of Commerce's May 23, 2025, public comment to the CLRC. We fully endorse the points expressed in CalChamber's public comment and ask that the CLRC consider it seriously before taking any further action.

Sincerely,

Ben Golombek
Executive Vice President and Chief of Staff for Policy
California Chamber of Commerce

CalBroadband
California Association of REALTORS®
California Life Sciences
Carlsbad Chamber of Commerce
Chino Valley Chamber of Commerce
Civil Justice Association of California

Computer and Communications Industry Association
Garden Grove Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
International Franchise Association
La Cañada Flintridge Chamber of Commerce
Livermore Valley Chamber of Commerce
Los Angeles Area Chamber of Commerce
Los Angeles County Business Federation
Mission Viejo Chamber of Commerce
Motion Picture Association
Murrieta/Wildomar Chamber of Commerce
National Retail Federation
Orange County Business Council
Palm Desert Area Chamber of Commerce
Palos Verdes Peninsula Chamber of Commerce
Paso Robles and Templeton Chamber of Commerce
Rancho Mirage Chamber of Commerce
Redondo Beach Chamber of Commerce
San Juan Capistrano Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Silicon Valley Leadership Group
Software Information Industry Association
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
U.S. Chamber of Commerce
Wilmington Chamber of Commerce

cc: Governor Gavin Newsom
Members, California State Senate
Members, California State Assembly

BG:am

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May 23, 2025

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

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

Dear Chairperson Carrion and Commissioners:

Under California's existing antitrust laws, the California economy has grown to the fourth-largest in the world and has given rise to the most innovative technology sector on Earth, all while protecting businesses and consumers from unlawful, anticompetitive conduct. Yet the sweeping revisions being considered by the California Law Revision Commission ("CLRC" or the "Commission") threaten California's progress and economic success. As such, the California Chamber of Commerce ("CalChamber"), and its more than 14,000 members, have serious concerns about the proposals being considered and recommend caution.

CalChamber[1] thanks the Commission 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 attempting to develop policies that ensure a strong and dynamic business environment that benefits all Californians. We write regarding the CLRC Staff's March 24, 2025 Memorandum 2025-21 ("Staff Memo")[2] containing options for a single-firm conduct ("SFC") provision that may be added to California law. In short, these proposals all greatly risk stifling competition in California and making illegal common business practices that have long been considered pro-competitive and good for consumers. Moreover, the proposed options remain unsupported by an independent analysis suggesting that they are necessary to protect Californians, and there has been no economic study measuring the costs these proposals will inflict on Californians, all of which can be, and should be, studied empirically before proceeding.

In this comment, we first respond to questions posed by the Commission during the April 3, 2025 hearing regarding the feasibility of conducting economic studies of competition in California as and the costs, benefits and fiscal impact of the proposed revisions. We then detail the massive impact the Staff Memo proposals will have on competition, innovation and businesses, large and small, in California.

[1] CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with BRG.
[2] Memorandum 2025-21 "Draft Language for Single Firm Conduct Provision," March 24, 2025.

The Proposals Remain Unsupported by an Economic Analysis of Competition in California or the Costs of Implementing the Proposals, Which are Studies That Can and Should be Performed

Since our first submission to the Commission in April 2024, CalChamber has repeatedly raised two key concerns. One, there has been no study showing that California's antitrust laws are failing. Put another way, there has been no empirical or analytical analysis showing that California consumers or businesses are suffering from reduced competition, higher prices or lessened innovation because of gaps in California law. Two, there has been no cost-benefit study performed to determine whether the proposed revisions to California's antitrust laws – on balance – are likely to improve economic performance and efficiency at a cost the State is willing to bear.

At the Commission's April 2025 meeting, several Commissioners asked whether these types of economic analyses are even feasible. The short answer is, absolutely!

As an initial matter, there are scores of economic consulting firms and PhD economists who perform studies of economies, industries, and markets all the time to answer difficult questions about levels of competition and the costs of regulation. They include BRG, which is advising CalChamber in this matter, Compass Lexecon, NERA Economic Consulting, The Brattle Group, Charles River Associates, Cornerstone Research, Bates White Economic Consulting and Econic Partners, to name just a few. Major consulting firms like McKinsey & Company, Boston Consulting Group, and Bain & Company also have strong economic consulting divisions. Moreover, California's Legislative Analyst's Office is a resource available to all California legislators and could be asked to prepare a report assessing the benefits, costs, and fiscal impact of the legislative proposals in the Staff Memo in a non-partisan manner.

