MEMORANDUM 2025-41

Draft Language for Single Firm Conduct Provisions, Legislative Findings and Declarations, and Public Comment

This Memorandum[1] presents revisions to the draft options on Single Firm Conduct (SFC) and Legislative Findings and Declarations based on the Commission's feedback at its June 25, 2025 meeting.[2] This Memorandum also includes additional public comment received after the Commission's June 26, 2025, meeting.

At that meeting, the Commission provided the staff direction to revise the draft language in Options One and Two and the Legislative Findings and Declarations. The Commission voted for the staff to discontinue work on Option Three.[3]

Several Commissioners suggested ending work on Option One, but two Commissioners disagreed. The Commission directed staff to continue work on Option One.[4]

The Commission directed staff to revise Option Two in various ways, including:

- Noting that harm to competition can occur by one or multiple actors.
- Clarifying "to attempt to restrain the free exercise of competition or the freedom of trade or production."
- Incorporating the term "unreasonable" to describe the type of trade restrained.
- Incorporating burden shifting.
- Clarifying language relating to the impact of federal law on state law.[5]

The Commission also directed staff to revise the draft language for the Findings and Declarations in various ways, including:

- Codifying a basic purpose statement for the Cartwright Act and adding a portion of the enhanced purpose statement.
- Refining language about the effect of federal law on state law.
- Distinguishing between findings and declarations versus mandatory statutory language.

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

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] Memorandum 2025-34, pp. 5-6. The Commission's feedback was based on Memorandum 2025-30.

[3] Memorandum 2025-34, p. 5.

[4] Id.

[5] Commission meeting, June 26, 2025 video

- Considering another term for "maximizing" in subdivision (a) of the statement reflecting California's laws, programs, and priorities.
- Drafting Comments or uncodified for the SFC language relating to federal precedent and avoid using case names.[6]

Finally, the Commission considered many public comments, including one suggesting a rulemaking role for the Attorney General, which the Commission rejected.[7]

This Memorandum was compiled with the assistance of the Commission's Antitrust Study consultant, Cheryl Johnson. The staff would also like to recognize the Working Group members for their important and foundational work.

PUBLIC COMMENTS RECEIVED IN RESPONSE TO THE SINGLE FIRM CONDUCT DRAFT OPTIONS AND FINDINGS AND DECLARATIONS

List and Organizational Descriptions of Public Comments Received

The following public comments are responsive to SFC and were received after the

[6] Commission meeting, June 26, 2025 video.
[7] Memorandum 2025-34, pp. 5-6.

Commission's June 26, 2025 meeting. They are appended to this memorandum.

As with prior memoranda, a brief description of each commentator is below.

International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, California Federation of Labor Unions (IBT Coalition)

This comment was submitted by Amanda Lewis of Cuneo Gilbert & LaDuca, LLP on behalf of the entities listed above.

According to their websites:

> The Teamsters are America's largest, most diverse union. In 1903, the Teamsters started as a merger of the two leading team driver associations. These drivers were the backbone of America's robust economic growth, but they needed to organize to wrest their fair share from greedy corporations. Today, the union's task is exactly the same.
>
> The United Food and Commercial Workers Western States Council is the regional coordinating body of 11 UFCW local unions representing over 200,000 workers in California, Arizona, Nevada, and Utah. The Council is a part of the 1.2 million member strong UFCW International Union. UFCW members are standing together to improve the lives of workers, families, and communities.
>
> The California Federation of Labor Unions is dedicated to promoting and defending the interests of working people and their families for the betterment of California's communities. From legislative campaigns to grassroots organizing, our affiliates are actively engaged in every aspect of California's economy and government.

American Economic Liberties Project, *California Nurses Association*, *Consumer Federation of California*, *Democracy Policy Network*, *Economic Security California Action*, *End Poverty in California*, *Institute for Local Self Reliance*, *Rise Economy*, *Small Business Majority*, *TechEquity Collaborative*, *United Domestic Workers (UDW/AFSCME Local 3930)*, *United Food and Commercial Workers Western States Council (UFCW)* *(ESCA and Partners)*

This comment was submitted by Scott Kronland of Altshuler Berzon, LLP on behalf Economic Security California Action and cosigned by the entities above. According to its website:

> Economic Security Project Action advocates for ideas that build economic power for all Americans. Our team disburses grants, runs issue campaigns, develops creative interventions and research products, and convenes the field to advance our issues and turn bold ideas into reality.

Internet Accountability Project

This comment was submitted by Mike Davis on behalf of the Internet Accountability Project. According to its website:

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

Office of Kat Taylor

This comment was submitted by Kat Taylor, co-founder of TomKat Ranch, LLC. According to her website:

> From strengthening regulations against the worst excesses in the financial system, including predatory lending, reforming charitable abuses, to helping provide free school meals for all our children, Kat builds and supports broad coalitions who fight for all Californians.

CAMEO Network

This Comment was submitted by Heidi Pickman, VP of Engagement and External Relations, on behalf of CAMEO Network. According to its website:

> CAMEO Network is made up of over 400 organizations, agencies, and individuals dedicated to furthering business development across the nation with small and micro-business financing such as loans and credit, technical assistance and business management training. We build capacity and expand resources for our members. We also educate the public on the economic impacts of micro-business through public awareness and advocacy at the local, state and federal level to support the growth of micro-business, start-ups, and entrepreneurs.

Former Assemblymember Jordan Cunningham

According to his website, Jordan Cunningham represented the Central Coast region in the California Assembly from 2016-2022 and co-authored ACR 95,[8] which requested this Antitrust Law study. Prior to his service in the Legislature, Jordan worked for the U.S. Department of Justice and served as a law clerk to two federal judges. Jordan is a graduate of U.C. Berkeley School of Law and is now in private practice.

SFC AS A SEQUENCED RECOMMENDATION

The Commission considered a comment from former Assemblymember Jordan Cunningham (Cunningham) at its November 17, 2022 meeting[9] that the Commission not sequence the Antitrust study into a series of subtopics.[10] The Commission agreed, deciding to address the topics holistically.[11]

Since then, Cunningham, along with ACR 95 co-author Assemblymember Buffy Wicks, submitted public comment reversing their previous recommendation for a single, comprehensive antitrust reform proposal.[12] The Commission did not take action as a result of that comment.[13]

Cunnigham again submitted a public comment on September 18, 2025 urging the Commission to submit a separate recommendation on SFC at its September 18, 2025 meeting:

> I write respectfully to urge you formally to vote to propose single firm conduct

[8] Chapter 147, Statutes of 2022. Assemblymember Buffy Wicks was the co-author.
[9] Commission meeting, November 17, 2022 video.
[10] Second Supplement to Memorandum 2022-50, EX 1.
[11] Minutes (November 2022), p. 3.
[12] First Supplement to Memorandum 2025-11, EX 58.
[13] Minutes (January 2025), pp. 3-4.

reforms to the Legislature on the 18th so the Legislature may consider at minimum those reforms next year. No better example of the urgency of the Commission's task of proposing reforms of California's antitrust law addressing single firm conduct to the Legislature exists than the recent ruling of the district court in Google's antitrust case on Tuesday, September 4th. Here is how *Business Insid*er described the ruling:

> In 2024, in what seemed like a landmark ruling, a federal judge said Google had an illegal monopoly in search.
>
> On Tuesday, that same judge unveiled Google's punishment, which amounts to …not too much, all things considered.
>
> There are plenty of places to find analysis of Judge Amit Mehta's ruling, but the fastest way to process it is to see what Wall Street thinks: Google stock is up 9% on Wednesday.
>
> And if you take a few more seconds, you can see how the specter of a major antitrust case has affected Google since the US government first filed suit in October 2020. Back then, a share of Google was worth about $80. On Wednesday, it's $231.
>
> That is: Google investors have spent years mostly ignoring the idea that the company could face severe punishment from US regulators. This week confirmed that they were correct.

Even though the Legislature adjourns in September, the fall and winter is when the needed foundational work for legislation is done before the Legislature returns in January.

Your work has been exemplary. When it comes to single firm conduct, it is, respectfully, the right time for the Legislature to benefit from it.[14]

ESCA and Partners and the IBT Coalition also urge the Commission to approve Option Two at its September 18, 2025 meeting:

> **We urge the Commission to take immediate action at its September 18, 2025 meeting to vote on and approve these single-firm conduct recommendations.** We agree with the Teamsters' letter's observation that the time has come for the Commission to take action on the single-firm conduct proposals before it. California cannot afford further delay while harmful consolidation continues to damage workers, consumers, and communities across the state. Inaction at this stage is tantamount to endorsing California's broken antitrust status quo which, as the Commission's exemplary work has demonstrated, cannot and should not continue. [15] (emphasis in original)

The Office of Kat Taylor[16] and CAMEO Network[17] also urge the Commission to take immediate action at its September 18, 2025 meeting. The staff notes that under the

[14] EX 32-33.
[15] EX 2.
[16] EX 23.
[17] EX 25.

Commission's ordinary practice, once the Commission agrees on language for a recommendation, it directs staff to prepare a Tentative Recommendation for its approval at a subsequent meeting, with or without changes, that is then circulated for public comment. The staff next brings the Tentative Recommendation and the public comments back to the Commission for its consideration. The Commission may revise the Tentative Recommendation to address public comments and may then either direct the staff to circulate a revised Tentative Recommendation for additional public comment or direct the staff to prepare a Draft Final Recommendation, which it may approve, with or without changes, at a subsequent Commission meeting.

Does the Commission wish to direct staff to continue to work on the Single Firm Conduct draft language recommendation as the first in the sequence of recommendations on the Antitrust Study without deciding on whether other topics will be treated in separate sequences at this time?

SINGLE FIRM CONDUCT DRAFT OPTIONS

Revised Option One: Basic SFC Provision

SFC Option One uses language similar to the Sherman Act § 2.[18] As currently drafted, the provision reads:

> **Section 167XX is added to the Business and Professions Code, to read:**
>
> It is unlawful for a person to monopolize or monopsonize,[19] 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.

Several Commissioners suggested dispensing with Option One due to its close alignment with existing federal antitrust law, but a few Commissioners indicated they would like to consider it further.[20] One Commissioner suggested that this might be a viable option if it were coupled with statements rejecting specific elements of federal precedents and that California courts were not necessarily bound by federal precedent.[21] The proposed

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[18] 15 U.S.C. § 2 states in part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…." For a full discussion of this option see Memoranda 2025-21, pp. 2-3 and 2025-30, pp. 5-6.

[19] The inclusion of "monopsonize," although commonly understood as encompassed within the broader term "monopolize," is intended to help address the historical underenforcement of buyer-side monopolies that impact labor, among others. See also Memoranda 2024-14, pp. 3-6; 2024-25, p. 17.

[20] Memorandum 2025-34, p. 5.

[21] Commission meeting, June 26, 2025 video.

statement rejecting specific elements of federal precedents is discussed more fully below.

If the Commission chooses this approach, the staff recommends that the Commission consider including one or more of the Legislative Findings and Declarations provisions discussed later in this Memorandum to emphasize California's autonomy.

The Commission has not received any public comment in support of Option One.[22] In contrast, several commentators expressed significant concern about Option One even if coupled with statements distancing it from federal law; they believe the close alignment of federal law with state law could impede the development of independent California law and import harmful federal precedent.[23]

Would the Commission like the staff to make revisions or conduct further analysis on this option? Alternatively, would the Commission like to adopt Option One or to direct the staff to discontinue work on this option?

Revised Option Two: Enhanced SFC Provision

This memorandum next presents proposed revisions to draft Option Two, which expands on the basic SFC provision presented in Option One by combining it with a prohibition on "restraints of trade," a phrase used in both the Cartwright Act[24] and the Sherman Act § 1.[25] As currently drafted the provision reads:

> **Section 167XX is added to the Business and Professions Code, to read:**
>
> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:
>
> (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.[26]

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[22] Memorandum 2025-30, pp. 5-6. The staff has not received any additional public comments in support of Option One as of the publication date of this Memorandum.

