FIRST SUPPLEMENT TO MEMORANDUM 2025-31

Antitrust Law: Status Update (Public Comment)

This supplement presents a public comment received by the Commission.[1] The public comment is attached as an Exhibit to this supplement.

PUBLIC COMMENT

Chamber of Progress (Chamber) submitted a comment to the Commission that is responsive to Memoranda 2025-31 and 2025-32 and expresses concerns about the memoranda. 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."

Respectfully submitted

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director

[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

June 25, 2025

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

Re: Antitrust Law – Draft Language on Merger Provisions and Draft Language on Misuse of Market Power (MMP) language (Memoranda 2025-31 and 2025-32)

Dear Chair Carrion and Members of the Commission:

On behalf of the Chamber of Progress - a center-left tech industry association supporting inclusive innovation - I respectfully urge the Commission to reconsider its proposed draft merger provisions outlined in *Draft Language on Merger Provisions*[1] (Memorandum 2025-31) and *Draft Language on Misuse of Market Power*[2] (Memorandum 2025-32). As California grapples with whether and how to revise its competition policy, the state must:

a) Resist calls to duplicate or supplant longstanding federal authority on merger enforcement, and
b) Reject flawed neo-Brandesian conceptions of market power.

Mergers and Acquisitions Are a Federal Matter for Good Reason

The Commission's proposal to enact a California-specific merger law is misguided. The regulation of mergers - particularly those affecting interstate commerce - has long been the province of federal law, primarily under the Clayton Act and Hart-Scott-Rodino framework.

Creating a new state-level merger review process introduces unnecessary duplication. Worse, it would create a patchwork legal environment, forcing merging firms to navigate separate (and possibly conflicting) state and federal requirements. This kind of legal fragmentation would create delays, increase litigation risk, and disincentivize legitimate combinations that benefit consumers and strengthen competition.

The federal government has consistently declined to enact more radical versions of merger law like the CALERA proposal, which the *Proposed State Merger Provisions* explicitly emulates. The core assumptions behind proposals to lower merger

[1] *See Draft Language on Merger Provisions* https://clrc.ca.gov/pub/2025/MM25-31.pdf
[2] *See Draft Language on Misuse of Market Power* https://clrc.ca.gov/pub/2025/MM25-32.pdf

enforcement thresholds are without empirical justification. California should not rush headlong to embrace an approach that Congress has evaluated and repeatedly rejected.

California's existing antitrust framework already complements federal law via the Cartwright Act and Unfair Competition Law. By layering on a redundant state-level merger control regime, the Commission risks introducing uncertainty, procedural burden, and economic harm - particularly to the state's critical innovation ecosystem.

The Memoranda mistake scaled consumer benefits for competitor harm

A core theme in the *Merger Provisions* is that mergers involving large firms are inherently suspect, while transactions by smaller firms should be encouraged. This is a false dichotomy. Many of the most dynamic, pro-consumer innovations in recent years have come precisely from scaled platforms that grew through acquisition and reinvestment, including Amazon, Google, and others.

The assumption that scale necessarily suppresses competition fails to consider the power of network effects to enhance consumer welfare. In marketplaces like Amazon's, scale enables lower prices, faster delivery, and broader selection - direct benefits for consumers and small merchants alike. Penalizing mergers that increase these efficiencies would not advance consumer welfare; it would hinder it.

Worse, the *Draft Language on Misuse of Market Power* makes this flawed assumption explicit:

> "MMP is based on the idea that conduct by parties with significantly more power than their rivals can have a disproportionate impact on the competitive process by leveraging their size to increase market share rather than by producing a better product or service.[3]"

Each proposed *Option* would presume that "*Bundling, tying, using loyalty rebates, or refusing to interoperate*" would constitute a Misuse of Market Power. Loyalty rebates save California consumers money at a time when the Trump administration's tariffs are driving up costs. They benefit consumers across the economy, most prominently making travel more affordable. And, critically, the value of loyalty programs evinces tremendous network effects and returns to scale, making it more likely that a working family can find, for example, a hotel where they can redeem a free stay at their destination.

The *Draft Language on Misuse of Market Power* breezily ignores this, at the peril of those with the fewest resources to spare.

California's Role in the Innovation Economy Depends on Exit Opportunities

[3] *See Draft Language on Misuses of Market Power,* p2.

California is the cradle of innovation in the U.S. in no small part because it supports a healthy ecosystem of venture capital, risk-taking, and exit opportunities. Mergers are not just economic events - they are structural features of this ecosystem. They offer a "fail-safe" for founders and liquidity for venture capitalists, fueling a cycle that encourages entrepreneurship.

By making mergers harder, slower, or riskier through new state-level hurdles, the Commission's proposals would inadvertently undermine the very incentives that have helped California produce world-leading firms in AI, e-commerce, and digital services. This isn't theoretical - firms like Google, Meta, and Amazon have each supported thousands of smaller California-based businesses through partnerships, acquisitions, and investments.

Codifying *Philadelphia National Bank* is emblematic of the faulty assumptions throughout

The *Draft Language on Merger Proposals's* Option 2 proposes codifying *United States v. Philadelphia National Bank.* That decision, made in the pre-digital 1960s, does not adequately account for the dynamics of platform markets, network effects, and the nonlinear growth trajectories of modern tech firms. Worse yet, it presumed that any combination resulting in a 30% market share was anti-competitive.

Applying this precedent rigidly at the state level would ignore decades of federal evolution in merger analysis - including the shift to analyzing actual market harm rather than simple concentration metrics. Rather than revisiting *Philadelphia National Bank* to inform new state legislation, California should defer to modern, economics-based standards used by bipartisan Administrations prior to January 2021.

The Better Path Is Enforcement Capacity, Not Statutory Overreach

We share the Commission's goals of protecting consumers and promoting fair competition. But rather than adding layers of new law, California should invest in better enforcement capacity under existing frameworks. The Cartwright Act and federal antitrust laws already offer robust tools - to the extent anything is lacking it is resourcing, not statutory reach.

We welcome continued dialogue as the Commission completes its important work.

Sincerely,

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