In fact, several economic consulting firms have already provided the Commission with economic analyses of some of these issues. For example, the Data Catalyst Institute authored a January 2024 economic analysis measuring potential costs associated with new antitrust laws and found that "based on a bespoke economic model . . . if European-style competition concepts, also called 'abuse of dominance' (AOD), become law in the U.S., it could cost small and medium-sized businesses (SMBs) more than $600 billion in lost sales revenue annually."[3] Likewise, the Computer & Communications Industry Association Research Center issued a March 2024 economic study, entitled *Assessment of Economic Costs of Imposing Abuse of Dominance Standards at the State Level*, finding that an AOD-style law in California "could reduce GDP by 1.1 percent and create 116,000 fewer jobs in the first year" and that "[b]y 2032, California could experience a whopping GDP loss of $554 billion, a 10.2 percent decrease in GDP, resulting in 1.2 million fewer jobs created."[4] In October 2024, the economic consulting firm, NERA, provided the Commission with an economic study of concentration in the United States and found that "the empirical evidence based on official data from the U.S. Census Bureau demonstrates that there is no general trend towards increasing and excessive concentration. Indeed, overall concentration levels are on par with those that prevailed before the allegedly lax antitrust policy of the Bush and Obama Administrations and the advent of 'Big Tech.'"[5] And Compass Lexecon performed an economic analysis of the levels of competition in the audiovisual industry, concluding, despite claims to

[3] Second Supplement to Memorandum 2024-13, p. EX 34.
[4] First Supplement to Memorandum 2024-13, p. EX 47.
[5] First Supplement to Memorandum 2025-11, p. EX 35.

the contrary, "that the empirical evidence supports that the audiovisual industry exhibits signs of a dynamic and highly competitive industry, benefiting both consumers and workers in the industry."[6]

While there are a number of different ways that these types of studies can be designed and performed, the economics of them can be quite basic. For example, to explore whether competition in California is less robust than it otherwise would be if California had an SFC provision, economists can compare prices in California with prices in states that have an SFC provision, such as Arizona, Colorado, Florida, and Maryland. That is, economists could compare pricing or margins for specific goods and services in states that have SFC provisions to those that do not, to test whether there are statistically significant price or margin differences between these two groups of states, while controlling for local and regional pricing effects and other variables, like the cost of living.

Likewise, the economic effects of the addition of an SFC provision to California law can be estimated using standard economic impact tools, such as input-output ("IO") analysis or computable general equilibrium ("CGE") models. These economic effects could include losses associated with businesses relocating to other states, the loss of taxes from relocating businesses and employees, and the loss of spending by relocating businesses and employees, among other impacts. IO and CGE models are designed to track direct and indirect effects from economic changes and are commonly used to study the economic effects of changes in government policies. Firms like Regional Economic Models, Inc. specialize in conducting these types of studies.

Yes, studies like these can take time and can be expensive. But the time and costs of such studies pale in comparison to the potential costs of California adopting new legal standards that may stifle competition and innovation and drive business and jobs from the State. As we have repeatedly noted, the Commission should at least study whether new laws are necessary and, if so, how much they will cost before taking further action.

The Breadth of the Potential SFC Provisions

The Staff Memo proposes three options for a Cartwright Act SFC prohibition: (i) The "Basic SFC Provision;" (ii) the "Enhanced SFC Provision;" and (iii) the "Exclusionary Conduct Provision." These are:

> Option One: Basic SFC Provision
>
> It is unlawful for a person to monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize, in any part of trade or commerce.[7]
>
> Option Two: Enhanced SFC Provision
>
> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

[6] Second Supplement to Memorandum 2024-46, p. EX 19.
[7] Staff Memo, p. 2 (footnotes omitted).

(1) In restraint of trade, or to attempt to restrain the free exercise of competition or the freedom of trade or production; or,

(2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.

(b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.[8]

Option Three: The Exclusionary Conduct Provision

(a) It shall be unlawful for one or more persons to engage in anticompetitive exclusionary conduct that affects any part of the trade or commerce within the State.

(b) Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to:

(1) Diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and

(2) Does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power.

(c) "Trading partners" are parties with which the defendant deals, either as a customer or as a supplier.[9]

Option One is designed to track the language of Section 2 of the federal Sherman Act, which prohibits monopolization, attempted monopolization and conspiracy to monopolize.[10] Option Two extends Option One by adding restrictions against restraints of trade. Restraints of trade are currently covered by the Cartwright Act and Section 1 of the Sherman Act, but in the context of joint conduct by two or more firms and not unilateral, single-firm conduct. Nevertheless, Option Two has at least some roots in current antitrust law. Option Three is altogether different, however, and the Staff Memo refers to it as a "clean break from existing federal SFC law."[11]

[8] Staff Memo, p. 4.
[9] Staff Memo, pp. 5 – 6.
[10] Option One's references to monopsonization can be thought of a being akin to monopolization by a buyer instead of by a seller.
[11] Staff Memo, p. 5.

Option One Is Problematic Given the Recommendation that Relevant Federal Standards be Rejected

Although Option One is supposed to track Section 2 of the federal Sherman Act, it comes with a recommendation that, if adopted, the Commission should also adopt language that "explicitly untethers California's law from federal law and certain narrow precedents that might limit California's ability to effectively control competition" (the "Untethering Text").[12] Put simply, adoption of the Untethering Text would remove the traditional guardrails that have been developed over decades to assist courts in distinguishing between truly anticompetitive conduct and aggressive competition on the merits that, while perhaps weakening rivals, is the essence of competition. For example, by rejecting federal precedent there would be no requirement that a defendant be a certain size or have a certain market share (*i.e.*, be a monopolist) before the proposed SFC law would apply, no explanation of how much of an increase in market power is problematic, and no carve-out for temporary increases in market power (regardless if achieved through competition on the merits or otherwise).[13] Indeed, there would be no requirement to define a proper relevant antitrust market, which is designed by federal law to evaluate any increase in market power. Moreover, the Untethering Text states that plaintiffs need not show that "[t]he rivals whose ability to compete has been reduced are as efficient, or nearly as efficient, as the defendant," thereby protecting less efficient competitors.

