MEMORANDUM 2025-32

Status Update: Draft Language on Misuse of Market Power

This Memorandum[1] presents an update on the staff's analysis of and draft language addressing misuse of market power (MMP) for single firm conduct, as requested by the Commission at its January 23, 2025, meeting.[2] During that meeting several Commissioners expressed apprehension about defining misuse of market power, with particular concerns about determining a specific market share percentage to trigger the heightened scrutiny.[3] The Commission voted to approve the staff recommendations in Memorandum 2025-11 and directed the staff to provide further analysis and draft language options for MMP.

The staff notes that Assembly Concurrent Resolution (ACR) 95,[4] which directed the Commission to undertake the Antitrust study, specifically requested the Commission to consider "Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's 'Twenty-First Century Anti-Trust Act' and in the 'Competition and Antitrust Law Enforcement Reform Act of 2021' [CALERA] introduced in the United States Senate, or as outlawed in other jurisdictions."[5] The legislation referenced by ACR 95 both address misuse of market power.[6]

The staff is requesting Commission feedback on the draft language presented but is not requesting a decision. The Commission should consider the draft language preliminary, as the staff continues to analyze MMP concepts and other language options at the recommendation of our Antitrust expert. The staff agrees that further study and analysis is needed on this complex and new approach. However, since this item has been on the agenda for several weeks, the staff believes it is important to provide the Commission with potential language options.

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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. For additional background on misuse of market power, see Memoranda 2025-11, pp.7-8; 2024-46, pp. 18-20.

[3] See video of January 3, 2025 Commission meeting.

[4] 2022 Cal. Stat. res. ch. 147.

[5] ACR 95, clause (1); see also New York S933A (2021); Sen. No. 225, 117th Cong., 1st Sess. (2021).

[6] These bills use the term "abuse of dominance."

Finally, the staff notes that any proposed MMP language should be considered in relation to the Commission's choices, if any, for Single Firm Conduct and Merger language, as explained further in this memorandum.

BACKGROUND ON MISUSE OF MARKET POWER

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. For example, if a small company with many coequal competitors issues a discount to increase business, it is not likely to impact the competitive process overall because the small company will not have the resources to maintain that discount indefinitely, and a price balance will resume between competitors. However, a company that is much larger than its competitors could implement so significant a discount over such a long period of time that the other companies go out of business. Similarly, a very large company can be so vital to a market that they could prohibit suppliers from providing services to other companies to keep the very large company's business, prohibiting new competition and starving other companies of materials to compete.

Some critics argue current federal law is insufficient to address this type of single firm conduct. In 2020, the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary released a Majority Staff Report and Recommendations based on their Investigation of Competition in Digital Markets:[7]

> The Subcommittee's investigation found that the dominant platforms have the incentive and ability to abuse their dominant position against third-party suppliers, workers, and consumers. Some of these business practices are a detriment to fair competition, but they do not easily fit the existing categories identified by the Sherman Act, namely ''monopolization'' or ''restraint of trade.'' Since courts have shifted their interpretation of the antitrust law to focus primarily on the formation or entrenchment of market power, and not on its exploitation or exercise, many of the business practices that the Subcommittee identified as undermining competition in digital markets could be difficult to reach under the prevailing judicial approach. To address this concern, the Subcommittee recommends that Congress consider extending the Sherman Act to prohibit abuses of dominance.[8]

[7] While specific to digital platforms, these recommendations are applicable to any large company. Jerrold Nadler, Chair, Committee on the Judiciary; David N. Cicilline, Chair, Subcommittee on Antitrust, Commercial, and Administrative Law. Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations. Originally released October 2020, adopted by Committee April 2021, Published July 2022.

[8] Id., p. 335.

An abuse of dominance standard exists in the European Union[9] and Canada,[10] among other countries, but has not been adopted in the United States. The federal CALERA has been reintroduced for a third time,[11] and several states have proposed adding antitrust laws that address market dominance, including New York, New Jersey, and Minnesota.[12] None have yet to be enacted.

Opinions are mixed as to whether special rules are needed to address these types of abuses. Much commentary focuses on the federal judicial interpretation of the existing statutes, not the language in the statutes themselves.[13] In reimagining California's antitrust laws, the Commission could draft broad, general statutes in such a manner to capture a range of behaviors by a range of company sizes, though advocates of MMP may argue it will facilitate more efficient enforcement to have statutes based on the market realities of companies with substantial market power. Regardless, MMP provisions should be considered in relation to the Commission's decisions on SFC and merger language.