[23] See, e.g., Second Supplement to Memorandum 2025-21, p. EX 2-3.

[24] Bus. & Prof. Code § 16721.5 establishes additional circumstances constituting an unlawful trust and unlawful restraint of trade.

[25] 15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…." For a full discussion about this proposed option and relevant public comments, see Memoranda 2025-30 and 2025-21, pp. XX.

[26] For a full discussion of draft Option Two, see Memorandum 2025-21, pp. 3-5.

The staff notes that Option Two is the only option that has received public comment in support,[27] most recently by the IBT Coalition and ECSA and Partners with suggested changes. Likewise, the comments from CAMEO Network[28] urge the Commission to adopt Option Two.

In response to public comments concerned that the term "restraint of trade," is too vague, the Commission directed staff to suggest language clarifying that the section applies to "unreasonable" restraints of trade. This could be accomplished by adding a new subdivision (c):

> (c) This section is intended to encourage free and open competition by prohibiting unreasonable restraints of trade.[29]

If the Commission adopts this new subdivision, a Commission Comment could explain that this language is intended to codify the California Supreme Court's ruling, *In re Cipro Cases I & II.*[30] As the Concerted Action Working Group stated:

> The California Supreme Court has held that the text of the Cartwright Act should not be interpreted literally. The *Cipro* Court noted that "[t]hough the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal."[31] Like the Sherman Act, courts interpret the Cartwright Act to prohibit only *unreasonable* restraints of trade.[32] (Emphasis added).[33]

Alternatively, the Commission could consider whether adding this language to the statute might suggest the intent to create a new standard. As explained in greater detail in a prior staff memorandum,[34] while "restraint of trade" is on its face broad and general, both the federal and California courts have substantial experience adjudicating this term as "unreasonable restraint of trade.[35] Rather than adding "unreasonable" to the statute, the

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[27] See Memorandum 2025-30.

[28] EX 25.

[29] The staff previously suggested adding "unreasonable" to subdivision (b) in Memorandum 2025-30, p. 9. The change is merely technical.

[30] (2015) 61 Cal. 4th 116, 136.

[31] *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 136 (citing *Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 540).

[32] *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.* (2020) 51 Cal.App.5th 867, 872, "The Cartwright Act prohibits all combinations created for or carrying out unreasonable restrictions in trade or commerce." See *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 398–99, "The distinction between per se and rule of reason analysis stems from the fact that the Cartwright Act, like its federal counterpart the Sherman Act, prohibits not all agreements restraining trade, but rather agreements that unreasonably restrain trade."

[33] Memorandum 2024-34, p. 10.

[34] Memorandum 2025-30, pp. 7-8.

[35] See Cal. Anti. & Unfair Comp. L. § 1.05): "The California Supreme Court also instructed that where the rule of reason applies, courts are to consider 'how the analysis should be structured to most efficiently differentiate

Commission could clarify in a Commission Comment that "unreasonable" restraint of trade is inferred from decades of state and federal jurisprudence.[36]

The Commission also directed the staff to do further analysis on the phrase in subdivision (a)(1) stating that it is unlawful to restrain the "free exercise of competition or the freedom of trade or production." Upon further research, the cited language does not have precedence in antitrust law, and the staff recommends deleting that phrase and revising (a)(1) as follows:

> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:
> (1) In restraint of trade, ~~or to attempt to restrain trade the free exercise of competition or the freedom of trade or production;~~ or,

The IBT Coalition also recommends deleting the phrase above.[37]

The IBT Coalition[38] and ECSA and Partners[39] further suggest the following revisions to subdivision (a), which would:

> Clarify that the general prohibition of Option Two applies to restraints of trade carried out directly or indirectly, through intermediaries such as an independent contractor.
>
> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events <u>whether they are carried out directly or indirectly through another entity or person such as an independent contractor or intermediary:</u>

The staff believes that the existing language outlawing actions "caused" or "directed" captures restraints of trade affected directly or indirectly. Thus, although the proposed language would add clarity for companies whose complex organizations and alliances may obscure the responsible actor's identity, the staff does not believe it is necessary.

IBT Coalition also suggested increasing the standard of proof to "clear and convincing," rather than the current "preponderance of the evidence:"

> [new subsection] <u>Subsection (a) of this section shall not apply if the defendant establishes, by clear and convincing evidence, that the pro-competitive benefits of the challenged conduct (1) are achievable only</u>

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between reasonable and unreasonable restraints of trade this context'" citing *In re Cipro Cases I & II*, (2015) 61 Cal. 4th 116, 148.

[36] See e.g., *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186, "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade."

[37] EX 15.

[38] Id.

[39] EX 2.

through that conduct and (2) outweigh that conduct's harm to competition.[40]

This change would require defendants to prove with "clear and convincing" evidence that any alleged procompetitive benefits actually justify anticompetitive conduct. This addresses concerns that antitrust cases have become more prolonged and uncertain because the status quo allows federal judges to accept vague claims of procompetitive benefits.[41] "Clear and convincing"[42] is a higher standard than the status quo; a prima facie antitrust case is generally rebutted by a preponderance of the evidence standard, which means that the evidence in support must merely be greater than the evidence against.[43] However, the staff believes this new, untested standard would lead to substantial uncertainty and is not necessary to change the state's antitrust litigation climate.

IBT Coalition also suggests adding language expressly stating that harm to competition in one market may not be offset by purported benefits in a separate market:

> [new subsection] Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.[44]

Staff believes that clarification is unnecessary because it restates existing caselaw on this issue.[45]

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[40] EX 15.

[41] See Memorandum 2024-15, p. 6 in which the Single Firm Conduct Working Group observes "there is no easy way for the courts to weigh the anticompetitive harms against the procompetitive benefits;" Memorandum 2024-35, p.7 in which the Enforcement and Exemption Working Group states: "The burden of proof a to procompetitive effects is affirmatively on the defendant , rather than placing it (as federal courts often do under rule of reason) on the plaintiff to either disprove the existence of such effects or to disallow certain defenses)."

[42] See California Judicial Council Jury Instructions (2025) (CACI) no. 201 and Book of Approved Jury Instructions (BAJI) No. 2.62, which defines "clear and convincing evidence" as evidence demonstrating "a high probability of the truth of the fact for which it is offered as proof" (BAJI No. 2.62 (8th ed. 1994 bound vol.); *In re Angelia P.* (1981) 28 Cal.3d 908, 919 ("Clear and convincing" evidence requires a finding of high probability) McBaine, *Burden of Proof Degrees of Belief'* (1944) 32 Cal. L, Rev. 242, 254 ("clear and convincing evidence" is an intermediate standard lying between "preponderance of the evidence" and "beyond a reasonable doubt.").

[43] See CACI No. 200 and BAJI No. 2.60, which defines "preponderance of the evidence" as "evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it." ; see also *People ex. Rel. Brown v. Tri-Union Seafood, LLC* (2009) 171 Cal. App.4th 1549, 1567.

[44] This is based on New York's Twenty-First Century Anti-Trust Act, S.335 (Gianaris), 2025-2026, Reg. Sess. (N.Y. 2025).

[45] See Cal. Anti. & Unfair Comp. L. § 3.04; see also Memorandum 2024-35, p.4, in which the Enforcement and Exemptions Working Group stated:

> The California Supreme Court has generally looked carefully at legislative history in interpreting the Cartwright Act. In so doing, the Court has articulated several points that distinguish the Act from federal antitrust enforcement and from the approaches taken under the laws of most other states. Federal precedent can be informative but is not binding upon courts interpreting the Cartwright Act5, a point that was acknowledged by the US Supreme Court in the ARC America case. Moreover, because the overriding interest of the legislature was

The Commission also expressed interest in exploring language that would create a presumption shifting the burden of proof to the defendant after the plaintiff presents a prime facie case in SFC cases. The IBT Coalition submitted language to address this issue.[46] The staff addressees this issue in a supplement to the Memorandum on Misuse of Market power.[47]

Would the Commission like the staff to provide additional analysis of Option Two? Alternatively, does the Commission want to adopt Option Two with or without changes?

REVISED STAFF DRAFT FINDINGS AND DECLARATIONS/CODIFIED INTENT LANGUAGE

The IBT Coalition,[48] CAMEO Network,[49] and ECSA and Partners encourage the Commission to include the draft findings and declarations language in its recommendation:

> We also would like to reiterate our strong support for the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents the staff has prepared. These provisions are all grounded in current law, will provide crucial guidance to courts about how to adjudicate Cartwright Act cases, provide clarity, consistency, and fairness in the application of the law as a result, and, consistent with every expert white paper, guarantee that California's antitrust law is of independent force and effect and not destined to follow the federal jurisprudence that has become increasingly hostile to meaningful antitrust enforcement. As we explained in our March 28, 2025 letter,[50] this draft language appropriately and accurately catalogues the broad scope of harms that can result from anticompetitive conduct and is grounded in and inspired by the comments in the expert white papers before the Commission. We believe this language is critical to ensuring that the Commission's intended reform is successful, and urge the Commission to adopt it in full. [51]

Below are revisions to the proposed draft findings and declarations pursuant to the Commission's direction,[52] and summaries of relevant public comments.

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in deterrence of anticompetitive conduct, in close cases overdeterrence may be preferable to underdeterrence as an outcome.

[46] EX 17-18.

[47] First Supplement to Memorandum 2025-43.

[48] EX 10.

[49] EX 25.

[50] Second Supplement to Memorandum 2025-21, EX 4.

[51] EX 2.

[52] Memorandum 2025-34, p. 5. For a full discussion of the Findings and Declarations and analysis of public comments, see Memorandum 2025-30, pp. 13-25 and the First Supplement to Memorandum 2025-30.

Basic purpose statement

The staff presented the following basic purpose statement, which currently reads:

> The Legislature finds and declares that the promotion and protection of free and fair competition is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.[53]

At its June 26, 2025 meeting, the Commission directed staff to codify this statement at the beginning of the Cartwright Act.[54] The staff proposes the following:

> **Section 167XX is added to the Business and Professions Code to read:**
> [The Legislature finds and declares that:]
> (a) The purpose of this chapter is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.

The Commission discussed whether the language "The Legislature finds and declares that" should be eliminated. Because there was no clear consensus, the staff is leaving the language in the draft for further Commission deliberation.

Does the Commission want to adopt this revised and codified draft basic purpose statement with or without changes?

Enhanced purpose statement

The staff presented the following enhanced purpose statement, which currently reads:

> The Legislature hereby finds and declares all of the following:
> (a) That protecting competition includes protecting competition between businesses when they compete for workers and prohibiting anticompetitive business practices that impede workers' freedom to choose employment.
> (b) There is widespread concern about the growing consolidation in our marketplaces and that the accumulation of market power by a few dominant corporations harms our marketplace opportunities, undermines the power of workers, consumers, and small businesses, and threatens our democratic values.
> (c) Effective enforcement against anticompetitive activity has been limited and impeded by the federal courts by applying narrow definitions of monopolies and monopolization, limiting the scope of unilateral conduct, making it excessively difficult to challenge unfair competition, and unreasonably heightening the standards that plaintiffs and government enforcers must overcome to establish violations of those laws.

[53] Memorandum 2025-21, p. 10.
[54] Memorandum 2025-34, p. 5.