If adopted, the Untethering Text will not only stifle competition and increase litigation and business costs in California, but may also outlaw business conduct that is commonly viewed as good for competition, consumers, and workers. The Untethering Text would convert Option One's language that hews closely to the Sherman Act into something very different and outlaw common business practices. We discuss several examples in the next section. Here, we simply note that the Untethering Text is designed to remove defenses to liability in antitrust litigation, even though those defenses are aimed at preserving or protecting pro-competitive or competitively neutral conduct from a finding of liability. Slashing prices to lure away competitors' customers; introducing innovative products and services aimed at pressuring outdated and inefficient competitors to either improve or exit the marketplace; giving rebates to loyal customers choosing to forego purchases from competing businesses; offering discounts to resellers seeking to invest in and promote a manufacturer's product to the exclusion of its competitors; and small or temporary gains in market power regardless of the size of the business or others in the market, would all be subject to government and private lawsuits under Option One and the Untethering Text.

While the aim of the Untethering Text may be to protect against predatory practices of dominant entities, as worded and in practice, even small companies employing common business strategies – such as price cutting – will be exposed to significant uncertainty and potential liability if Option One and the Untethering Text are adopted.

[12] Staff Memo, p. 3.

[13] The lack of a market share or market power threshold is included in the Untethering Text even though when discussing predatory pricing, the CLRC's antitrust advisor for this study, Cheryl Johnson, stated, "Now predatory pricing may not be unlawful. In fact, it may be procompetitive if somebody is pricing their goods very low but they are a small player and are not putting people out of business. … So size and market power does matter in terms of the effect of the conduct." California Law Revision Commission meeting, January 23, 2025, meeting video, question and answer starting at 2h 46m 7s and ending at 2h 47m 39s.

Option Two Is Extremely Broad and Captures Many Types of Common Business Conduct

A "restraint of trade" is an action that inhibits parties from entering into transactions. The federal Sherman Act has been interpreted as enjoining only "unreasonable" restraints of trade – restraints whose competitive harms outweigh any competitive benefits. As written, however, Option Two condemns as unlawful any "restraint of trade" and is not limited only to unreasonable restraints of trade. Given the Staff Memo's focus on distinguishing any new California SFC law from its federal counterpart, the failure to limit Option Two's applicability to unreasonable restraints of trade could be interpreted as an intention for the provision to apply to all restraints. Furthermore, adding a prohibition against any "attempt to restrain the free exercise of competition or the freedom of trade or production" to Section (a)(1) also demonstrates an intention that Option Two be interpreted broadly.[14]

Common business contracts such as exclusive dealing contracts, tie-ins, requirements contracts, and most-favored nation agreements could be illegal under Option Two even though these types of contracts can have strong, pro-competitive effects or be competitively neutral. Exclusive dealing contracts are an example. An exclusive dealing contract between a manufacturer and a wholesaler prevents the wholesaler from selling the products of a different manufacturer. This necessarily inhibits the wholesaler's freedom of trade with other manufacturers and other manufacturers' freedom of trade with the wholesaler. Similarly, a requirements contract between a manufacturer and an input supplier prevents the manufacturer from buying the input from a different supplier, which necessarily inhibits the freedom of the manufacturer to trade with other suppliers of the input and the freedom of other input suppliers to trade with the manufacturer. Additional examples can be found with respect to intellectual property. Under Option Two, would a business in California with rights to certain patented technology be required to license that technology to all other businesses in California so as not to restrain those businesses' freedom of production? Would a manufacturer licensing a technology be able to enforce exclusive territories in California or other use restrictions in its licenses, which is a common practice today? Would movie studios be required to give all cinemas in the State the right to show all movies, or could the studios license their movies to the cinemas of their choosing, as they do today? These types of common contracts likely would run afoul of Option Two's prohibition of attempts to restrain the freedom of trade or production.

Yet it is well recognized that these types of vertical restraints – several of which are addressed in more detail below – can be pro-competitive. This is why they are analyzed using the rule-of-reason framework under federal antitrust law. Treating these types of commercial practices as *per se* illegal because they limit or restrain someone's free exercise of competition, freedom of trade or freedom of

[14] The CLRC's antitrust advisor for this study, Cheryl Johnson, described Option Two as, "But you're also not going to let unilateral actors restrain trade, unreasonably restrain trade. I know we say, "restrain trade," but in antitrust talk, that means unreasonable restraints of trade." California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 13m 16s and ending at 1h 14m 38s. Once untethered from federal law, the interpretation of California law cannot rely on "antitrust talk" developed around federal law. We note that state antitrust laws at times are explicit about restraint of trade language. For example, as detailed in the state law summary provided as Exhibit A to the Staff Memo, statutory language in Massachusetts includes, "It is the purpose of this chapter to encourage free and open competition in the interests of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth." Similarly, that in Rhode Island includes, "The purposes of this chapter are … (2) To promote the unhampered growth of commerce and industry throughout the state by prohibiting unreasonable restraints of trade and monopolistic practices, inasmuch as these have the effect of hampering, preventing, or decreasing competition." Staff Memo Exhibit A, pp. 16 and 26.

production would necessarily inhibit pro-competitive and competitively neutral conduct, which would increase costs for businesses in California and harm both California consumers and workers.