OPTION ONE: MISUSE OF MARKET POWER: PRESUMPTIONS

This option establishes a rebuttable presumption that conduct by companies with substantial market power violates existing antitrust law.

Section XX is amended to read:

(a) A person with substantial market power is presumed to violate Section X or Y[14] if the person engages in the following conduct:

(1) Leveraging substantial market power in one market into a separate market[15]

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[9] Treaty on the Functioning of the European Union, Document 12008E102.

[10] Competition Act (R.S.C. 1985, c C-34), Abuse of Dominant Position.

[11] Sen. No. 130, 119th Congress, 1st Sess. (2025); Sen. No. 4308, 118th Congress, 2d Sess. (2024); and Sen. No. 225, 117th Cong., 1st Sess. (2021).

[12] New York S933A (2021); New Jersey S.3778 (2022); Minnesota HF 1563 (2023).

[13] See, e.g. S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12 (2023); "If read broadly, the prohibitions on 'monopolization,' 'unfair means of competition,' and 'restraints on trade' could be used to handle the challenges of our time. But 'broadly' is manifestly not how the laws are read by the judiciary at this point. For the courts have grafted onto these laws burdens of proof, special requirements and defenses that are found nowhere in the statutes, and that have rendered the laws applicable only to the narrowest of scenarios, usually those involving blatant price effects. And it is this that makes the laws inadequate for the challenges presented by digital markets." Jerrold Nadler, Chair, Committee on the Judiciary; David N. Cicilline, Chair, Subcommittee on Antitrust, Commercial, and Administrative Law. Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, 331, n 2473. Originally released October 2020, adopted by Committee April 2021, Published July 2022.

[14] X and Y are intended to reference the Single Firm Conduct and Mergers provisions, respectively.

[15] Memorandum 24-26, p. 12 suggested declaring presumptively unlawful "using data from the covered platform to support another business line."

(2) Bundling,[16] tying,[17] using loyalty rebates,[18] or refusing to interoperate[19]
(3) Denying use of essential facilities or resources[20]
(4) Refusing to deal[21]
(5) Engaging in predatory pricing tactics such as pricing below costs[22]
(6) Imposing exclusivity as a condition of doing business[23]
(7) Self-preferencing,[24] or
(8) Acquiring, directly or indirectly, the whole or any part of the stock, or other share capital of another person.[25]

(b) A person's substantial market power may be established by direct evidence, indirect evidence, or a combination of the two.
(1) A person with a share of thirty percent or more of a relevant market shall be presumed to have substantial market power.

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[16] Several news outlets reported on an investigation of Microsoft by the FTC about bundling concerns, among other issues. See, e.g., Leah Nylen, *Trump's FTC moves ahead with broad Microsoft antitrust probe*, Fortune.com, March 12, 2025.

[17] See *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Company* (1971) 4 Cal.3d 354, 361.

[18] Loyalty rebates were among the items listed as potential single firm anticompetitive conduct in Memorandum 20245-15, p. 15.

[19] See Jerrold Nadler, Chair, Committee on the Judiciary; David N. Cicilline, Chair, Subcommittee on Antitrust, Commercial, and Administrative Law, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, pp. 335-337, originally released October 2020, adopted by Committee April 2021, Published July 2022.

[20] Discrimination against rivals, which includes denying use of essential facilities or resources, were among the items listed as potential single firm anticompetitive conduct in Memorandum 20245-15, p. 15; see also Jerrold Nadler, Chair, Committee on the Judiciary; David N. Cicilline, Chair, Subcommittee on Antitrust, Commercial, and Administrative Law, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, p. 336, originally released October 2020, adopted by Committee April 2021, Published July 2022.

[21] This provision is responsive to *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398, which, while the U.S. Supreme Court acknowledging refusal to deal may violate antitrust laws in certain circumstances, their decision in this case made refusal to deal claims harder to prove, referring to the general proposition that "there is no duty to aid competitors." at 412. See a further discussion in Memorandum 2024-34, pp. 39-41.

[22] See Memorandum 2024-15, p. 6. "…under federal antitrust law, a plaintiff asserting a claim for predatory pricing must show that the defendant's prices are below cost and that the market structure is such that the defendant has a reasonable probability of recouping its losses from below-cost sales once rivals are driven from the market." Predatory pricing was also among the items listed as potential single firm anticompetitive conduct in Memorandum Id, p. 15.

