MEMORANDUM 2025-31

Draft Language for Merger Provisions

This Memorandum[1] presents staff recommendations for draft legislation addressing mergers as requested by the Commission at its January 23, 2025 meeting.[2]

The Commission voted to approve the staff recommendations in Memorandum 2025-11 that California adopt its own merger provisions and explore "misuse of market power" (MMP), but it did not decide whether to adopt an "appreciable risk" merger standard, preferring staff first provide additional information on the current standard and burdens of proof. MMP is discussed in Memorandum 2025-32.

In addition to background on existing law, this memorandum presents three base options for a California law to regulate mergers, with the advantages and disadvantages of adopting each. As with the recommendations for single firm conduct, the provisions in this memorandum are intended to be amended into the existing Cartwright Act,[3] taking advantage of existing remedies and relevant jurisprudence.

Although the Commission approved the staff recommendation that California adopt its own merger notification laws, staff is not presenting recommendations at this time in deference to SB 25 (Umberg),[4] which is pending in the Legislature.

Similar to the memorandum on Single Firm Conduct,[5] the staff is requesting Commission feedback on the options presented but is not requesting the Commission select any proposal at the June 26, 2025 meeting. This will allow interested parties adequate time to provide public comments for consideration by the Commission at its September 18, 2025 meeting.

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1 Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov).

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 posted after the meeting and/or without staff analysis.

2 Minutes (January 2025), p. 4.

3 Bus. & Prof. Code §§ 16700 – 16770.

4 SB 25 (Umberg, 2025) is sponsored by the Uniform Law Commission (ULC) and requires a person who is obligated to file a notification pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 to file a copy of that form and any additional documentation, as specified, with the California Attorney General (AG), among other provisions under certain circumstances. See the First Supplement to Memorandum 2024-24 for an explanation of the ULC's premerger notification act. SB 25 was passed by the Senate and ordered to the Assembly.

5 Memorandum 2025-21, p. 1.

BACKGROUND ON CURRENT MERGER STANDARDS AND BURDENS OF PROOF

Mergers can be challenged before or after they are completed. California currently does not have a broad, state-level merger statute[6] and can only review mergers under state law for certain industries.[7] California is also not automatically privy to the federal filings required of merging entities over a certain size,[8] though the Attorney General may access them through other channels.[9] Once the Attorney General becomes aware of a potentially unlawful merger, California must bring an action in federal court under Section 7 of the federal Clayton Act (Clayton Act). The Clayton Act prohibits mergers whose effects "may be substantially to lessen competition, or to tend to create a monopoly."[10] This includes not only the immediate effects of a merger, but likely future impacts as well.[11]

To determine whether a merger is lawful, courts generally apply a three-part burden shifting framework. Typically, the plaintiff must first establish a prima facie case[12] that the contested merger may substantially lessen competition or tend to create a monopoly. This can be done with direct evidence, such as increased prices or decreased quality, or indirectly, "by proving that the defendant possessed the requisite market power within a defined market."[13] Once the prima facie case is established, the burden shifts to the defendant to present evidence that plaintiff inaccurately predicts the merger's effect on

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[6] Fourteen states have a state-level merger statute. See Memorandum 2024-21, Exhibit A-3.

[7] See, for example, Corp. Code §§ 5914 – 5926 (nonprofit health facilities), §§ 14700 – 14707 (retail grocery firms and retail drug firms), and Health & Safety Code §§ 127507 – 12507.6 (health care).

[8] The Hart-Scott-Rodino Antitrust Improvements (HSR) Act of 1976 established the federal premerger notification program, which provides the Federal Trade Commission and the Department of Justice with information about large mergers and acquisitions before they occur. Premerger notification involves completing a "Notification and Report Form for Certain Mergers and Acquisitions," with information about each company's business. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. See Federal Trade Commission, Premerger Notification Program.

[9] California's Attorney General may subpoena HSR filings or access them through the merging parties. See Uniform Law Commission, Uniform Antitrust Pre-Merger Notification Act, 2024, p. 1.

[10] 15 U.S.C. § 18. Mergers are sometimes also challenged under Section 2 of the Sherman Act.

[11] Memorandum 2024-25, p. 2; *St. Alphonsus Med. Ctr – Nampa Inc. v. St. Luke's Health Sys., Ltd*. (9th Cir. 2015) 778 F.3d 775, 783.