Staff indicated that it is "very important" to adopt the Untethering Text with Option Two for the same reasons as with Option One.[15] But as with Option One, the result would be to expose even small companies employing common business strategies to significant uncertainty and potential liability.

Option Three Is Expansive and May Outlaw Standard, Pro-competitive Conduct

Option Three is similarly broad and covers common business conduct that is considered pro-competitive. The Staff Memo notes that Option Three uses new terminology and a new analytical framework.[16] It is, therefore, subject to uncertainty regarding how it will be interpreted by courts. Uncertainty itself increases costs for business and is, therefore, harmful to California businesses, consumers, and workers.

The first part of the test for illegality set out in Option Three is whether the conduct diminishes or creates a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals, thereby increasing or creating a meaningful risk of increasing the defendant's market power. Many types of business conduct diminish the competitive constraints of rivals. For example, improving a firm's product quality is a type of business conduct that would diminish the competitive constraints imposed by the firm's rivals and may temporarily increase the firm's market power.

Market power is the ability to price above a competitive level for a significant period, and Option Three is based on a trade-off between market power (Section (b)(1)) and trading partner benefits (Section (b)(2)). As explained by the Staff Memo, even if conduct results in increased market power or presents a risk of increased market power, Section (b)(2) "is intended to exempt conduct that benefits trading partners, such as producing a superior product."[17] The standard for exemption would be challenging to meet in practice, however.

The market power/trading partner benefit trade-off condemns conduct that "[d]oes not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power." Different customers value different competitive changes differently. Take a product improvement, for example. Some customers may place a high value on specific product improvements. Even if these customers purchase the improved product at a higher price because of the quality improvement, they are better off. Other customers may place less value on the product improvement and receive less value from the purchase of the improved product or opt to forgo making purchases at the higher price. Thus, these customers are worse off even with the quality improvement. Trading partners in this latter group are arguably "harmed," which means the conduct could be prohibited under Option Three. As this example illustrates, some type of (undefined) analysis may be required to weigh benefits accruing to some trading partners with harm to other trading partners arising from any increase in market power. Without such a trade-off, "producing a superior product" would not be exempted under Section (b)(2). In short, while the proposed Option Three may seem simple in theory, it is likely to be highly complex in application, especially without any federal precedent as guidance.

[15] California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 2m 14s and ending at 1h 2m 53s.
[16] Staff Memo, p. 5.
[17] Staff Memo, p. 6.

In addition to chilling product improvements, consider again the example of an exclusive dealing contract between a manufacturer and a wholesaler. Such a contract would prevent the wholesaler from selling the products of the manufacturer's rivals. This necessarily imposes an additional constraint on the operations of each of these rivals, which is either competitively neutral *(e.g.*, the rivals have other, equally good wholesale options available to them) or is competitively detrimental (*e.g.*, the rivals have only less attractive wholesale options available). If only less attractive options were available, an exclusive dealing contract would reduce the constraint posed by each of the manufacturer's competitors, resulting in potential illegality under the first prong of the Option Three test. There may also be competitive harm suffered by customers of the diminished rivals, resulting in illegality under the second prong of that test. Other common vertical restraints may similarly be barred by Option Three, even though it is well recognized that vertical restraints can be pro-competitive or competitively neutral.

As with Options One and Two, the Staff Memo recommends the adoption of the Untethering Text with Option Three,[18] which will similarly expose even small companies employing common business strategies to significant uncertainty and potential liability.

The Untethering Text Will Suppress Competition and Innovation and is Likely to Make Common Business Practices Unlawful in California

The proposed Untethering Text urges a rejection of federal precedents. It also includes a list of elements that are common or required when proving liability in monopolization and attempted monopolization litigation under the Sherman Act, but that would not be required when proving liability under a Cartwright Act SFC provision:

> The Legislature hereby finds and declares that although the following may constitute evidence of a violation of this section, liability shall not require a finding that:
>
> (a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct;
>
> (b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons;
>
> (c) Any price of the defendant for a product or service was below any measure of the costs to the defendant for providing the product or service;
>
> (d) The conduct of the defendant makes no economic sense apart from its tendency to harm competition;

[18] California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 9m 39s and ending at 1h 10m 4s.

(e) The risk of harming competition presented by the conduct or any resulting actual harm must be quantified or proven with quantitative evidence;

(f) In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform;

(g) In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue;

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendant's; or,

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.[19]

If adopted, the Untethering Text is likely to outlaw common pricing and distribution practices that are generally viewed as good for competition, consumers, and workers.

Common Pricing Practices Could Become Unlawful

Cutting Prices and Predatory Pricing Claims:

One of the most frequently used competitive strategies is a simple drop in prices to attract competitors' customers. But due to efforts to "untether" from federal law on predatory pricing, standard price cutting could be challenged and deemed unlawful.

In its simplest form, predatory pricing involves an incumbent firm setting a price below its cost to drive rivals out of the market. Once the rivals have been driven from the market, the incumbent firm can raise its price because it faces no (or reduced) competition.[20] By pricing below its cost, the incumbent takes an economic loss in the short term. For this to be a rational pricing strategy, the incumbent must expect to earn more in the eventual "recoupment phase" when its price is elevated than it loses from pricing at the below-cost, predatory level.