(d) A goal of California's antitrust laws is ~~which includes~~ to ensure open and fair labor markets. [55]

The Commission directed the staff to move the language in subdivision (a) to the basic purpose statement and dispense with subdivisions (b) to (d).[56] The staff recommends the following edits to instead add this as new subdivision (b) to the basic purpose statement:

~~The Legislature hereby finds and declares all of the following:~~

~~(a) That protecting competition includes protecting competition between businesses when they compete for workers and prohibiting anticompetitive business practices that impede workers' freedom to choose employment.~~

(b) ~~That~~ ~~pP~~Protecting competition includes protecting competition between businesses when they compete for workers ~~and~~ by prohibiting anticompetitive business practices that impede workers' freedom to choose employment.

~~(c) Effective enforcement against anticompetitive activity has been limited and impeded by the federal courts by applying narrow definitions of monopolies and monopolization, limiting the scope of unilateral conduct, making it excessively difficult to challenge unfair competition, and unreasonably heightening the standards that plaintiffs and government enforcers must overcome to establish violations of those laws.~~

~~(d) A goal of California's antitrust laws is which includes to ensure open and fair labor markets.~~

Does the Commission agree to include new subdivision (b) in the basic purpose statement with or without changes and delete the remaining enhanced purpose statement?

Statement reflecting California's laws, preferences, and priorities

The staff presented the following enhanced purpose statement, which currently reads:[57]

~~The Legislature hereby finds and declares all of the following:~~

(a) Courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors maximizing deterrence of antitrust violations.[58]

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[55] Memorandum 2025-21, pp. 10-11. See also Memorandum 2025-30, pp. 17-19.

[56] Commission meeting June 26, 2025, video. The Commission also noted that subdivision (d) duplicates subdivision (a).

[57] Memorandum 25-30, pp. 17-19.

[58] See Memorandum 2025-15, pp. 8-9 citing *Clayworth v Pfizer, Inc*. (2010) 49 Cal. 4th 758, as providing support for the proposition that the Cartwright Act favors over-deterrence to under-deterrence. See also, Bus. & Prof. Code §16750(a) in which California rejected the U.S. Supreme Court decision in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720, prohibiting injured indirect purchasers from suing for relief under federal antitrust law.

In addition, the Enforcement and Exemptions Working Group Report stated:

> Moreover, because the overriding interest of the legislature was in deterrence of anticompetitive conduct, in close cases overdeterrence may be preferable to underdeterrence as an outcome. (citing *Clayworth*). Memorandum 2024-35, p. 5.

(b) Actions that unreasonably restrain trade or create or attempt to create a monopoly or monopsony, can be harmful and anticompetitive whether done by unilateral action or multiple parties and both should be subject to antitrust scrutiny.

(c) The 2023 Merger Guidelines issued by the U.S. Department of Justice and Federal Trade Commission recognize that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition,[59] and courts shall harmonize their rulings with the Guidelines ~~and the guidance of the Guidelines should be followed whenever possible~~ when construing this section to the extent consistent with California law and interests.[60]

(d) The California Supreme Court has determined that the Cartwright Act is "broader in ~~scope~~ range and deeper in reach"[61] than the federal Sherman Act~~;~~ and that the Cartwright Act is not modeled on the Sherman Act.[62] Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery,[63] use of a proximate cause test for Cartwright Act standing,[64] recognition of broader harms and per se conduct,[65] lower actionable market shares, structured rule of reason analysis,[66] and differing burdens of proof.

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[59] 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (December 18, 2023).

[60] See Memorandum 2025-42, pp. 11, 15, 17-18, which discusses referring to the Merger Guidelines in the various options presented for Mergers and Acquisitions.

[61] *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920 ("[W]e have observed that the Cartwright act is broader in range and deeper in reach than the Sherman Act.")

[62] *Aryeh v. Canon Business Sols., Inc.* (2013) 55 Cal.4th 1185, 1195. "Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was not modeled on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." (citing *California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147); *see also Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920 ("[W]e have observed that the Cartwright act is broader in range and deeper in reach than the Sherman Act."); *California v. ARC America Corp.* (1989) 490 U.S. 93, 102. "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."

[63] See *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 763, "In 1978, in direct response to *Illinois Brick*, the Legislature amended the state's Cartwright Act (Bus. & Prof. Code, § 16700 et seq.) to provide that unlike federal law, state law permits indirect purchasers as well as direct purchasers to sue (§ 16750(a))." Memorandum 2024-35, p. 9.

[64] The Enforcement and Exemptions Working Group wrote:

> Instead, antitrust standing under the Cartwright Act merely requires a plaintiff show that an antitrust violation was the proximate cause of its injuries [citing *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723]. The "antitrust injury" must be the type of injury the antitrust laws were intended to prevent and within the area of the economy that is endangered by a breakdown of competitive conditions [citing Id. at 807]. But under the Cartwright Act, "[t]he alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury" [citing *Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23]. This standard is broader than the [*Associate General Contractors of California v. California State Council of Carpetners* (1983) 459 U.S. 519] test and federal antitrust standing would allow [citations omitted]. Memorandum 2024-35, p. 10.

[65] See e.g., Bus. & Prof. § 16600.1, which declares noncompete agreements in employment contracts illegal.

[66] The Exemptions and Enforcement Working Group wrote:

(e) ~~Courts interpreting this law shall not be bound by federal precedent interpreting the Sherman Act and shall make their own determinations of whether challenged conduct by a single firm violates California law and is in keeping with the language and spirit of that law~~. Federal law shall not be binding on California courts, but courts may consider federal law persuasive authority to the extent they find it persuasive and consistent with California law and interests.

At its June 26, 2025 meeting, the Commission directed the staff to dispense with subdivisions (b) and (c) and include subdivisions (a), (d), and (e) in a potentially codified provision to provide direction to courts.[67] The staff proposes the following revisions:

Section 167XX is added to the Business and Professions Code to read:[68]

[The Legislature finds and declares all of the following]

(a) Courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors maximizing deterrence of antitrust violations as indicated in *Clayworth v Pfizer, Inc*. (2010) 49 Cal. 4th 758, 764.[69]

~~(b) Actions that unreasonably restrain trade or create or attempt to create a monopoly or monopsony, can be harmful and anticompetitive whether done by unilateral action or multiple parties and both should be subject to antitrust scrutiny.~~

(c) ~~The 2023 Merger Guidelines issued by~~ California joins ~~The~~ the U.S. Department of Justice and Federal Trade Commission[70] in ~~recognize~~ recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition~~, and courts shall harmonize their rulings with the Guidelines and the guidance of the Guidelines should be followed whenever possible when construing this section to the extent consistent with California law and interests~~.[71]

In 2015 the California Supreme Court considered the two liability standards that generally prevail under federal law, per se and "rule of reason," and further identified a third approach which some federal courts have denominated "quick look" analysis lying in between the two. It embraced its own third, middle ground approach as the most appropriate one for courts to employ on the pharmaceutical settlements before it and described a sliding-scale judicial approach to liability determination that some academics have also discussed as a "structured rule of reason." [citing *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116.] Memorandum 2024-35, p. 7

[67] Commission meeting June 26, 2025, video. As discussed in Memorandum 2025-30 and at the Commission meeting, this direction is important, especially for federal courts that are frequently tasked with applying and interpreting California statutes. The Commission believed that subdivision (b) is subsumed in the revised basic purpose statement and that subdivision (c) should be moved into the draft merger provisions.

[68] The footnotes citing caselaw in the proposed statute are for information purposes and not intended for inclusion in any recommended legislation, but will likely be captured in a Commission Comment.

[69] See Memorandum 2025-15, pp. 8-9 citing *Clayworth v Pfizer, Inc*. (2010) 49 Cal. 4th 758, as providing support for the proposition that the Cartwright Act favors over-deterrence to under-deterrence.

[70] 2023 Merger Guidelines U.S. Department of Justice and the Federal Trade Commission (December 18, 2023).

[71] At its June 26, 2025 meeting, the Commission directed the staff to include similar language in the Mergers

(d) The California Supreme Court has determined that the Cartwright Act is "broader in ~~scope~~ range and deeper in reach"[72] than the federal Sherman Act; [courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations];[73] and that the Cartwright Act is not modeled on the Sherman Act.[74] Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery,[75] use of a proximate cause test for Cartwright Act standing,[76] recognition of broader harms and per se conduct,[77] lower actionable market shares, structured rule of reason analysis,[78] and differing burdens of proof.

(e)~~Courts interpreting this law shall not be bound by federal precedent~~

Options to deem the 2023 Merger Guidelines as persuasive authority. See Commission meeting June 26, 2025, video. Option Two of the four Merger Options presented to the Commission reference the 2023 U.S. Merger Guidelines as either persuasive or binding in Memorandum 2025-31, and the Commission has yet to discuss these options. Depending on the Commission's decisions on the Merger Options, the Commission may wish to revisit this direction. See Memorandum 2025-42.

[72] *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920 ("[W]e have observed that the Cartwright act is broader in range and deeper in reach than the Sherman Act.")

[73] *Clayworth v Pfizer, Inc*. (2010) 49 Cal. 4th 758, 764.

[74] *Aryeh v. Canon Business Sols., Inc.* (2013) 55 Cal.4th 1185, 1195. "Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was not modeled on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." (citing *California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147); ; Memorandum 2024-34, p. 3.

[75] See *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 763, "In 1978, in direct response to *Illinois Brick*, the Legislature amended the state's Cartwright Act (Bus. & Prof. Code, § 16700 et seq.) to provide that unlike federal law, state law permits indirect purchasers as well as direct purchasers to sue (§ 16750(a))." Memorandum 2024-35, p. 9.

[76] The Enforcement and Exemptions Working Group wrote:

> Instead, antitrust standing under the Cartwright Act merely requires a plaintiff show that an antitrust violation was the proximate cause of its injuries.[citing *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723]. The "antitrust injury" must be the type of injury the antitrust laws were intended to prevent and within the area of the economy that is endangered by a breakdown of competitive conditions [citing Id. at 807]. But under the Cartwright Act, "[t]he alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury" [citing *Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23]. This standard is broader than the [*Associate General Contractors of California v. California State Council of Carpetners* (1983) 459 U.S. 519] test and federal antitrust standing would allow [citations omitted]. Memorandum 2024-35, p. 10.

[77] See e.g., Bus. & Prof. § 16600.1, which declares noncompete agreements in employment contracts illegal.

[78] The Exemptions and Enforcement Working Group wrote:

> In 2015 the California Supreme Court considered the two liability standards that generally prevail under federal law, per se and "rule of reason," and further identified a third approach which some federal courts have denominated "quick look" analysis lying in between the two. It embraced its own third, middle ground approach as the most appropriate one for courts to employ on the pharmaceutical settlements before it and described a sliding-scale judicial approach to liability determination that some academics have also discussed as a "structured rule of reason." [citing *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116.] The Court implied that this standard could be applied appropriately to other areas of anticompetitive conduct as well, although it did not go further. Memorandum 2024-35, p. 7.

~~interpreting the Sherman Act and shall make their own determinations of whether challenged conduct by a single firm violates California law and is in keeping with the language and spirit of that law~~. Federal caselaw on the subject of this article ~~shall~~ is not binding on California courts, but courts may consider federal caselaw as persuasive authority to the extent they find it consistent with California law and ~~interests~~ Section 167XX .

The Commission requested staff to suggest alternative language for the term "maximizing" in subdivision (a), which is the term used in California Supreme Court case cited. In response to the Commission's request, the staff suggests "reinforcing" or "strengthening." However, staff believes that referencing the actual language of *Clayworth* provides important guidance to distinguish California law from federal law. Alternatively, a Commissioner suggested moving the language in subdivision (a) to subdivision (d), which appears as bracketed language in the revised language. If the Commission adopts this approach, then subdivision (a) can be deleted. As with the other caselaw, this can also be included in a Commission Comment.

Rather than completely deleting subdivision (c), the staff suggests the Commission could retain portions to recognize that California joins the federal government in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition. This also supports the Commission's direction to staff to include language noting unilateral or multiparty conduct can result in unfair competition. This statement is then followed by (d), which distinguishes adjudication of California's antitrust laws.