[12] Memorandum 2024-25, p. 2; see, e.g., *United States v. AT&T, Inc*. (D.C. Cir. 2019) 916 F.3d 1029, 1032, explaining that a prima facie case can demonstrate a "reasonable probability" of harm to competition either through "statistics about the change in market concentration" or a "fact-specific" showing (quoting *Brown Shoe*, 370 U.S. at 323 n.39).

[13] *Law v. National Collegiate Athletic Association* (10th Cir.1998) 134 F.3d 1010, 1019; see also *Orson, Inc. v. Miramax Film Corp.* (3rd Cir. 1996) 79 F.3d 1358, 1367. "Due to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make. Accordingly, the courts allow proof of the defendant's "market power" instead. Market power—the ability to raise prices above those that would prevail in a competitive market—is essentially a "'surrogate for detrimental effects.'" (quoting *U.S. v. Brown University in Providence in State of R.I.* (3rd Cir. 1993) 5 F.3d 658, 668.

future competition and/or fails to consider other factors, such as procompetitive benefits, that ameliorate the initial finding.[14] If successful, the burden goes back to the plaintiff to show additional evidence of anticompetitive effects and merges with plaintiff's ultimate burden of proof.[15]

While the Clayton Act's operative language prohibiting mergers whose effect "may be substantially to lessen competition,"[16] has not changed since 1914, there is widespread acknowledgement that judicial interpretation has eroded its original meaning.[17] Some argue the standard as interpreted by the courts now requires proof that the merger "will probably" or is "likely" to cause harm, rather than the original which was construed as requiring evidence of only "a reasonable probability" or "a reasonable likelihood" of competitive harm.[18]

The staff presents options below to address mergers and acquisitions under California law.

MERGER OPTIONS

OPTION ONE: CLAYTON ACT

The first option for a California merger provision largely mirrors the Clayton Act.[19] The language presented below has been modestly amended for comprehension and relevance[20] and retains the operative standard. "Monopsony" was also added to parallel similar language proposed for single firm conduct.[21]

Section X is added to read:

(a) No person shall acquire, directly or indirectly, the whole or any part of the

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14 See *United States v. Gen. Dynamics Corp*. (1974) 415 U.S. 486, 498; *U.S. v. Baker Hughes* (D.C. Cir. 1990) 908 F.2d 980, 990, quoting *General Dynamics* and describing its holding as permitting rebuttal based on a "finding that 'no substantial lessening of competition occurred or was threatened by the acquisition.'"

15 *United States v. AT&T, Inc*. (D.C. Cir. 2019) 916 F.3d 1029, 1032.

16 Because the second prong of the Clayton Act's Section 7, "tend to create a monopoly" has been largely ignored in the last few decades, the discussion in this memo will focus on "may be substantially to lessen competition." For a fuller discussion of the second prong, see "The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7. Robert H. Lande, John M. Newman and Rebecca Kelly Slaughter. Volume 103, Issue 4, Texas Law Review.

17 See Memorandum 2024-25, pp. 2, 18; Seventh Supplement to Memorandum 2024-24, EX 2.

18 Seventh Supplement to Memorandum 2024-24, EX 2.

19 15 U.S.C. § 18.

20 Portions exempting common carriers, a safe harbor for previous acquisitions, and preserving powers delegated to other federal entities were not carried over to this option. The California Public Utilities Commission regulates common carriers, so the exemption language from the Clayton Act is unnecessary. Additionally, the Clayton Act contains language exempting existing acquisitions that were legal prior to the law's enactment. While California could carry over these provisions and backdate them to the Clayton Act's 1914 enactment, such transactions are beyond the statute of limitations.

21 Memorandum 2025-21, p. 2.

> stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

The first paragraph contains the operative provision, prohibiting mergers whose effect may be to substantially lessen competition or tend to create a monopoly or monopsony. The second paragraph creates an exemption for persons acquiring stock or other assets for investment purposes, or forming subsidiaries or branches, if the effects do not substantially lessen competition.