[19] Staff Memo, pp. 13-14.

[20] Carlton, Dennis W. and Jeffrey M. Perloff, *Modern Industrial Organization*, 3rd Ed., 2000, pp. 338-339. Along these lines, the CLRC's antitrust advisor for this study, Cheryl Johnson, described predatory pricing as: "When a dominant party misuses their market power, for instance, to engage in predatory pricing to put out all their competitors and then to take over the market afterwards." California Law Revision Commission meeting, January 23, 2025, meeting video, question and answer starting at 2h 46m 7s and ending at 2h 47m 39s.

Thus, what distinguishes predatory pricing from aggressive price cutting is (i) pricing below some measure of cost and (ii) a likelihood that losses can be recouped once competitors are driven from the market. The Untethering Text, however, specifically abandons these standards. It states that the key economic elements of a predatory pricing claim – the below-cost pricing and recoupment period touchstones – would not be required if challenged under the proposed Cartwright Act SFC provision.[21] This significantly blurs the line between lawful price cutting and anticompetitive predatory pricing.

Without requiring a showing that pricing is below some measure of cost or that the defendant can recoup its losses, a predatory pricing claim loses its economic foundations.[22] Without these foundations, ***all price cutting***, especially to relatively low prices, would be at risk under a new SFC provision. Low and highly-competitive (but above cost) prices could be judged to be predatory under all three options presented in the Staff Memo. Price cutting could be challenged under Option One as an act of monopolization, Option Two because it restrains the freedom to trade by rival sellers priced out of the market, and Option Three because the competitive constraint from rivals diminishes as rivals exit the market. Without the need to assess whether actual prices are below cost, above cost pricing can be deemed to be predatory, and without the need to assess whether recoupment is likely, pricing can be deemed to be predatory even if exit by rivals is unlikely to result in increased prices.[23]

Loyalty Programs:

Like price cutting, loyalty programs are ubiquitous in the economy and coveted by consumers. Starbucks has a loyalty program that provides free coffee to repeat customers, as does Peet's Coffee, Dunkin', Panera Bread and Caribou Coffee. United, Delta, American, Southwest, Allegiant, JetBlue and virtually every other airline offers frequent flyer rewards programs. Gasoline retailers like Exxon Mobil, Chevron, Shell, 7-Eleven, Circle K and Speedway offer loyalty rewards programs to frequent fuel

[21] Untethering Text at (c) and (g). See also SFC Working Group Report, p. 17 ("liability … does not require finding … (iii) that any price of the defendant for a product or service was below any measure of the costs to the defendant for providing the product or service") and SFC Working Group Report, p. 15 ("the 'recoupment' requirement for a predatory pricing claim under federal antitrust law is not a requirement under California law."). In addition, see SFC Working Group Report, p. 17 ("liability … does not require finding … that in a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue."). We note also that there are no market share or market power threshold requirements under the Untethering Text part (i). See also SFC Working Group Report, p. 18 ("A single firm may violate section (a) regardless of whether it has or may achieve a market share above a threshold recognized under Section 2 of the Sherman Act. Furthermore, this statute is [sic] does not require the plaintiff to establish any threshold of market power.").

[22] Note also that the Untethering Text also includes that the Plaintiff need not show that the conduct of the Defendant makes no economic sense apart from its tendency to harm competition (item (d)). Below-cost pricing is only economically rational if losses can be made up later, and this, therefore, reinforces the Untethering Text related to recoupment periods.

[23] Single-Firm Conduct Working Group proponents have indicated that, with Option Three, beneficial, pro-competitive conduct would be protected by requiring challenged conduct to be that which "does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power." See SFC Working Group Report, p. 16; California Law Revision Commission Transcript of May 2, 2024, meeting, Working Group 1: Single Firm Conduct, pp. 9-14, available at Public Database linked at https://clrc.ca.gov/B750.html. Single-Firm Conduct Working Group, Presentation to the California Law Reform Commission, Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton, and Carl Shapiro, May 2, 2024, available at Public Database linked at https://clrc.ca.gov/B750.html. Though customers in the near term may gain from low prices, customers in the future would be harmed by elevated prices. Without a requirement for the analysis of a recoupment period, which is when future customers would be harmed, beneficial, pro-competitive conduct cannot be distinguished from harmful anticompetitive conduct.

purchasers. Grocery stores and hotel chains offer loyalty programs, as do sporting apparel stores like The North Face, REI and Dick's. Rewards programs have the effect of reducing the prices paid by consumers who participate in the rewards program as compared to those who do not.