In response to Commission direction given at its June 26, 2025 meeting, the staff also revised subdivision (e) by changing "shall" to "is" to be declarative of existing law, and replaced "interests" with "Section 167XX," the placeholder for the revised basic purpose statement. Finally, the staff recommends changing "federal law" to "federal caselaw" since it is the judicial interpretation of federal law this subdivision seeks to address.

Does the Commission want the staff to conduct further analysis of these provisions? Does the Commission wish to adopt the revised statement reflecting California laws, preferences, and priorities with or without changes?

Statement clarifying that specific elements of federal precedents are not binding

The staff presented the statement rejecting specific elements of federal precedents, which currently reads:[79]

[79] Memorandum 2025-30, pp. 19-21.

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) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service;
(d) The defendant's conduct makes no economic sense apart from its tendency to harm competition;
(e) The conduct's risk of harming competition or actual harm must be 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;[80]
(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;[81]
(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, and need not define or prove a "relevant market" where there is direct evidence of market effects or power.[82]

This draft language follows the Single Firm Working Group's recommendations to avoid importing particular federal judicial interpretations that are "inconsistent with preserving vigorous competition in California."[83] The Commission discussed this draft

[80] See *Ohio v. American Express* (2018) 585 U.S. 529.

[81] *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 454-55; Memorandum 2024-15, p. 12.

[82] This language is intended to conform the Single Firm Conduct Working Group's language in (i) Memorandum 2024-15, p. 18.

[83] See Memorandum 2024-15, p. 13, in which the Single Firm Conduct Working Group stated:

> [W]ithout further elucidation, using language that mimics the Sherman Act would come with a potentially severe disadvantage: California state courts might then believe that they should apply 130 years of federal jurisprudence to cases brought under California state law. In recent decades, that jurisprudence has substantially narrowed the scope of the Sherman Act, as described above, so relying on it could well rob California law of the power it needs to protect competition. This drawback is accentuated if California seeks to enact stronger antitrust laws to protect its citizens than has the United States.

See also Memorandum 2024-15, p. 8and *Aryeh v. Canon Business Sols., Inc.* (2013) 55 Cal.4th 1185, 1195;

language at length at its June 26, 2025 meeting.[84] Initially, some Commissioners believed the language was unnecessary since the statement reflecting California's laws, preferences, and priorities already indicates that courts are not bound by federal law when applying or interpreting California antitrust law, although the courts may consider federal law persuasive when appropriate. Some Commissioners also expressed concerns about referring to specific cases as caselaw evolves. Upon further discussion, the Commission expressed that this draft language could form the basis of a Commission Comment or a noncodified language relating to the statement reflecting California's laws, preferences, and priorities as examples of federal law principles that a court may reject.

The staff first presents an option that could be included as uncodified findings and declarations:

> The Legislature ~~hereby~~ finds and declares that although the following may constitute evidence of a violation of ~~this section~~ Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code, California law does not require a finding of any of the following conduct or elements to establish liability~~; shall not require a finding that~~: The Legislature further finds and declares that this a nonexclusive list of conduct.
>
> (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) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service;
> (d) The defendant's conduct makes no economic sense apart from its tendency to harm competition;
> (e) The conduct's risk of harming competition or actual harm must be 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,

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Clayworth v. Pfizer (2010) 49 Cal.4th 758; *State ex. rel. Van De Kamp v. Texaco, Inc*. (1988) 46 Cal. 3d 1147; *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920 ("[W]e have observed that the Cartwright act is broader in range and deeper in reach than the Sherman Act."); and Memorandum 2024-34, p. 3.

[84] Commission meeting June 26, 2025, video.

(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 and need not define or prove a "relevant market" where there is direct evidence of market effects or power.

The staff next presents language that could be the basis of a Commission Comment to Section 167XX:

Comment. Section 167XX is added

[Additional text would be needed to describe this section once the Commission makes decisions on the language.]

Subdivision (e) is intended to clarify that certain federal judicial precedent and interpretations of the Sherman Act is not binding on courts for a finding of liability under Section 167XX, but a court may consider federal law as persuasive authority to the extent the court finds it persuasive and consistent with California law and 167XX [basic purpose statement]. A nonexhaustive list of elements and conduct that federal courts have required to establish liability under the Sherman Act that have limited antitrust enforcement are below. State courts may consider these elements and conduct as evidence of illegal conduct, but they are not required to find liability.

- 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;
- The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons;
- The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service;
- The defendant's conduct makes no economic sense apart from its tendency to harm competition;
- The conduct's risk of harming competition or actual harm must be proven with quantitative evidence;
- 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;
- 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; [85]
- The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendant's; or,
- A single firm or person has or may achieve a market share at or above a

[85] The Single Firm Conduct Working Group stated:

California courts have ruled that to prevail under Section 17043, a plaintiff need not prove the defendant had the ability to recoup its losses, as required under federal law. [citing *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 454-55]. Memorandum 2024-15, p. 12.

> threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power. and need not define or prove a "relevant market" where there is direct evidence of market effects or power.
>
> [This language should be accompanied by relevant citations to federal case law].

The staff believes that the first option is preferable to the second as it more clearly reflects legislative intent. The staff also notes that the purpose of Comments is to "describe the derivation and general effect of a proposed revision. They may also include brief explanatory background information."[86] The staff is concerned that this comment would require citations to and analyses of numerous cases and that putting this level of detail in a Commission Comment could be inconsistent with the Commission's practices.

Does the Commission wish to adopt either revisions to this statement, with or without changes?

OTHER PUBLIC COMMENTS

IBT Coalition

The IBT Coalition also suggested language that would preserve the ability of bona fide labor unions to organize and add a savings clause.[87] They suggest the adding savings clause "to ensure that any new SFC provision does not unintentionally supplant existing law that provides for a *per se* or "quick look" standard of review for certain types of restraints." The proposed savings clause would read:

> Nothing in this Act may be construed to:
> (1) Impair or limit the applicability of any of the State antitrust laws; or
> (2) Prohibit any other remedy provided by State law.[88]

The staff believes this is unnecessary as the courts can follow rules of statutory construction when interpreting the proposed laws. The staff also believes the language relating to labor unions ability to organizes is unnecessary as California law already protects that ability.[89]

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[86] Handbook § 260(a); see also the 2024-25 Annual Report in Memorandum 2025-14, pp. 15-17, for further discussion of Commission Comments.

[87] EX 9.

[88] EX 18.

[89] See e.g., Lab. Code § 923.

IAP:

The IAP's comments emphasizes that antitrust reform is needed, stating:

> First, the business establishment organizations that oppose your efforts, and antitrust reform more broadly, are, by definition, the voices of those who have benefitted from the status quo. They are not impartial observers but rather interested parties seeking to preserve the advantages they already hold.
>
> Second, while the political Left, Right, and Center disagree on many matters, on the issue of antitrust reform, there is a rare consensus. Across the ideological spectrum, there is recognition that ambitious reform is both necessary and urgently needed.
>
> Third, in the course of detailed economic and legal debate, one essential truth must not get overlooked: antitrust law is about freedom. It is about the freedom to choose where to work, the freedom to bargain for fair wages and benefits, the freedom to start your own business rather than working for someone else, and the freedom to turn a dream into reality. To imagine that a monopoly could be tolerated for so long as it delivers low prices is to miss the point entirely. A society where all are compelled to work for a single organization, no matter how efficient, would be intolerable. Antitrust law is not only about economics. It is about liberty.[90]

Does the Commission want the staff to conduct further analysis of these provisions?

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director

[90] EX 20-21.

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August 27, 2025

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

Re: Antitrust Law – Study B-750 Support for Staff Recommendations on Single-Firm Conduct and Mergers

Dear Chairperson Carrion and Honorable Commissioners:

On behalf of our client, Economic Security California Action[1], we write to comment on the staff recommendations presented in Memorandum 2025-31, "Draft Language for Merger Provisions" and on the staff's previous recommendations regarding single firm conduct. We commend the staff on their continued excellent work regarding this ongoing study. The most recent memorandum carefully and clearly lays out the various paths the Commission may take as it modernizes California's merger law. We

[1] The following organizations have also endorsed this letter: American Economic Liberties Project; California Nurses Association; Consumer Federation of California; Democracy Policy Network; End Poverty in California; Institute for Local Self Reliance; Rise Economy; Small Business Majority; TechEquity Collaborative; United Domestic Workers (UDW/AFSCME Local 3930); United Food and Commercial Workers Western States Council (UFCW).

commend the Commission's commitment to ensuring that California antitrust law will protect workers, consumers, and small businesses.

I. Recommendations Regarding Single-Firm Conduct

Before addressing the latest staff recommendations to modernize California's merger provisions, we first wish to address the staff's previous recommendations regarding single-firm conduct, which we previously discussed in our March 28, 2025 letter. We endorse the recommendations submitted by the International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, and California Federation of Labor Unions regarding single firm conduct provisions. Their August 20, 2025 letter urges the Commission to approve Option Two with critical improvements, including simplifying the general prohibition against restraints of trade, establishing clear standards of proof, and creating per se violations for conduct by firms with substantial market power. We agree.

We also would like to reiterate our strong support for the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents the staff has prepared. These provisions are all grounded in current law, will provide crucial guidance to courts about how to adjudicate Cartwright Act cases, provide clarity, consistency, and fairness in the application of the law as a result, and, consistent with every expert white paper, guarantee that California's antitrust law is of independent force and effect and not destined to follow the federal jurisprudence that has become increasingly hostile to meaningful antitrust enforcement. As we explained in our March 28, 2025 letter, this draft language appropriately and accurately catalogues the broad scope of harms that can result from anticompetitive conduct and is grounded in and inspired by the comments in the expert white papers before the Commission. We believe this language is critical to ensuring that the Commission's intended reform is successful, and urge the Commission to adopt it in full.

We urge the Commission to take immediate action at its September 18, 2025 meeting to vote on and approve these single-firm conduct recommendations. We agree with the Teamsters' letter's observation that the time has come for the Commission to take action on the single-firm conduct proposals before it. California cannot afford further delay while harmful consolidation continues to damage workers, consumers, and communities across the state. Inaction at this stage is tantamount to endorsing California's broken antitrust status quo which, as the Commission's exemplary work has demonstrated, cannot and should not continue.

II. Recommendations Regarding the Staff's Draft Language for Merger Provisions

The staff has issued a memorandum, Memorandum 2025-31, that comprehensively analyzes the potential options for the Commission as it considers proposals to update and revitalize the merger provisions of California's antitrust law. After considering those recommendations, we urge the Commission to:

- **Reject Option One**: California should not merely copy the Clayton Act, as this would import decades of weak federal precedent;
- **Adopt Options Two, Three, and Four together**: Combining the *Philadelphia National Bank* presumption, bright-line thresholds from the 2023 Guidelines, and the "appreciable risk" standard creates a strong, clear, and enforceable framework; and
- **Recommend comprehensive merger reform**: The Commission should include premerger notification requirements, industry-specific standards, and explicit consideration of labor and community impacts in its recommendation to the Legislature.

A. The Current State of Market Concentration in California

Market concentration in California has reached crisis levels. Across healthcare, technology, grocery, retail, and media, to take prominent examples, consolidation has produced markets dominated by a handful of firms. That dominance stifles new entry, narrows consumer choice, and leaves workers with fewer alternatives, suppressing wages, benefits, and bargaining power.

Federal antitrust enforcement has proven insufficient to check this trend. Federal agencies lack the vigor to adequately enforce the antitrust laws in our dynamic modern economy, and federal agencies cannot realistically monitor, much less litigate, every transaction—especially those that result in extreme consolidation locally without triggering concerns at a national level. Even when they do, judicial interpretation of Section 7 of the Clayton Act has eroded its prophylactic purpose. Courts now demand proof that harm is "likely" or "probable," rather than recognizing, as Congress intended, that mergers must be stopped in their incipiency before damage becomes irreversible. Memorandum 2025-31 at 2.