This conservative approach is intended to ameliorate confusion and claims of uncertainty from those opposing any legal standard departing from federal law. All businesses are currently subject to the Clayton Act, whose language the courts have decades of experience interpreting. Moreover, working from familiar federal base language avoids the challenges that can arise when interpreting a completely new regulatory structure. Merely adding language that provides the ability to challenge mergers in state courts is a significant change to California's antitrust law.

The downside to borrowing federal law is that it implicitly imports the federal jurisprudence that has steadily increased the burden of proof necessary to challenge mergers.[22] However, the Commission could adopt guardrail language establishing the parameters of federal influence and emphasizing California's values in interpreting its own merger law.[23]

Of the 14 states with merger provisions, all but one[24] contains similar Clayton Act language prohibiting certain actions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." However, each varies beyond that. For example, many contain variations on the phrase "substantial lessening of competition," but fail to follow with "or tend to create a monopoly."[25] Mississippi, Louisiana, and Oklahoma

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[22] See Memorandum 2024-25, pp. 2, 18; Seventh Supplement to Memorandum 2024-24, EX 2.

[23] Memorandum 2025-21, pp. 9-14. See also Memorandum 2025-32.

[24] Tex. Bus. & Com. Code § 15.05(d)

[25] See, e.g., Colo. Rev. Stat. § 6-4-107, La. Rev. Stat. Ann. § 51:125, Neb. Rev. Stat. Ann § 59-1606.

prohibit acquisitions only between corporations in the same line of business[26] and Mississippi additionally requires a public welfare standard.[27] Ohio specifically prevents insurance mergers that impact competition,[28] and New Jersey only prohibits anticompetitive acquisitions from two or more corporations.[29] Four states also prohibit acquisitions that restrain trade or commerce.[30]

However, there are also reasonable arguments for changing the Clayton Act's problematic standard to clearly reset judicial interpretation. The following options depart more significantly from existing law.

OPTION TWO: PHILADELPHIA NATIONAL BANK

Option Two takes Option One's base language and adds the presumption established in *United States v. Philadelphia National Bank*[31] that highly concentrated markets are inherently uncompetitive. This option also incorporates the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission (Merger Guidelines)[32] to guide the court's analysis.

> **Section X is added to read:**
>
> (a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) A merger that may produce a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive

[26] Miss. Code Ann. § 75-21-13, La. Rev. Stat. Ann. § 51:125 and Okla. Stat. tit. 79 § 208.

[27] Miss. Code Ann. § 75-21-13 states in part, "(1) No corporation shall acquire directly or indirectly, the whole or any part of the capital stock of any competing corporation doing business in this state, nor directly or indirectly acquire the franchise, plant or equipment of any other competing corporation doing business in this state if such other corporation be engaged in the same kind of business and be a competitor therein, where the effect of such acquisition of stock, franchise, plant or equipment may be to substantially lessen competition or to restrain trade or competition in the state, or any community thereof, or tend to create a monopoly of any line of commerce and will be inimical to public welfare."

[28] Ohio Rev. Code Ann. § 3901.321.

[29] N.J. Stat. § 56:9-4(c).

[30] Nev. Rev. Stat. Ann. § 598A.060, N.J. Stat. § 56:9-4, Miss. Code Ann. § 75-21-13, La. Rev. Stat. Ann. § 51:125.

[31] (1963) 374 U.S. 321.

[32] The Merger Guidelines provide direction to the market about the federal agencies' enforcement priorities. 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission.

> effects.[33] This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321.
>
> (c) In interpreting this section, the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission shall be considered persuasive authority and understood to complement and be harmonized with this section.
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> (d) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

United States v. Philadelphia National Bank involved a proposed merger between two banks that would have resulted in a combined 30% market share. The U.S. Supreme Court relied heavily on Congress' concerns about increasing economic concentration in enacting the Clayton Act[34] and declared the merger illegal because 30% would result in an "inherently anticompetitive tendency" in the market.[35] (The court noted that market shares below 30% might also pose a threat to competition.[36]) This framework came to be known as the "structural presumption" because of its decisive role in merger cases.[37]

Philadelphia Bank has never been overturned, though many federal courts have ceased to accord such weight to the plaintiff's initial showing of concentration due to the rising influence of the Chicago School, which promoted the efficiencies of bigger businesses above the competitive process. [38]

The benefit of Option Two is that it is modelled on an existing body of law and guidance that businesses are currently subject to and familiar with. California judges can look to

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33 This language is drawn from *U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321, 362-363:

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

34 (1963) 374 U.S. 321, 362-363.