Loyalty programs, however, can be seen as penalizing customers who conduct more business with a firm's rivals[24] and often diminish customer switching among rivals. Any program or policy that encourages buyers to purchase products from one provider over a rival (*e.g.*, retail coupons) discourages purchases from rivals, reduces the demand for rivals' offerings and may diminish the profitability and unit sales of rivals. Such conduct necessarily reduces the competitive constraint rivals impose on other market participants in even a modestly concentrated market while also restricting the rivals' free exercise of competition and may be viewed as running afoul of both Option Two and Option Three. It also presents a risk of monopolization or attempted monopolization under Option One, especially when evaluated without a market share standard per the Untethering Text. Even so, the ubiquitous nature of these programs makes clear that competition and loyalty programs can go hand-in-hand, and indeed loyalty rewards can be an element of competition between rivals, for example, when firms compete for frequent coffee or gas purchasers or frequent travelers by improving their rewards programs.[25] The economics and antitrust literature generally views loyalty programs as being pro-competitive.[26] And consumers often belong to multiple, competing rewards programs. Yet loyalty programs have not prevented industries like airlines and gasoline retailing from having numerous rivals active in the marketplace.

Nevertheless, the SFC Working Group Report states that loyalty rewards that "penalize a customer that conducts more business with the defendant's rivals" could be anticompetitive "depending on the circumstances."[27] The Staff Memo, however, provides no guidance on how loyalty rewards should be evaluated under the various SFC provisions being considered. Because loyalty programs encourage consumers to purchase products from one provider over that provider's rival(s), they can reduce the demand for a rival's offerings, and can diminish a rival's profitability, they could give rise to

[24] SFC Working Group Report, p. 15.

[25] Maze, Jonathan, "Dutch Bros Sales Improve Despite 'Headwinds,' Thanks to Loyalty," *Restaurant Business*, November 11, 2021, available at https://www.restaurantbusinessonline.com/financing/dutch-bros-sales-improve-despite-headwinds-thanks-loyalty Kelso, Alicia, "Dutch Bros Rewards Will Play a Big Part in the Company's 'Long Game,'" *Nation's Restaurant News*, February 23, 2023, available at https://www.nrn.com/restaurant-finance/dutch-bros-rewards-will-play-a-big-part-in-the-company-s-long-game-; Koprowski, Amanda, "Shell's Fuel Rewards Marks One Year Anniversary of Platinum Status," *Convenience Store News*, July 14, 2024, available at https://csnews.com/shells-fuel-rewards-marks-one-year-anniversary-platinum-status; Griff, Zach, "American Airlines Unveils 10 Changes to the AAdvantage Program," *The Points Guy*, January 9, 2024, available at https://thepointsguy.com/news/american-aadvantage-changes-2024/.

[26] See, for example, Zenger, Hans, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics*, Vol. 8, No. 4, 2012, pp. 717-768; Ware, Roger, "The Economics of Multiproduct Loyalty Programs," *Canadian Competition Law Review*, Vol. 30, No. 1, 2012, pp. 112-132; Campbell, Neil and Florence (Sze Pui) Chan, "Loyalty Is Usually Good – The Treatment of Loyalty Programs Under the Competition Act," *Canadian Competition Law Review*, Vol. 30, No. 1, 2012, pp. 51-92; Caminal, Ramón and Adina Claici, "Are Loyalty-Rewarding Pricing Schemes Anti-Competitive?" *International Journal of Industrial Organization*, Vol. 25, 2007; Spector, David, "Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Rule of Reason," *Competition Policy International*, Vol. 1, No. 2, Autumn 2005, pp. 89-114. While the effects of loyalty programs are generally viewed as being pro-competitive, we note that their effects can be ambiguous in certain cases. Therefore, the merits should be analyzed on a case-by-case basis to avoid chilling procompetitive conduct which would occur if an overall ban on loyalty programs were enacted.

[27] SFC Working Group Report, p. 15.

lawsuits and adverse rulings under the proposed SFC provisions. One consequence would be the chilling of incentives to offer such programs even though they are popular with consumers, lower their prices, and are generally pro-competitive.

Common Distribution Practices Could Become Unlawful

SFC cases often involve product or service distribution practices, such as exclusive dealing and the use of most-favored nations clauses. As with commonly used pricing practices, these commonly used distribution practices may run afoul of the proposed SFC provisions even though these distribution practices are not likely to have anticompetitive effects.

Exclusive Dealing:

It is common for manufacturers to enter into exclusive dealing contracts with distributors or retailers. These contracts limit the distributors' or retailers' ability to carry products from rival manufacturers. Exclusive dealing contracts are generally thought of as being pro-competitive and efficiency-enhancing because they allow a manufacturer to locate distributors and retailers who are willing to heavily promote the manufacturer's products and to train staff on the benefits of these products, which usually enhances competition among brands.[28] It is well established in the economics and antitrust literature that exclusive dealing is one way to address the free riding of one manufacturer on the efforts of another by essentially giving the other manufacturer a property right in its promotional expenses.[29] For example, one manufacturer may spend heavily to promote a product or to train distributor staff in offering services to customers or prospects, while a rival manufacturer may not. When customers seek to make purchases, they may find the product from the rival manufacturer to be more attractive because it has a lower price due to its lower cost structure resulting from its more limited promotional and training expenses. The rival essentially free rides on the other manufacturer's market development and promotional efforts, reducing the manufacturer's incentive to engage in these efforts. That is, exclusive dealing prevents free-riding on a manufacturer's demand-increasing promotions where such promotions would be underprovided in the absence of the exclusive dealing contract. Exclusive dealing in this context is pro-competitive because it addresses this free-riding problem and thereby facilitates the manufacturer's investments in product and market development.[30]