The insufficiency of federal enforcement creates an urgent need for California to enact its own mergers and acquisitions laws that empower the California Attorney

General to block harmful deals at home, particularly those that impact local economies. California need not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across our economy, from healthcare to technology to grocery stores to media. Instead, to prevent harmful consolidation, especially in local and regional markets, California should establish a state-level pre-merger notification system that applies to all market sectors, gives the Attorney General the opportunity to evaluate whether a proposed merger contributes to consolidation in a market, considers the impact on consumers and workers, and allows for timely action to intervene. California should also set clear merger thresholds to protect competition and prevent monopoly formation, while increasing transparency in merger reviews to ensure accountability.

B. Staff Recommendations to Revise California's Merger Provisions.

Against this backdrop, the staff has presented four options for California merger law, each representing a different level of departure from current federal jurisprudence. Option One largely mirrors the Clayton Act with modest amendments. Option Two codifies the *Philadelphia National Bank* presumption and designates the 2023 Merger Guidelines as persuasive authority. Option Three incorporates specific bright-line thresholds from the Guidelines. Option Four adopts an "appreciable risk" standard that lowers the burden of proof for enforcement actions. The Commission has been asked not to select among them at this stage, but to receive comment. We urge the Commission to seize the opportunity to direct staff to prepare a robust composite approach that integrates the strongest elements of Options Two, Three, and Four, while rejecting Option One.

We agree with staff's central insight: Adopting merger provisions that simply replicate the federal Clayton Act would squander California's opportunity to modernize its state antitrust law. California should instead take from the federal framework what remains sound, discard what has been hollowed out by judicial narrowing, and craft a statute that restores the protective force Congress originally intended but that courts have eroded.

We also agree that California's new merger law should specifically include and address monopsony harms. Labor markets are as critical as product markets, and California merger law should protect against the pernicious harms to workers that result from employer concentration and wage suppression. The effects of monopsony power in

labor markets create the same competitive distortions as monopoly power in product markets.

Below, we discuss each option presented by the staff.

Option One: Copying the Clayton Act

We oppose adopting Option One, which would largely replicate Section 7 of the Clayton Act. This approach would perpetuate the very defects that necessitate reform. Simply replicating the Clayton Act's language would import decades of weak federal jurisprudence that has raised the burden of proof and undermined merger enforcement. California should not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across every sector of the economy. Such an approach would be inconsistent with what the Commission endorsed in January 2025 and would fail to achieve the California Legislature's directive in ACR-95 to recommend a modernization of state antitrust law to promote and ensure the tangible and intangible benefits of free market competition for Californians.

Option Two: *Philadelphia National Bank* Presumption

Option Two would codify the structural presumption recognized in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), which held that mergers producing firms with undue market share and significantly increasing concentration are presumptively unlawful. This approach would restore the incipiency principle that Congress intended and restore the recognition that highly concentrated markets are inherently uncompetitive. Designating the 2023 DOJ/FTC Merger Guidelines as persuasive authority would further strengthen this option by grounding California law in modern enforcement practice. This approach would provide clear guidance to courts and restore the incipiency standard Congress originally intended when it enacted the Clayton Act. It makes sense for the approach in Option Two to be included in the Commission's recommendation to the Legislature.

Option Three: Federal Merger Guidelines

Option Three incorporates specific presumptions from the 2023 Guidelines: Mergers that raise the HHI above 1,800 with an increase of more than 100 points, or that produce a firm with a market share above 30% plus an HHI increase over 100 points, would be presumptively unlawful. 2023 Merger Guidelines § 2. Codifying these bright-line rules would give enforcers practical tools, create predictability for businesses, and reduce costly evidentiary burdens by establishing clear parameters for the otherwise

vague terms "undue concentration" and "significant increase" relied on in *Philadelphia National Bank*. The Guidelines were adopted by federal agencies following rigorous national vetting and have been relied upon by courts, providing direct guidance based on established metrics. We further recommend extending this approach beyond horizontal mergers to vertical and adjacent-market mergers, particularly in technology and healthcare, where dominance in one market can distort competition in another.

Option Four: Appreciable Risk Standard

Option Four would change the Clayton Act legal standard for permissible mergers by changing the "substantially lessen competition standard" to one that asks whether the merger would create an "appreciable risk of materially lessening competition." This standard, which is borrowed from Senator Amy Klobuchar's Competition and Antitrust Law Enforcement Reform Act ("CALERA") proposal, would restore the Clayton Act's original prophylactic purpose.

We strongly support this approach. This proposal would modernize California's merger law by lowering the burden of proof for enforcers and allowing potentially harmful mergers to be stopped at their incipiency, as Congress originally intended. This standard *must* be paired, however, with the *Philadelphia National Bank* presumption (Option Two) and the Guidelines' bright-line thresholds (Option Three)—not treated as a standalone option. We also endorse shifting the burden of proof for mega-firms (*e.g.*, companies with market capitalization above $100 billion) by requiring them to show by clear and convincing evidence that their mergers pose no appreciable risk to competition. *See* Memorandum 2025-31 at 14.

Both the "appreciable risk of materially lessening competition" and "public interest" standards should be implemented for proving harm in merger reviews. Both standards are familiar to courts and antitrust enforcers and would enable California to challenge potentially harmful mergers before damage to competition becomes certain and irreparable.

C. Additional Recommendations Not Captured by the Staff Memorandum.

Finally, we recommend that, in addition to directing that staff prepare a merger proposal that combines Options Two, Three, and Four, the Commission consider strengthening California's merger regime in three further respects:

- **Pre-Merger Notification.** California should adopt its own robust pre-merger notification system, parallel to Hart-Scott-Rodino but tailored to

state markets, so as to ensure that the Attorney General can review transactions that escape federal scrutiny.

- **Industry-Specific Standards.** As bills such as AB 853 and AB 3129 recognize, healthcare, grocery, and technology mergers deserve heightened scrutiny given their outsized impact on workers and consumers. California should include heightened scrutiny of mergers in these industries in its merger statute.
- **Labor and Community Impacts.** Merger review should consider wage suppression, union bargaining power, effects on small businesses and communities of color, and reinvestment obligations in banking and fintech. A directive to consider these impacts should be included in the statute.

D. Conclusion Regarding Merger Proposals

California faces a critical moment in addressing the consolidation that has reached alarming levels across our economy. This resulting concentration of market power in too few hands chokes out competition, limits consumer choice, and undermines workers' ability to seek out better employment options.

By adopting the hybrid approach discussed above—combining the *Philadelphia National Bank* presumption, bright-line thresholds from the 2023 Guidelines, and the "appreciable risk" standard—California can reclaim antitrust's original purpose of stopping harmful consolidation in its incipiency and set a national model for protecting competition, workers, and democracy. These combined approaches will:

- **Lower the burden of proof**: Restore the incipiency principle and empower California to block harmful mergers before they damage workers, consumers, and communities;
- **Center workers and communities**: Explicitly include labor market harms, formalize worker participation, and evaluate community and equity impacts;
- **Strengthen scrutiny of mega-firms and key industries**: Shift the burden of proof for the largest companies and apply heightened review in critical sectors; and
- **Make California a leader**: Provide a comprehensive framework that other states can follow in protecting competition and democracy.

The Commission should take action now to provide clear direction to staff on merger language.

* * *

Thank you for considering these comments and for your continued work on this critical issue.

Sincerely,

Scott A. Kronland

Scott A. Kronland

cc: Economic Security California Action

American Economic Liberties Project
California Nurses Association
Consumer Federation of California
Democracy Policy Network
End Poverty in California
Institute for Local Self Reliance
Rise Economy
Small Business Majority
TechEquity Collaborative
United Domestic Workers (UDW/AFSCME Local 3930)
United Food and Commercial Workers Western States Council (UFCW)

August 20, 2025

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

Dear Chairperson Carrion and Honorable Commissioners:

We welcome the opportunity to provide comments to the California Law Revision Commission (CLRC) on the various legislative proposals under consideration, with a focus on Memorandum 2025-21, "Draft Language for Single Firm Conduct Provision,"[1] and Memorandum 2025-31, "Draft Language for Merger Provisions."[2] The work of the CLRC is both critical and time sensitive. We commend the Commission and the Commission staff for their serious and thoughtful efforts to date, including retaining the advice and deeply substantive participation of a broad array of experts with diverse perspectives and backgrounds. When it comes to single firm conduct, it is noteworthy that all of the experts rejected the *status quo*, opting instead to endorse significant reform.

I. Overview

Below, we provide an overview of our recommendations for the proposed Single-Firm Conduct (SFC) and merger provisions.[3] All stakeholders are best served by a law that is as clear and predictable as possible. These improvements further this aim by (i) aligning the proposal with existing law where it makes sense to do so, (ii) expressly rejecting existing law where it does not make sense, and (iii) harmonizing the proposals with California's unique body of existing law.

Single-Firm Conduct: Approve Option Two with Suggested Improvements at the September 18, 2025 Meeting

[1] Cal. Law Revision Comm'n, *Memorandum 2025-21: Draft Language for Single Firm Conduct Provision* (Mar. 24, 2025), https://clrc.ca.gov/pub/2025/MM25-21.pdf.

[2] Cal. Law Revision Comm'n, *Memorandum 2025-31: Draft Language for Merger Provisions* (June 16, 2025), https://clrc.ca.gov/pub/2025/MM25-31.pdf.

[3] Although this submission is focused on the merger and SFC provisions, we look forward to engaging with the Commission and its staff as it moves forward with its important work of crafting additional provisions to address anticompetitive conduct that falls outside the scope of these provisions and existing federal antitrust jurisprudence. Such work will be necessary to achieve the Legislature's directive to recommend changes to the state's antitrust laws "to promote and ensure the tangible and intangible benefits of free market competition for Californians."

At this advanced stage of the Study, we strongly urge the Commission to move from discussion to action with the urgency the circumstances demand.[4] At its upcoming September meeting, the undersigned respectfully urge the Commission to approve Option Two[5] for the SFC provision including the codification of the findings and declarations[6] and incorporating the following changes:

- **Simplify the General Prohibition:** Simplify proposed Sec. 16720.1(a)(1) to state that the following is unlawful: to act "in restraint of trade, or to attempt to restrain trade."

- **Establish "Clear and Convincing" Standard of Proof for Defense to General Prohibition:** Establish that a defendant must demonstrate by "clear and convincing" evidence that the pro-competitive benefits of what would otherwise be a prohibited restraint of trade (1) are achievable only through that conduct; and (2) outweigh the anticompetitive effects of the challenged conduct.

- **Specify Certain Restraints of Trade by Firms with Substantial Market Power Are *Per Se* Violations of Proposed Sec. 16720.1:**[7] Establish that certain restraints of trade by firms with substantial market power are *per se* unlawful where the plaintiff establishes that the firm (1) has substantial market power; and (2) the challenged conduct has produced some anticompetitive effects within the market. At a minimum, the following should be included in the list of *per se* unlawful conduct:

    - **Tying:** Any restraint that conditions the sale or purchase of any product or services on an agreement to sell or purchase another product or service; and

    - **Exclusive dealing:** Any restraint that requires another person to deal exclusively or primarily with the firm imposing the restraint or another person specified by that firm or any restraint that has the necessary effect of requiring another person to deal exclusively or primarily with the firm imposing the restraint or another person specified by that firm.