35 Id. at 325. The defendants also failed to present sufficient evidence to "rebut the inherently anticompetitive tendency manifested by [the amount of market share]" that would "clearly [show] that the merger is not likely to have … anticompetitive effects." (at 363, 366).

36 Id. at 364, 365. "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." The court noted further, "Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of [section] 7 nor the legislative history suggests that any particular percentage share was deemed critical."

37 Memorandum 2024-25, p. 18.

38 See Memoranda 2024-25, pp. 3, 6; 2024-26, p. 4.

Philadelphia Bank and its progeny to interpret California's merger regime, as well as how the Merger Guidelines are used. The Merger Guidelines reflect the federal enforcement's shift towards *Philadelphia Bank*, again favoring competition.[39]

Some may argue referencing the Merger Guidelines is not enough, however, and despite the decades of relevant jurisprudence, the standards remain too vague to truly reinvigorate enforcement. For example, some may argue that this proposed option does not give courts specific guidance on the criteria to establish a presumption and the grounds for rebutting the presumption. The counterpoint is that this vagueness allows for flexibility in the ever-changing antitrust landscape, and establishing bright line rules frequently prove merely a challenge for persons to find ways to circumvent them.

OPTION THREE: FEDERAL MERGER GUIDELINES

Option Three builds on Option Two's base language, codifies specific language from the Merger Guidelines[40] drawn from *United States v. Philadelphia National Bank,*[41] and adds new language instructing how to rebut the presumptions.

> **Section X is added to read:**
>
> (a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.[42]
>
> (b) This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321, which found that a merger which may produce a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market is deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[43]
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> (c) A merger shall be presumed to substantially lessen competition or tend to create a monopoly or monopsony if it results in:

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[39] Of note, the 2023 Merger Guidelines "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise." 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, p. 3.

[40] The Merger Guidelines provide direction to the market about the federal agencies' enforcement priorities. Of note, the 2023 Guidelines "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise." 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, p. 3.

[41] (1963) 374 U.S. 321.

[42] This language is based on 15 U.S.C. § 18.

[43] This language is drawn from *U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321.

(1) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points; or

(2) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.[44]

(d) A defendant may rebut the presumption in (c) by demonstrating by a preponderance of the evidence that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis and that any potential anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market.

(e) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

This option codifies Merger Guideline 1, which specifically address mergers in concentrated markets as was the case in *Philadelphia Bank*, using a measurement called the Herfindahl-Hirschman Index (HHI):

> The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase.[45]

The Guidelines then tie HHI levels to corresponding standards in the Clayton Act:

> A merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly. The Agencies also may examine the market share of the merged firm: a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.
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> When exceeded, these concentration metrics indicate that a merger's effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger. This presumption of illegality can be rebutted or disproved. The higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove

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[44] This subdivision mirrors Section 2, 2.1: Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market, 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, pp. 5-6.

[45] Id., p. 5.

it.[46]

Codifying the Guidelines in relation to *Philadelphia Bank* establish quantifiable metrics for the otherwise vague terms "undue concentration" and "significant increase." The Merger Guidelines, while not law, were adopted by the federal agencies following rigorous national vetting[47] and have been relied on by courts.[48] This option gives direct guidance to courts as to how to evaluate mergers based on established metrics, giving greater certainty to the market.

While some may take comfort in a bright line standard, others may exploit its rigidity by defining a market in such a way that the HHI numbers circumvent the restriction. Further, focusing on these metrics may cause courts to lose sight of the underlying competitive issues, prohibiting transactions that exceed the limits but remain competitive. This structure would also not capture circumstances where very large firms absorb nascent competitors, since such transactions may not register on the HHI index. However, this is not the only option for policing mergers, as the Guidelines suggest such activity may fall under the Sherman Act Section 2, "nascent threat to monopolists."[49]

There are additional arguments that this Merger Guideline does necessarily reflect an interpretation of *Philadelphia Bank*:

> The 2023 Guidelines also provide that the structural presumption is triggered by transactions that would create a firm with a market share exceeding 30% while increasing the market's HHI by more than 100. These triggers for the presumption did not appear in the 2010 [Horizontal Merger Guidelines]. The 30% figure is derived from the Supreme Court's 1963 decision in *United States v. Philadelphia National Bank*. That decision, however, did not address HHI changes and instead grounded the presumption in a combination of the 30% threshold and a "significant" increase in market concentration. The Court did not specify a minimum value for a "significant" increase in concentration, but the HHI increase in that case was roughly 600. The discrepancy between this figure and the Guidelines' use of the lower trigger of 100 has prompted some[50] to question

46 Id. pp. 5-6.

47 "The 2023 Merger Guidelines are the culmination of a nearly two-year process of public engagement and reflect modern market realities, advances in economics and law, and the lived experiences of a diverse array of market participants." Federal Trade Commission and Justice Department Release 2023 Merger Guidelines, December 18, 2023.

48 See, e.g., *Federal Trade Commission v. Kroger Company* (2024) 2024 WL 5053016 (D.Ore. 2024); *Federal Trade Commission v. Tapestry Inc.* (S.D. N.Y. 2024) 755 F. Supp. 3d 386.

49 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, pp. 20-21. This conduct may also fall under the proposed Option 2 in Memorandum 2025-21, p. 4, "restraint of trade."

50 Citing Shapiro, C. Evolution of the Merger Guidelines: Is This Fox Too Clever by Half? Rev Ind Organ 65, 147–175 (2024).

whether the Guidelines' approach is firmly rooted in existing doctrine.[51]

Further, some may argue that requiring proof for rebutting the presumption that "anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market" is too high a bar and not reflective of current law which has never settled on the exact parameters of an efficiencies defense.[52]

Further, some may argue that in referencing a specific version of a federal guidance document that updates frequently, California will inevitably fall out of step with federal practices. This could disrupt the market, causing confusion and additional expense for companies maintaining compliance with multiple regulatory schemes.[53] This can be addressed by acknowledging California is free to amend its law to conform with new Guidelines. Further, the intent in establishing a California merger law is to create a body of state antitrust jurisprudence that was always intended to diverge from the federal system.[54]

Finally, some may say this option is insufficient to bring the change California seeks, and a further break from federal law is necessary. The is the basis for the last option.

OPTION FOUR: APPRECIABLE RISK

Option Four takes the basic framework from Option One but reduces the Clayton Act's standard prohibiting mergers whose effect "may be substantially to lessen competition" to

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[51] J. Sykes, 2023 Merger Guidelines: Analysis and Issues for Congress, Congressional Research Service, pp. 2-3, March 28, 2024.

[52] See, e.g., *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.* (9th Circuit 2015) 778 F.3d 775, 789:

> … four of our sister circuits (the Sixth, D.C., Eighth, and Eleventh) have suggested that proof of post-merger efficiencies could rebut a Clayton Act § 7 prima facie case. (citations omitted) The FTC has also cautiously recognized the defense, noting that although competition ordinarily spurs firms to achieve efficiencies internally, "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." Merger Guidelines § 10; see also Oliver E. Williamson, Economies as an Antitrust Defense Revisited, 125 U. Pa. L.Rev. 699, 699 (1977) ("Sometimes ... a merger will ... result in real increases in efficiency that reduce the average cost of production of the combined entity below that of the two merging firms."). However, none of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense; thus, even in those circuits that recognize it, the parameters of the defense remain imprecise.

[53] Memorandum 2024-25, p. 15.

[54] Memorandum 2024-34, p. 4. The Concerted Action working group noted, "…in *In re Cipro Cases I & II*, ("*Cipro*") the California Supreme Court reiterated that "'[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.'" Id. at 858–59 (quoting *Aryeh v. Canon Bus. Sols., Inc.* (2013) 55 Cal.4th 1185, 1195; and then citing *Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1164).

those whose effect "may be to create an appreciable risk of lessening competition more than a de minimis amount," based on Sen. Klobuchar's Competition and Antitrust Law Enforcement Reform Act (CALERA).[55]

> **Section X is added to read:**
>
> (a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to create an appreciable risk of lessening competition more than a de minimis amount, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