Even though it is generally pro-competitive, exclusive dealing inhibits a rival manufacturer's freedom to trade with distributors that are "locked up" under an exclusive contract with another manufacturer. It also inhibits the locked-up distributor's freedom to trade with other manufacturers. As a result, exclusive dealing contracts could be challenged as possibly violating Option Two. It could also

[28] See, for example, Cooper, James C., Luke M. Froeb, Dan O'Brien, and Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization*, No. 23, 2005, p. 639; Wright, Joshua D., "An Evidence-Based Approach to Exclusive Dealing and Loyalty Discounts," *Global Competition Policy*, July 2009; Heide, Jan B., Shantanu Dutta, and Mark Bergen, "Exclusive Dealing and Business Efficiency: Evidence from Industry Practice," *Journal of Law and Economics*, Vol. XLI, October 1998, p. 387; Abbott, Alden F. and Joshua D. Wright, "Antitrust Analysis of Tying Arrangements and Exclusive Dealing," *Encyclopedia of Law and Economics*, Gerrit De Geest (Ed.), 2008, pp. 200-201.

[29] The seminal paper in this area is Marvel, Howard, "Exclusive Dealing," *Journal of Law and Economics*, vol. XXV, April 1982, 1-25. See also Ornstein, S.I., "Exclusive Dealing and Antitrust," *The Antitrust Bulletin*, Spring 1989, 65-98.

[30] Heide, Jan B., Shantanu Dutta, and Mark Bergen, "Exclusive Dealing and Business Efficiency: Evidence from Industry Practice," *Journal of Law and Economics*, Vol. XLI, October 1998, p. 387.

be a violation of Option Three if a manufacturer does not have access to its preferred distributor, making it a less-effective a competitor.

Exclusive dealing may also violate Option One if it is adopted with the Untethering Text. Under federal law, exclusive dealing contracts can only harm competition among manufacturers if they "lock up" a significant share of the market, thereby making entry or expansion by rivals more difficult. If a market is local and has several available distributors or retailers, for example, and one only serves 10% of a local market, then a manufacturer that enters into an exclusive dealing contract with that distributor or retailer – and no others in the local area – cannot use that contract to block entry or expansion by rival manufacturers. The distributor's share of the local market is simply too small for its exclusive dealing contract with a manufacturer to raise concerns regarding the creation of barriers to entry into the market for a new manufacturer. The Untethering Text, however, states that a defendant would not be required to meet or achieve any specific market share or threshold of market power to establish a claim. Without a market share threshold requirement, it does not matter what standard is used to define the relevant market because the market definition itself does not otherwise matter. Furthermore, without defining a market using an accepted standard of analysis and having some guidelines as to what constitutes a "troubling" market share, a court cannot determine the extent to which exclusive dealing contracts "cover" that market. Thus, exclusive dealing may be found to violate even Option One, especially if it is coupled with the Untethering Text's abandonment of market power or market share thresholds to find liability. That is, there can be a difference in outcomes under Option One and the Sherman Act – even though Option One closely tracks the Sherman Act – because there would be no principled manner to assess the extent of the market limited by exclusive dealing contracts under an untethered Option One.

Most-favored Nation Clauses:

A most-favored nation ("MFN") clause is a contractual commitment to a buyer that the buyer is paying the lowest price charged by the seller.[31] The SFC Working Group Report notes that MFN clauses can be concerns "especially if such clauses are widely used by the defendant."[32]

MFN clauses restrict a seller's freedom to trade with other buyers or to compete for the business of other buyers by lowering prices (possibly violating Option Two) and weaken the competitive constraint provided by rivals to the buyer (possibly violating Option Three). As with exclusive dealing contracts, the Untethering Text inhibits the analysis of whether MFN clauses are widely used by the defendant for the product at issue or a comparison of their pro- versus anti-competitive features, subjecting them to possible liability under Option One.

But MFNs can have pro-competitive effects, such as reducing uncertainty and transactions costs, decreasing search costs, limiting free-riding, and encouraging efficient investment. These clauses are

[31] A 'simple' or 'traditional' MFN guarantees the protected buyer that it will be charged the lowest price offered by the seller to its other buyers. A contractual restriction by one platform that restrict sellers from charging lower prices for their products or services on other platforms including the sellers' own website is known as a "broad" or "wide" platform MFN. For a review of the economics literature pertaining to MFNs, *see*, for example, Chipty, Tasneem, "Platform MFNs: Can Asking for the Lowest Price Discourage Competition?" *The Price Point*, ABA Antitrust Law Section, January 2024; and, Long, Sarah, "Retail MFNs and Online Platforms Under EU Competition Law: A Practical Primer," *Antitrust Chronicle*, Competition Policy International, September 2019.
[32] SFC Working Group Report, p. 15.

commonly used in hotel booking and in on-line retail marketplaces.[33] A platform that promotes hotel room bookings may not be sustainable, for example, if after finding a hotel room on the website an individual can book the room for less at the hotel operator's own website or some other third-party website. The same concerns may arise for any on-line retail sales. A firm is less likely to invest in developing a business around a product or service if others can free ride on that investment and acquire or offer the product or service at a lower price through other means.[34] MFNs, therefore, encourage the development of on-line hotel booking services and other on-line offerings, which benefits competition and consumers. Eliminating MFNs throughout the California economy without allowing a weighing of any pro- versus anti-competitive effects for specific MFNs, or considering whether an MFN is "wide" or "narrow,"[35] would harm competition in parts of that economy.