[23] Exclusive dealing provisions were among the items listed as potential single firm anticompetitive conduct in Memorandum 2024-15, p. 15. See also Memorandum 2024-34, p. 59:

> Exclusive dealing refers to situations where a contract between a manufacturer/seller and a buyer "forbids the buyer from purchasing the contracted good from any other seller or that requires the buyer to take all of its needs in the contract good from that manufacturer. The contract need not specifically require the buyer to avoid other suppliers if the practical effect is the same. While not a per se violation of the antitrust laws, the courts recognize that such agreements take away a buyer's freedom to choose to purchase from the seller's competitors and may allow a monopolist to strengthen its position in the market.

[24] This generally refers to a company preferring its own products over those of competitors. This conduct is acknowledged to have exclusionary effects. See Memorandum 2024-35, pp. 7, 17.

[25] This draws from the Clayton Act (15 U.S.C. § 18) and should be reconciled with any merger language the Commission may choose.

(2) A person with assets, net annual sales, or a market capitalization[26] greater than $500,000,000,000, as adjusted for inflation on the basis of the Consumer Price Index, is presumed to have substantial market power.[27]

(c) A person with substantial market power may rebut this presumption by a preponderance of the evidence that the pro-competitive benefits outweigh the anticompetitive harm.[28]

This language is based on the idea that conduct that is pro-competitive when done by a company without substantial market share is likely to be anticompetitive when done by a company with substantial market share. This option references existing single firm conduct and merger standards[29] and places the burden on the company with substantial market share to prove the pro-competitive benefits of its conduct outweighs the harm.

The staff chose 30% as a market share threshold as a compromise between existing California law,[30] which recognizes a 20% market share as sufficient in certain circumstances, and standards in other proposals. The EU dominance standard is 40%,[31] as is the presumption in several states' abuse of dominance proposals.[32] CALERA places its presumption at 50%.[33] This option also adds an asset, sales, and market capitalization presumption to indicate substantial market power as an alternative to choosing a percentage market share. While this, too, may be manipulated through a company's split into holding companies, etc. to avoid litigation, it could be effective in evaluating a very large

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[26] Market capitalization is the total dollar amount of a company's outstanding shares. See Black's Law Dictionary.

[27] X and Y are intended to reference the Single Firm Conduct and Mergers provisions.

[28] See *United States v. Gen. Dynamics Corp.* (1974) 415 U.S. 486, 498, ("While the statistical showing proffered by the Government in this case, the accuracy of which was not discredited by the District Court or contested by the appellees, would under this approach have sufficed to support a finding of 'undue concentration' in the absence of other considerations, the question before us is whether the District Court was justified in finding that other pertinent factors affecting the coal industry and the business of the appellees mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition of United Electric. We are satisfied that the court's ultimate finding was not in error.")

[29] This is still arguably single firm conduct because the MMP language references only the size of the acquiring firm, not the size of a company following a merger. The merger language is referenced to gauge the merger against its competitive effects in the market, as versus the monopoly standard of single firm conduct.

[30] See *Fisherman's Wharf Bay Cruise Corp. v. Superior Court of San Francisco* (2003) 114 Cal.App.4th 309, which permitted a cause of action based on a competitor's control of 20% of the market under the Cartwright Act.

[31] "If a company has a market share of less than 40%, it is unlikely to be dominant." This memorandum considers other factors in its determination of dominance, as well. The European Commission, Competition Policy, Procedures in Article 102 Investigations. The U.S. House of Representatives recommended a presumption of dominance at 30% market share for a seller and 25% for a buyer. Jerrold Nadler, Chair, Committee on the Judiciary; David N. Cicilline, Chair, Subcommittee on Antitrust, Commercial, and Administrative Law, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, p. 335, originally released October 2020, adopted by Committee April 2021, Published July 2022.

[32] New York's 21st Century Antitrust Act, S335 (Gianaris, 2025), New Jersey's Antitrust Act, S3778 (Singleton, 2023), and Minnesota HF1563 (Greenman, 2023).

[33] Sen. No. 130, 119th Congress, 1st Sess. § 4(b)(3)(3) (2025).

company's entrance into a new market where the company may not yet have demonstrated market share.

Setting the threshold at $500B ensures no small or medium sized companies are subject to the presumption. For perspective on relative sizes, Microsoft Corporation, Wal-Mart, and Visa have market capitalizations of $3.53T, $753B, and $684.23B, respectively.[34]

Multiple state and federal bills have been introduced (and none enacted) that also use assets, net annual sales, or market capitalization as a proxy for dominance. Each uses a different threshold:

- CALERA scrutinizes transactions if the person acquiring or the person being acquired are valued over $100B.[35]
- The American Innovation and Choice Online Act[36] targets technology firms with net annual sales or market capitalization of $550B.
- Trust Busting for the Twenty First Century Act[37] declares "dominant digital firms" as those with market capitalizations exceeding $100B.
- The Ending Platform Monopolies Act,[38] H.R. proposed restrictions on technology companies with annual sales or market capitalizations over $600B.