This new standard consists of two parts: it modifies "may be" with "appreciable risk" and replaces "substantially" with "more than a de minimis amount." Together these are intended to reduce the burden of proof necessary to prove an illegal merger. While there is no magic to these words specifically,[56] some are reflected in court rulings[57] and a federal legislative proposal prepared by multiple antitrust experts to "revise the legal standard under section 7 of the Clayton Act to better enable enforcers to arrest the likely anticompetitive effects of harmful mergers in their incipiency, as Congress intended."[58]

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[55] Sen. No. 225, 117th Cong. 1st Sess. (2021). This bill was reintroduced as Sen. No. 130 119th Cong. 1st Sess. (2025). The purpose of "may be" in the Clayton Act is to establish that the standard anticipates the probability of future harm, which is achieved by "creates an appreciable risk." "May be" is thus unnecessary but reinforces the probabilistic nature of the standard. "Materially" is further defined in CALERA as "more than a de minimis amount" and the Commission staff elected to skip the intermediate term.

[56] Several other bills have been introduced that amend the Clayton Act standard in different ways. See e.g., Sen. No. 1074, 117th Cong. 1st Sess. (2021), "Trust-Busting for the Twenty-First Century Act," which changes the standard to prohibit certain mergers whose effect "may be to lessen competition in any way," and Sen. No. 3847, 117th Cong. 1st Sess. (2021) "Prohibiting Anticompetitive Mergers Act of 2022," which prohibits mergers whose effect may be to "harm the competitive process, or create or help maintain a monopoly, a monopsony, market power, or unfair methods of competition." Sen. Klobuchar's language was chosen in part because, although it has yet to pass, it continues to be re-introduced in Congress and has generated scholarly attention.

[57] *St Alphonsus Medical Center-Nampa Inc. v. St. Luke's Heath System, Ltd.* (9th Cir. 2015) 778 F. 3d 775, 778 (no requirement of proof of anticompetitive effects; "all that is required is merger create an appreciable danger of such consequences, citing *Hosp. Corp. of Am.* (7th Cir. 1986) 807 F.2d 1381, 1389).

[58] Sen. No. 130 119th Cong. 1st Sess. §2(b)(2) (2025).

There would be several benefits to creating a new merger standard in California. As noted in a prior Memorandum:

> Adopting a different state standard for proof of competitive harm from the federal standard could have several benefits. First, the volume and strength of evidence required to prove possible anticompetitive harms would be lower, which would make it easier for the state to address anticompetitive mergers. Second, the change would signal a departure from federal merger law and provide distance from the federal precedents that hinder successful merger enforcement. Such decisions have steadily chipped away at checks on power-concentrating mergers by, among other acts, assuming that vertical mergers are procompetitive, blocking findings of nascent or potential entrants, and heavily focusing on price effects while ignoring harms to labor, innovation and other nonprice elements. Without those burdens, state court judges may feel freer to establish more protective caselaw.[59]

Changing a familiar standard comes with significant risks, though. There is an argument that the federal standard does not need to be changed to more effectively police mergers, but rather additional state enforcement resources are needed.[60] While perhaps true, substituting a lesser standard could also make it easier to prove cases, freeing resources toward pursuing additional cases.

Critics will also argue creating a new standard will cause significant disruption to businesses, creating uncertainty until a solid base of jurisprudence is built. In response to the Mergers and Acquisitions report discussing the "appreciable risk" standard, one stakeholder noted:

> But it is not all clear how a stricter standard would be worthwhile. … Deviating from Brown Shoe's warning that merger policy does not focus on "ephemeral possibilities" but transactions that have a "probable anticompetitive effect" would open a Pandora's Box that would have absurd results in a dynamic economy full of possibility—thousands of ultimately procompetitive mergers may be thought to have some "appreciable risk" of harm ex-ante.[61]

NEXT STEPS

The staff is requesting Commission feedback on the options presented but is not requesting the Commission select any proposal at the June 26, 2025 meeting. This will allow interested parties adequate time to provide public comments for consideration by the Commission at its September 18, 2025 meeting.

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59 Memorandum 2025-11, p. 12.

60 California currently reviews on average five merger cases per year. Contrast this with the federal government, which receives over 2,000 merger filing reports per year and acts on approximately 30. Memorandum 2024-35, p. 11.

61 Memorandum 2024-32, p. EX 11.

Does the Commission have any questions about the options presented, and would the Commission like the staff to draft any additional merger provisions?

Respectfully submitted,

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