Loyalty Rebates:

A loyalty rebate provided by a manufacturer to a wholesaler is a discount on the price charged for a product based on the volume of that product purchased. If a certain volume target is met, for example, the buyer's unit price may fall, possibly for all units purchased. A buyer may have multiple volume targets or thresholds in its pricing schedule. Targets may be buyer-specific and can be based on metrics such as market share instead of purchase volumes. Based on the magnitude of the discounts provided, loyalty rebates can provide distributors or retailers with very strong incentives to sell the products of a specific manufacturer, and a sufficiently large discount can provide incentives for the wholesaler not to carry products from competing manufacturers. If the discount provided to the customer is significant enough to discourage the customer from purchasing from rival suppliers, the discount may be thought of as payment for exclusivity or near exclusivity on the part of the buyer. Rebates of this magnitude can have effects similar to those from exclusive dealing, and therefore can violate Options One, Two, and Three. Even so, loyalty rebates can also promote increased sales with the proper choice of volume thresholds while allowing for efficient production planning and reduced uncertainty.[36]

Courts have analyzed whether loyalty rebates are anticompetitive via an analysis that includes elements of predatory pricing (pricing below cost, recoupment periods) and exclusive dealing (the fraction of the market covered). The questions considered include whether the discounts lead to below-

[33] See, for example, Sean Ennis, Marc Ivaldi and Vicente Lagos, "Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change," Toulouse School of Economics Working Paper No. 1106, November 11, 2022.

[34] See, for example, Vandenborre, Ingrid and Michal J. Frese, "Most Favoured Nation Clauses Revisited," *European Competition Law Review*, No. 12, 2014, pp. 588-593 (citing Salop, Steven C. and Fiona Scott Morton, "Developing an Administrable MFN Enforcement Policy" *Antitrust*, Vol. 27, No. 2, 2012, pp. 15-19); Wang, Chengsi and Julian Wright, "Search Platforms: Showrooming and Price Parity Clauses," *The RAND Journal of Economics*, 51(1), 2020, pp. 32-58. Wu, Jason J. and John P. Bigelow, "Competition and the Most Favoured Nation Clause," *CPI Antitrust Chronicle*, July 2013, No. 2, p. 5; and Van der Veer, Jan Peter, "Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis," *Journal of European Competition Law & Practice*, Vol. 4, No. 6, 2013, p. 502.

[35] A contractual restriction by one platform that restrict sellers from charging lower prices for their products or services on other platforms including the sellers' own website is known as a "broad" or "wide" platform MFN. In contrast, platform MFNs are considered "narrow" if they only prevent a third-party seller from setting a lower price on its own website (or other direct sales channel) than that quoted on the platform imposing the MFN.

[36] For a discussion of how loyalty rebates allow manufacturers to increase output and sales, see Zenger, Hans, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics*, Vol. 8, No. 4, 2012, pp. 717-768 ("[A loyalty rebate] allows firms to increase output, as incremental quantities are sold at a lower (discounted) price.").

cost pricing; if so, is there a reasonable prospect for recoupment of any losses; and if the contracts are exclusive or near exclusive, to what extent do they cover the market? For the reasons addressed in our discussions of predatory pricing and exclusive dealing, loyalty rebates may be ensnared by all three Options in the Staff Memo, and the analysis of whether specific loyalty rebates would harm competition would be significantly handicapped by the Untethering Text, even though they are commonly-used business strategies that can be efficiency-enhancing and need not harm competition.

Conclusion

Distinguishing legitimate forms of competition from conduct that harms competition and significantly enhances market power is challenging. This is acknowledged by the SFC Working Group Report, which states, "We know from more than a century of experience under the Sherman Act that courts find it very difficult to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits."[37] This difficulty arises because the questions themselves are complex, not because the language in the Sherman Act is too brief or simplistic. If there were simple solutions that enabled analysts and courts to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits, courts would have found them during previous decades.

The Options provided in the Staff Memo do not provide an easy means to make this distinction accurately. Rather, the Options, along with the proposed Untethering Text, would inhibit courts from making informed decisions on how to target enforcement at competitively harmful conduct while permitting competitively beneficial conduct. Given this, the Options in the Staff Memo are likely to have substantial adverse effects on California residents, workers and businesses, including by making it more expensive, riskier and less desirable to conduct business in the State and ultimately chilling pro-competitive and pro-consumer conduct.

Worse, the Options provided in the Staff Memo are not based on a demonstrated need, but rather on anecdotal and personal beliefs that competition in California could be more robust. Furthermore, the proposals being considered are not supported by a detailed and thorough cost-benefit study that carefully considers the implications – both positive and negative – of the proposed legislative text. Analyzing the costs and benefits of proposals like those in the Staff Memo is particularly important because the proposed SFC Options and the Untethering Text are not likely to assist courts in distinguishing legitimate forms of competition from conduct that harms competition and significantly enhances market power.

Sincerely,

Eric P. Enson

Eric P. Enson

[37] SFC Working Group Report, p. 1.