Staff chose $500B to capture a range of industries and distinguish this provision from federal proposals.

Some may argue that a MMP provision is unnecessary, particularly if California adopts a broad and flexible SFC provision with clear direction to the courts. Further, some may argue that while providing enhanced enforcement options for companies with substantial market share may be helpful, the uncertainty could outweigh any benefits because of the untested framework and potential chilling effect on markets.

OPTION TWO: MISUSE OF SUBSTANTIAL MARKET POWER

This option uses the same definition of "substantial market power" as in Option One, but instead of declaring the listed conduct presumptively illegal, it uses the list as examples of the types of conduct that may be illegal if the purpose or effect of the conduct is likely to harm competition in more than a de minimis way.

Section XX is amended to read:

(a) It shall be unlawful for a person with substantial market power to misuse

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[34] According to marketwatch.com, accessed June 16, 2025.

[35] Sen. No. 130, 119th Cong., 1st Sess. § 4(b)(3)(6)(B)(ii) (2025). CALERA also requires the acquisition to result in the holding of $50B or more of the acquired party.

[36] Sen. No. 2992, 117th Cong., 2d Sess. § 2(a)(5)(B)(ii)(II) (2021).

[37] Sen. No. 1074, 117th Cong., 1st Sess. § 3(2) (2021).

[38] H.R. No. 3825, 117th Cong., 1st Sess. § 5 (5)(B)(i)(II) (2021).

that power.

(b) A person's substantial market power may be established by direct evidence, indirect evidence, or a combination of the two.
  (1) A person with a share of thirty percent or more of a relevant market shall be presumed to have substantial market power.
  (2) A person with assets, net annual sales, or a market capitalization greater than $500,000,000,000, as adjusted for inflation on the basis of the Consumer Price Index, shall be presumed to have substantial market power.

(c) The following is a nonexclusive list of conduct that is a misuse of market power if the purpose or effect of the conduct is likely to harm competition in more than a de minimis way:
  (1) Leveraging substantial market power in one market into a separate market
  (2) Bundling, tying, using loyalty rebates, or refusing to interoperate
  (3) Denying use of essential facilities or resources
  (4) Refusing to deal
  (5) Engaging in predatory pricing tactics such as pricing below costs
  (6) Imposing exclusivity as a condition of doing business
  (7) Self-preferencing, or
  (8) Acquiring, directly or indirectly, the whole or any part of the stock, or other share capital of another person.

(d) A person with substantial market power may rebut this presumption by a preponderance of the evidence that the pro-competitive benefits outweigh the anticompetitive harm.

This option borrows from the New York Twenty-First Century Anti-Trust Act which provides a nonexclusive list of examples of conduct that could be an abuse of dominance.[39]

This option includes the same conduct presumed illegal by a company with substantial market power in Option One and allows that other conduct may also be considered a misuse of substantial market power if "the purpose or effect of the conduct is likely to harm competition in more than a de minimis way." While this is not an existing antitrust standard, it is meant to convey in plain language that a court should find conduct by companies with substantial market power illegal if it impacts competition a small amount. "De minimis" occurs in 50 instances in across the California codes in varying circumstances, and all in reference to a negligible amount of the matter referenced.[40] The

[39] S.335 § 340(2)(b)(ii), (Gianaris, 2025). However, this bill adopts a standard protecting competitors, and not competition, that is criticized by the Single Firm Conduct Working Group. Memorandum 2024-15, p.14

[40] See e.g., Corp. Code § 5510(f), which, while requiring broadcast of a board member meeting, does not require a corporation to end a meeting, or automatically found in violation of the statute for a "de minimis" disruption of a feed; Pub. Res. Code 4629.5(g)(2)(B), which exempts from the definition of retailer someone with "de minimis sales of qualified lumber products and engineered wood products of less than twenty-five thousand dollars ($25,000)…"

phrase is also used in the 2023 Federal Merger Guidelines.[41]

This Option is subject to the same criticisms as Option One, with the additional uncertainties of a non-exhaustive list of conduct potentially constituting misuse of substantial market power and a new standard by which to judge conduct.

Does the Commission have any questions about this Memorandum? Does the Commission want the staff to continue to study MMP and to provide options for Consideration at the Commission's next meeting.

Respectfully submitted,

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[41] 2023 Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, p. 11.