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[4] We strongly agree with staff's conclusion in Memorandum 2025-30 that additional analysis of whether to expressly address the harms from abuses of monopsony power is entirely unwarranted and unnecessary. The law is well-settled on the point that "the effects of monopsony power in labor markets are just as pernicious as the effects of monopoly." Cal. Law Revision Comm'n, *Memorandum 2025-30: Draft Language for Single Firm Conduct Provision and Public Comment* (June 17, 2025), https://www.clrc.ca.gov/pub/2025/MM25-30.pdf (citing Cal. Law Revision Comm'n, *Memorandum 2024-14: Expert Report: Concentration in California* (Mar. 28, 2024), at 4, https://www.clrc.ca.gov/pub/2024/MM24-14.pdf).

[5] Cal. Law Revision Comm'n, *supra* note 1.

[6] We endorse the findings proposed in Cal. Law Revision Comm'n, *Memorandum 2025-21: Draft Language for Single Firm Conduct Provision* (Mar. 24, 2025), 11-12, https://clrc.ca.gov/pub/2025/MM25-21.pdf as updated by the Staff recommendations in Cal. Law Revision Comm'n, *Memorandum 2025-30: Draft Language for Single Firm Conduct Provision and Public Comment* (June 17, 2025), https://www.clrc.ca.gov/pub/2025/MM25-30.pdf.

[7] We characterize the treatment applicable to this conduct as *per se* unlawful because once the elements are established, the defendant cannot offer a rebuttal or a defense to justify the challenged conduct. That said, it could also be characterized as a "quick look" approach, as it combines elements of both the *per se* and "quick look" approaches.

- **Specify Certain Restraints of Trade by Firms with Substantial Market Power Are Presumptively Unlawful:** Establish that certain restraints of trade by firms with substantial market power are presumptively unlawful under proposed Sec. 16720.1.[8] This conduct would be subject to a "quick look" type of analysis, such that the burden would first be on the plaintiff to establish that (1) the firm has substantial market power; and (2) the challenged restraint of trade produced some anticompetitive effect within the market. The burden would then shift to the defendant to demonstrate by "clear and convincing" evidence that the pro-competitive benefits of the challenged restraint (1) are achievable only through that conduct; and (2) clearly outweigh the anticompetitive effects of the challenged restraint.

  To address harm to workers, at a minimum, the following should be included in the list of presumptively unlawful restraints of trade:

  - **Restraining Workers' Freedom of Association:** Any restraint on a person's ability to exercise their full freedom of association to obtain acceptable terms and conditions of employment; and

  - **Restraining Autonomy of Independent Businesses:**[9] Any restraint on the wages, benefits, or other non-price terms and conditions of employment offered by another firm including any restraint on another firm's ability to independently decide whether to employ another person, recognize a union of its employees, or to otherwise agree to negotiate with its employees collectively over terms and conditions of employment.[10]

- **Codify that Out-of-Market Benefits Cannot Be Offered as a Defense:** Incorporate language from New York's 21st Century Anti-Trust Act,[11] expressly stating that harm to competition in one market may not be offset by purported benefits in a separate market.

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[8] The recommended framework for assessing the presumptively unlawful conduct is similar to the "quick look" standard of review under the Cartwright Act. As the California Supreme Court has explained, the "quick look" approach is "applicable to cases where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015) (internal quotation marks omitted). The Court added that, under this standard, "a defendant may be asked to come forward with pro-competitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first." *Id*.

[9] Similar to New York's Twenty-First Century Anti-Trust Act, it will be necessary to exempt bona fide labor unions to ensure this provision does not interfere with the ability of workers to organize and bargain collectively for improved wages and working conditions. *See* Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

[10] Given that vertical price fixing is *per se* illegal under the Cartwright Act, the inclusion of a savings clause, as recommended below, may be important. This would help ensure that California's new SFC provision does not unintentionally supplant the California Supreme Court's ruling in *Mailand v. Burckle*. *See* 20 Cal. 3d 367, 572 P.2d 1142 (1978).

[11] Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

- **Expressly Account for Unlawful Conduct through Intermediaries:** Clarify that the prohibited conduct is unlawful whether it is carried out directly or indirectly by another entity or person such as an independent contractor or other intermediary.

- **Grant the California Attorney General Rulemaking Authority:** Grant the Attorney General Rulemaking Authority to designate additional conduct that should be added to the list of *per se* and presumptively unlawful conduct, similar to the authority that is provided for in New York's 21st Century Anti-Trust Act.

- **Add a Savings Clause:** Include a savings clause to ensure the new SFC provision does not override existing law that provides for a *per se* or "quick-look" standard of review for certain types of SFC.

Merger Provision: Options Two, Three, and Four with Suggested Improvements

For the merger provision, we recommend that the Commission adopt a provision that incorporates elements of Options Two, Three, and Four from Memorandum 2025-31[12] as well as our recommended improvements. These improvements are critical for addressing mergers that may result in anticompetitive effects for workers. Below, we highlight the elements that must be included in a California state merger provision to provide adequate tools for public and private enforcers to block anticompetitive mergers:

- **Adopt the "Appreciable Risk" standard:** We support including this component of Option Four.

- **Codify *Philadelphia National Bank* Presumption:** We support including this component of Options Two and Three.

- **Codify the 2023 Merger Guidelines Presumptions:** We support including this component of Option Three.

- **Designate the 2023 Merger Guidelines as Persuasive Authority:** We support including this component of Option Two.

- **Provide Explicit Direction to the California Department of Justice (CA DOJ) to Consider a Merger's Effects on Labor Markets and Workers:** We support the addition of this language from New York's 21st Century Anti-Trust Act.

- **Formalize a Role for Workers in the CA DOJ's Merger Review Process:** We support the addition of this language from New York's 21st Century Anti-Trust Act.

- **Shift the Burden of Proof for Acquisitions by Mega-Firms:** For companies with a market capitalization of $100 billion or more, we support shifting the burden to the

[12] Cal. Law Revision Comm'n, *supra* note 2.

merging parties to prove by "clear and convincing" evidence that a merger does not create an appreciable risk of materially lessening competition.[13]

California has an opportunity to reclaim the animating spirit of the antitrust reforms of the early Twentieth century, particularly as they relate to protecting competition in labor markets for the benefit of workers. As things stand today, federal and California state antitrust law is ill-equipped to address a substantial amount of anticompetitive conduct. Over the last half-century or so, in particular, courts have been narrowing the reach of antitrust law and ratcheting up the burden of proof to a degree that private and public enforcers cannot afford the time or resources necessary to litigate many antitrust cases, regardless of the strength of the case. We offer these recommendations in support of the Commission's vital role in initiating a course correction for the benefit of California workers, consumers, and small- and medium-sized businesses.

Sincerely,

International Brotherhood of Teamsters

Teamsters California

United Food and Commercial Workers, Western States Council

California Federation of Labor Unions

[13] It would be appropriate to provide an exemption to this mega-firm burden-shifting provision for acquisitions that fall below a certain threshold, understanding that they would still be subject to a forthcoming general state law prohibitions on anticompetitive mergers as well as Section 7 of the Clayton Act.

August 28, 2025

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

Dear Chairperson Carrion and Honorable Commissioners:

The undersigned labor unions offer the following improvements to the California Law Revision Commission (CLRC) legislative proposals on Single Firm Conduct (SFC) as set forth in Memorandum 2025-21, "Draft Language for Single Firm Conduct Provision,"[1] and Memorandum 2025-30, "Draft Language for Single Firm Conduct Provision and Public Comment."[2] The language set forth below implements the recommendations set forth in our August 20 submission for the SFC provision.[3]

We reiterate our request that the Commission move from discussion to action with the urgency the circumstances demand to approve Option Two for the SFC provision, including the codification of the findings and declarations, and incorporating the following changes at its upcoming September meeting.

A. Simplify the General Prohibition

Simplify proposed Section 16720.1(a) of Option Two[4] and specify that this section prohibits restraints of trade regardless of whether they are carried out directly or indirectly, through intermediaries such as an independent contractor.

Edits would be as follows, with removed language stricken and new language in italics and underlined:

[1] Cal. Law Revision Comm'n, *Memorandum 2025-21: Draft Language for Single Firm Conduct Provision* (Mar. 24, 2025), https://clrc.ca.gov/pub/2025/MM25-21.pdf.

[2] Cal. Law Revision Comm'n, *Memorandum 2025-30: Draft Language for Single Firm Conduct Provision and Public Comment* (June 17, 2025), https://clrc.ca.gov/pub/2025/MM25-30.pdf.

[3] *Multi-party 14* (Aug. 20, 2025), available at https://drive.google.com/file/d/1NH8uxAalSwNyyk4ElBAAnB-iYEiuj3Iu/view.

[4] Cal. Law Revision Comm'n, *Memorandum 2025-30: Draft Language for Single Firm Conduct Provision and Public Comment* (June 17, 2025), https://clrc.ca.gov/pub/2025/MM25-30.pdf.

(a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events *whether they are carried out directly or indirectly through another entity or person such as an independent contractor or intermediary*:

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

B. Establish "Clear and Convincing" Standard of Proof for Defense to General Prohibition

Establish a defense to the general prohibition that requires "clear and convincing" evidence that the pro-competitive benefits of what would otherwise be a prohibited restraint of trade (1) are achievable only through that conduct; and (2) outweigh the anticompetitive effects of the challenged conduct.

To implement this, add the subsection below to proposed Section 16720.1 of Option Two:

Subsection (a) of this section shall not apply if the defendant establishes, by clear and convincing evidence, that the pro-competitive benefits of the challenged conduct (1) are achievable only through that conduct and (2) outweigh that conduct's harm to competition.

C. Specify Certain Restraints of Trade by Firms with Substantial Market Power Are *Per Se* Violations of Proposed Sec. 16720.1

To address harm to workers, establish certain restraints of trade by firms with substantial market power are *per se* unlawful[5] and grant the Attorney General rulemaking authority to designate additional conduct that should be added to the list of *per se* unlawful restraints of trade, similar to the authority that is provided for in New York's 21st Century Anti-Trust Act.[6]

To implement this, add the subsection below to proposed Section 16720.1 of Option Two:

The following restraints are per se illegal when engaged in by a person with substantial market power, provided that the challenged conduct has produced some anticompetitive effect:

(1) Any restraint that conditions the sale or purchase of any product or service on an agreement to sell or purchase another product or service;

[5] As noted in our August 20 submission, we suggest these provisions with a focus on protecting workers, but this should not be considered an exhaustive list of restraints that should be *per se* unlawful under proposed Section 16720.1 of Option Two.

[6] Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

(2) Any restraint that requires another person to deal exclusively or primarily with the person imposing the restraint or another person specified by the person imposing the restraint, or any restraint that has the necessary effect of requiring another person to deal exclusively or primarily with the person imposing the restraint or another person specified by the person imposing the restraint; and

(3) Any restraint that the attorney general determines, through rulemaking, generally serves no legitimate business purpose that cannot be achieved in some less restrictive way.

D. Specify Certain Restraints of Trade by Firms with Substantial Market Power Are Presumptively Unlawful

To address harm to workers, establish certain restraints of trade by firms with substantial market power are presumptively unlawful[7] and grant the Attorney General rulemaking authority to designate additional conduct that should be added to the list of presumptively unlawful restraints of trade, similar to the authority that is provided for in New York's 21st Century Anti-Trust Act.[8]

These restraints would be subject to a "quick look" type of analysis, such that the burden would first be on the plaintiff to establish that (1) the firm has substantial market power; and (2) the challenged restraint of trade produced some anticompetitive effect within the market. The burden would then shift to the defendant to demonstrate by "clear and convincing" evidence that the pro-competitive benefits of the challenged restraint (1) are achievable only through that conduct; and (2) outweigh the anticompetitive effects of the challenged restraint.

To implement this, add the subsection below to proposed Section 16720.1 of Option Two:

(1) Except as provided in paragraph (2), the following restraints are presumed to be illegal when engaged in by a person with substantial market power, provided that the challenged conduct has produced some anticompetitive effect:

(A) Any restraint on another person's ability to exercise their full freedom of association to obtain acceptable terms and conditions of employment;

(B) Any restraint on the wages, benefits, or other non-price terms and conditions of employment offered by another person including any restraint on another person's ability to independently decide whether to employ a person, recognize a union of its

[7] As noted in our August 20 submission, we suggest these provisions with a focus on protecting workers, but this should not be considered an exhaustive list of restraints that should be presumed unlawful under proposed Section 16720.1 of Option Two.

[8] Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

employees, or to otherwise agree to negotiate with its employees collectively over terms and conditions of employment;[9] *and*

(C) Any restraint that the attorney general determines, through rulemaking, poses a substantial risk of harming competition that is not already presumed illegal."

(2) Paragraph (1) shall not apply if the defendant establishes, by clear and convincing evidence, that the pro-competitive benefits of the challenged restraint—

(A) are achievable only through that conduct; and

(B) *outweigh the anticompetitive effects of the challenged restraint*.

E. Codify that "Out-Of-Market" Benefits Cannot Be Used as a Defense

Add language expressly stating that harm to competition in one market may not be offset by purported benefits in a separate market. To implement this, add the subsection below to proposed Section 16720.1 of Option Two:

Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.[10]

F. Add a Subsection to Address Proof of Substantial Market Power

Establish that a plaintiff can demonstrate "substantial market power" through direct evidence, indirect evidence, or a combination of the two. To implement this, add the subsection below to proposed Section 16720.1 of Option Two:

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 40 per cent or greater of a relevant market as a seller shall be presumed to have substantial market power; a person who has a share of 30 per cent or greater of a relevant market as a buyer shall be presumed to have substantial market power.

[9] Given that vertical price fixing is *per se* illegal under the Cartwright Act, the inclusion of a savings clause, as recommended below, may be important. This would help ensure that California's new SFC provision does not unintentionally supplant the California Supreme Court's ruling in *Mailand v. Burckle*. *See* 20 Cal. 3d 367, 572 P.2d 1142 (1978).

[10] *See generally* Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

(2) Direct evidence of a person's substantial market power may include reduction in output or in quality of goods or services, the imposition of supracompetitive prices, or the ability to force, induce or otherwise coerce a supplier to offer a lower price, discount, or other service than what the supplier offers other buyers.

(3) *In labor markets, direct evidence of a person's substantial market power may include the imposition of sub-competitive wages or working conditions; the repeated violation of laws protecting workers such as labor laws, wage-and-hour laws and workplace health and safety laws; and the interference with, restraint of, or coercion of workers' ability to exercise of their full freedom of association to obtain acceptable terms and conditions of employment*.[11]

G. Preserve Ability of Bona Fide Labor Unions to Organize and Bargain Collectively

Similar to New York's Twenty-First Century Anti-Trust Act, it will be necessary to exempt bona fide labor unions to ensure this provision does not interfere with the ability of workers to organize and bargain collectively for improved wages and working conditions.

To implement this, add the following provision to proposed Section 16720.1 of Option Two:

Nothing herein contained shall be deemed to prohibit or restrict the right of workers, including employees and independent contractors, to combine in unions, organizations and associations, not organized for the purpose of profit, to establish or maintain union apprenticeship or training programs that may lead to any government-issued trade license, or to bargain collectively concerning their wages and the terms and conditions of their employment.

H. Add a Savings Clause

Add a savings clause to ensure that any new SFC provision does not unintentionally supplant existing law that provides for a *per se* or "quick look" standard of review for certain types of restraints.

To implement this, add the following provision to proposed Section 16720.1 of Option Two:

Rules of Construction.—Nothing in this Act may be construed to—

(1) Impair or limit the applicability of any of the State antitrust laws; or

(2) *Prohibit any other remedy provided by State law*.

[11] *Id.*

We appreciate the opportunity to share our views on this important legislation and stand ready to work with the Commission and Commission staff to promote competition in California for the benefit of California workers, consumers, and small- and medium-sized businesses.

Sincerely,

International Brotherhood of Teamsters

Teamsters California

United Food and Commercial Workers, Western States Council

California Federation of Labor Unions

5 September, 2025

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

Re: Antitrust Law – Study B-750: Recommendation of Single-Firm Conduct Reform

Dear Chair Carrion and Honorable Commissioners:

The Internet Accountability Project (IAP) is a nonprofit organization of conservatives committed to restoring accountability and fairness in the digital economy and beyond. We were founded to provide a principled conservative voice to the growing bipartisan movement to address the harms of concentrated corporate power, particularly in Big Tech. Our work underscores that unchecked monopoly power is not only an economic problem but a profound threat to freedom, opportunity, and dignity.

We write to commend once again the California Law Revision Commission and its staff for the thoughtful work already done in this proceeding, and to underscore four points that we respectfully urge the Commission to keep in view as it considers its next steps.

First, the business establishment organizations that oppose your efforts, and antitrust reform more broadly, are, by definition, the voices of those who have benefitted from the status quo. They are not impartial observers but rather interested parties seeking to preserve the advantages they already hold.

Second, while the political Left, Right, and Center disagree on many matters, on the issue of antitrust reform, there is a rare consensus. Across the ideological spectrum, there is recognition that ambitious reform is both necessary and urgently needed.

Third, in the course of detailed economic and legal debate, one essential truth must not get overlooked: antitrust law is about freedom. It is about the freedom to choose where to work, the freedom to bargain for fair wages and benefits, the freedom to start your own business rather than working for someone else, and the freedom to turn a dream into reality. To imagine that a monopoly could be tolerated for so long as it delivers low prices is to miss the point entirely. A society where all are compelled to work for a single

organization, no matter how efficient, would be intolerable. Antitrust law is not only about economics. It is about liberty.

Fourth, the demand that the Commission undertake broad economic analysis before making recommendations is nothing more than a tactic to delay. Such analysis is outside the Commission's purview, would bog down and discourage reform just as it has enforcement, and, as is well known, can be made to reach virtually any conclusion depending on the assumptions chosen. Most importantly, this premise – that antitrust is only about economic models and not also about freedom and dignity – is exactly the kind of thinking that caused antitrust enforcement to fail.

Fifth, the recent federal court decision allowing Google to maintain its dominant position, despite controlling nearly 90% of the search engine market, highlights both a misreading of antitrust precedent by Judge Mehta and the urgent need for state legislative reform. While the Trump Department of Justice rightly brought the case, the ruling illustrates how outdated interpretations of federal antitrust law have failed to evolve alongside digital markets. This breakdown in federal enforcement makes clear that states like California cannot wait for Washington to act. When courts effectively endorse monopolies, the responsibility falls squarely on state legislatures to intervene, restore competition, and safeguard the public interest.

Finally, the urgency of this moment cannot be overstated. The situation is not improving. It is deteriorating. The California Legislature needs the benefit of the Commission's formal recommendations on single-firm conduct reform within a timeframe that allows for meaningful legislative consideration and action next year. Delay will not only waste a critical window for reform but risk allowing the problem to develop further, making future remedies more difficult, costly, and less effective.

For all these reasons, it is time for the Commission to recommend to the Legislature a single-firm conduct proposal this year, leaving any remaining drafting issues to be resolved later. The staff has crafted thoughtful and well-supported options. Additional debate will not add value. It will only delay consideration by the Legislature, which is precisely what the opposition seeks, since their overarching argument is that no reform is needed at all.

Finally, we respectfully reiterate the key points from our prior submission:

- The staff's recommendations reflect a broad consensus of experts across the ideological spectrum.
- California's history demonstrates that the state should not tolerate domination by a handful of powerful interests.
- California cannot rely solely on federal enforcement, which has failed to prevent monopoly power.
- Adoption of single-firm conduct provisions is essential to protect Californians.

- Staff's proposal to deem specific conduct presumptively unlawful is both sound and fair, providing clarity for businesses while enabling enforcement.

In conclusion, the Commission's work has been rigorous, principled, and well grounded in the public record. Principled conservatives who value competition, freedom, and innovation are watching your work closely, are impressed by it, and urge you at your next meeting to approve a single-firm conduct proposal for the Legislature.

Respectfully submitted,

Mike Davis
Founder & President
Internet Accountability Project

OFFICE OF KAT TAYLOR

September 4, 2025

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

RE: SUPPORT FOR THE COMMISSION RECOMMENDING A PROPOSAL FOR SINGLE FIRM CONDUCT REFORM TO THE LEGISLATURE ON SEPTEMBER 18th.

Dear Chair Carrion and Honorable Commissioners:

The Office of Kat Taylor (OKT) commends the Commission and its staff for its thorough, comprehensive, and exemplary work in addressing anticompetitive, single firm conduct. The Commission's single firm conduct-related work, from the extraordinary breadth, depth, and diversity of expert opinions obtained by staff that are reflected in the January 2024 Single Firm Conduct Working Group Report to the thoroughly researched staff memoranda and voluminous public comment submitted and digested by you and your staff, has been a model for thoughtful approaches to law revision.

OKT supports policy and programmatic efforts to strengthen agricultural producers' ability to make their operations more sustainable, as well as opportunities to support producers financially in transitioning to more ecologically friendly farming. As the co-founder of TomKat Ranch, an 1,800-acre regenerative grass-fed cattle ranch, it serves as a learning laboratory and educational center with a team of ranchers, scientists, and ecological leaders who work to inspire the transition of California rangeland to regenerative management.

OKT respectfully suggests that the time has come for the Legislature and the Governor to have the benefit of that model single firm conduct work so they may thoughtfully consider it next year. OKT makes this suggestion regardless of whether the Commission simultaneously approves proposed merger or other language.

Your *Concentration and Competition in California* Working Group paper from March of last year explains the urgency of our suggestion. It painstakingly and persuasively documents that the California food supply system is in "crisis;" a "consolidation crisis." Your experts correctly warn:

> From the level of farms, through the distribution channel, down to the retailers, California

faces a consolidation crisis placing a stranglehold on the cost of food to consumers.[1]

OKT has a longstanding interest in ensuring the Legislature urgently addresses this "crisis." Our body of work is dedicated to promoting environmental stewardship, equitable access to healthful food, and support for rural communities by fundamentally reforming the ways our food is grown, cultivated, harvested, and delivered.

OKT can confirm that your experts are right to describe ourselves in a food "consolidation crisis." Our own experience confirms the data in your report, which reveals that every major aspect, every major sector, of our food delivery ecosystem, is in a "consolidation crisis." From your report:

- "[N]owhere is this more apparent than in the protein industry where decades of consolidation has left meat subject to the control of a very small number of companies.[2] ... Four large conglomerates (Tyson, JBS, Marfrig, and Seaboard) control 55 to 85 percent of the market for pork, beef, and poultry. The change in consolidation over the last four decades is shocking. In 1977, the largest four beef-packing firms controlled just 25 percent of the market— that has risen to 82 percent today."[3]

- "Concentration in the food retail area is another area of concern. In the United States, sales by the 20 largest food retailers totaled $449.3 billion in 2013, accounting for 63.8 percent of U.S. grocery store sales. It is estimated that only four retailers (Walmart, Kroger, Costco, and Albertson's) control roughly 69 percent of the US grocery market."[4]

To reiterate: your own experts are correctly informing you we are in a "crisis" – a "consolidation crisis" -- involving the availability and affordability of *food*. Single firm conduct reform is the foundation of addressing this crisis; namely, anticompetitive behavior by "consolidated" – single firm – businesses.

OKT respectfully urges the Commission to consider and adopt a single firm conduct offering to the Legislature on September 18th. Please reach out to Charisse.Lebron@kattaylor.com with any follow-up questions. Thank you for the opportunity to provide comment on this critical matter.

Sincerely,

Kat Taylor

Kat Taylor
Co-Founder, TomKat Ranch LLC
Principal, Office of Kat Taylor

[1] Page 10.
[2] Pages 10-11.
[3] Page 15.
[4] Ibid.

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September 8, 2025

The Honorable Xochitl Carrion, Chair,
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Re: Antitrust Law – Study B-750 Support for Staff Recommendations on Single-Firm Conduct and Mergers

Dear Chairperson Carrion and Honorable Commissioners:

On behalf of CAMEO Network, I write to comment on the staff recommendations presented in Memorandum 2025-31, "Draft Language for Merger Provisions" and on the staff's previous recommendations regarding single firm conduct. We commend the staff on their excellent continued work regarding this ongoing study. The most recent memorandum carefully and clearly lays out the various paths the Commission may take as it modernizes California's merger law. We commend the Commission's commitment to ensuring that California antitrust law will protect workers, consumers, and small businesses.

CAMEO Network is California's statewide micro-business network made up of 400 organizations, agencies, and individuals dedicated to furthering Micro-Business development in California with small and micro-business financing such as loans and credit, technical assistance and business management training. Annually, CAMEO members serve about 200,000 very small businesses with training, business and credit assistance and loans. These firms – largely start-ups with less than six employees – support or create 300,000 new jobs in California and generate a total of $15 billion in economic activity.

I. Recommendations Regarding Single-Firm Conduct

Before addressing the latest staff recommendations to modernize California's merger provisions, we first wish to address the staff's previous recommendations regarding single-firm conduct, which we previously discussed in our March 28, 2025 letter. We endorse the recommendations submitted by the International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, and California Federation of Labor Unions regarding single firm conduct provisions. Their August 20, 2025 letter urges the Commission to approve Option Two with critical improvements, including simplifying the general prohibition against restraints of trade, establishing clear standards of proof, and creating per se violations for conduct by firms with substantial market power. We agree.

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We also would like to reiterate our strong support for the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents the staff has prepared. These provisions are all grounded in current law, will provide crucial guidance to courts about how to adjudicate Cartwright Act cases, provide clarity, consistency, and fairness in the application of the law as a result, and, consistent with every expert white paper, guarantee that California's antitrust law is of independent force and effect and not destined to follow the federal jurisprudence that has become increasingly hostile to meaningful antitrust enforcement. As we explained in our March 28, 2025 letter, this draft language appropriately and accurately catalogues the broad scope of harms that can result from anticompetitive conduct and is grounded in and inspired by the comments in the expert white papers before the Commission. We believe this language is critical to ensuring that the Commission's intended reform is successful, and urge the Commission to adopt it in full.

We urge the Commission to take immediate action at its September 18, 2025 meeting to vote on and approve these single-firm conduct recommendations. We agree with the Teamsters' letter's observation that the time has come for the Commission to take action on the single-firm conduct proposals before it. California cannot afford further delay while harmful consolidation continues to damage workers, consumers, and communities across the state. Inaction at this stage is tantamount to endorsing California's broken antitrust status quo which, as the Commission's exemplary work has demonstrated, cannot and should not continue.

II. Recommendations Regarding the Staff's Draft Language for Merger Provisions

The staff has issued a memorandum, Memorandum 2025-31, that comprehensively analyzes the potential options for the Commission as it considers proposals to update and revitalize the merger provisions of California's antitrust law. After considering those recommendations, we urge the Commission to:

- **Reject Option One:** California should not merely copy the Clayton Act, as this would import decades of weak federal precedent;
- **Adopt Options Two, Three, and Four together:** Combining the Philadelphia National Bank presumption, bright-line thresholds from the 2023 Guidelines, and the "appreciable risk" standard creates a strong, clear, and enforceable framework; and
- **Recommend comprehensive merger reform:** The Commission should include premerger notification requirements, industry-specific standards, and explicit consideration of labor and community impacts in its recommendation to the Legislature.

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A. The Current State of Market Concentration in California

Market concentration in California has reached crisis levels. Across healthcare, technology, grocery, retail , and media, to take prominent examples, consolidation has produced markets dominated by a handful of firms. That dominance stifles new entry, narrows consumer choice, and leaves workers with fewer alternatives, suppressing wages, benefits, and bargaining power.

Federal antitrust enforcement has proven insufficient to check this trend. Federal agencies lack the vigor to adequately enforce the antitrust laws in our dynamic modern economy, and federal agencies cannot realistically monitor, much less litigate, every transaction—especially those that result in extreme consolidation locally without triggering concerns at a national level. Even when they do, judicial interpretation of Section 7 of the Clayton Act has eroded its prophylactic purpose. Courts now demand proof that harm is "likely" or "probable," rather than recognizing, as Congress intended, that mergers must be stopped in their incipiency before damage becomes irreversible. Memorandum 2025-31 at 2.

The insufficiency of federal enforcement creates an urgent need for California to enact its own mergers and acquisitions laws that empower the California Attorney General to block harmful deals at home, particularly those that impact local economies. California need not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across our economy, from healthcare to technology to grocery stores to media. Instead, to prevent harmful consolidation, especially in local and regional markets, California should establish a state-level pre-merger notification system that applies to all market sectors, gives the Attorney General the opportunity to evaluate whether a proposed merger contributes to consolidation in a market, considers the impact on consumers and workers, and allows for timely action to intervene. California should also set clear merger thresholds to protect competition and prevent monopoly formation, while increasing transparency in merger reviews to ensure accountability.

B. Staff Recommendations to Revise California's Merger Provisions.

Against this backdrop, the staff has presented four options for California merger law, each representing a different level of departure from current federal jurisprudence. Option One largely mirrors the Clayton Act with modest amendments. Option Two codifies the Philadelphia National Bank presumption and designates the 2023 Merger Guidelines as persuasive authority. Option Three incorporates specific bright-line thresholds from the Guidelines. Option Four adopts an "appreciable risk" standard that lowers the burden of proof for enforcement actions. The Commission has been asked not to select among them at this stage, but to receive comment. We urge the Commission to seize the opportunity to direct

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staff to prepare a robust composite approach that integrates the strongest elements of Options Two, Three, and Four, while rejecting Option One.

We agree with staff's central insight: Adopting merger provisions that simply replicate the federal Clayton Act would squander California's opportunity to modernize its state antitrust law. California should instead take from the federal framework what remains sound, discard what has been hollowed out by judicial narrowing, and craft a statute that restores the protective force Congress originally intended but that courts have eroded.

We also agree that California's new merger law should specifically include and address monopsony harms. Labor markets are as critical as product markets, and California merger law should protect against the pernicious harms to workers that result from employer concentration and wage suppression. The effects of monopsony power in labor markets create the same competitive distortions as monopoly power in product markets.

Below, we discuss each option presented by the staff.

Option One: Copying the Clayton Act

We oppose adopting Option One, which would largely replicate Section 7 of the Clayton Act. This approach would perpetuate the very defects that necessitate reform. Simply replicating the Clayton Act's language would import decades of weak federal jurisprudence that has raised the burden of proof and undermined merger enforcement. California should not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across every sector of the economy. Such an approach would be inconsistent with what the Commission endorsed in January 2025 and would fail to achieve the California Legislature's directive in ACR-95 to recommend a modernization of state antitrust law to promote and ensure the tangible and intangible benefits of free market competition for Californians.

Option Two: Philadelphia National Bank Presumption

Option Two would codify the structural presumption recognized in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), which held that mergers producing firms with undue market share and significantly increasing concentration are presumptively unlawful. This approach would restore the incipiency principle that Congress intended and restore the recognition that highly concentrated markets are inherently uncompetitive. Designating the 2023 DOJ/FTC Merger Guidelines as persuasive authority would further strengthen this option by grounding California law in modern enforcement practice. This approach would provide clear guidance to courts and restore the incipiency standard Congress originally intended when it enacted the Clayton Act. It makes sense for the approach in Option Two to be included in the Commission's recommendation to the Legislature.

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Option Three: Federal Merger Guidelines
Option Three incorporates specific presumptions from the 2023 Guidelines: Mergers that raise the HHI above 1,800 with an increase of more than 100 points, or that produce a firm with a market share above 30% plus an HHI increase over 100 points, would be presumptively unlawful. 2023 Merger Guidelines § 2. Codifying these bright-line rules would give enforcers practical tools, create predictability for businesses, and reduce costly evidentiary burdens by establishing clear parameters for the otherwise vague terms "undue concentration" and "significant increase" relied on in Philadelphia National Bank. The Guidelines were adopted by federal agencies following rigorous national vetting and have been relied upon by courts, providing direct guidance based on established metrics. We further recommend extending this approach beyond horizontal mergers to vertical and adjacent-market mergers, particularly in technology and healthcare, where dominance in one market can distort competition in another.

Option Four: Appreciable Risk Standard
Option Four would change the Clayton Act legal standard for permissible mergers by changing the "substantially lessen competition standard" to one that asks whether the merger would create an "appreciable risk of materially lessening competition." This standard, which is borrowed from Senator Amy Klobuchar's Competition and Antitrust Law Enforcement Reform Act ("CALERA") proposal, would restore the Clayton Act's original prophylactic purpose.

We strongly support this approach. This proposal would modernize California's merger law by lowering the burden of proof for enforcers and allowing potentially harmful mergers to be stopped at their incipiency, as Congress originally intended. This standard must be paired, however, with the Philadelphia National Bank presumption (Option Two) and the Guidelines' bright-line thresholds (Option Three)—not treated as a standalone option. We also endorse shifting the burden of proof for mega-firms (e.g., companies with market capitalization above $100 billion) by requiring them to show by clear and convincing evidence that their mergers pose no appreciable risk to competition. See Memorandum 2025-31 at 14.

Both the "appreciable risk of materially lessening competition" and "public interest" standards should be implemented for proving harm in merger reviews. Both standards are familiar to courts and antitrust enforcers and would enable California to challenge potentially harmful mergers before damage to competition becomes certain and irreparable.

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C. Additional Recommendations Not Captured by the Staff Memorandum.

Finally, we recommend that, in addition to directing that staff prepare a merger proposal that combines Options Two, Three, and Four, the Commission consider strengthening California's merger regime in three further respects:

- Pre-Merger Notification. California should adopt its own robust pre-merger notification system, parallel to Hart-Scott-Rodino but tailored to state markets, so as to ensure that the Attorney General can review transactions that escape federal scrutiny.
- Industry-Specific Standards. As bills such as AB 853 and AB 3129 recognize, healthcare, grocery, and technology mergers deserve heightened scrutiny given their outsized impact on workers and consumers. California should include heightened scrutiny of mergers in these industries in its merger statute.
- Labor and Community Impacts. Merger review should consider wage suppression, union bargaining power, effects on small businesses and communities of color, and reinvestment obligations in banking and fintech. A directive to consider these impacts should be included in the statute.

D. Conclusion Regarding Merger Proposals

California faces a critical moment in addressing the consolidation that has reached alarming levels across our economy. This resulting concentration of market power in too few hands chokes out competition, limits consumer choice, and undermines workers' ability to seek out better employment options.

By adopting the hybrid approach discussed above—combining the Philadelphia National Bank presumption, bright-line thresholds from the 2023 Guidelines, and the "appreciable risk" standard—California can reclaim antitrust's original purpose of stopping harmful consolidation in its incipiency and set a national model for protecting competition, workers, and democracy. These combined approaches will:

- Lower the burden of proof: Restore the incipiency principle and empower California to block harmful mergers before they damage workers, consumers, and communities;
- Center workers and communities: Explicitly include labor market harms, formalize worker participation, and evaluate community and equity impacts;
- Strengthen scrutiny of mega-firms and key industries: Shift the burden of proof for the largest companies and apply heightened review in critical sectors; and

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- Make California a leader: Provide a comprehensive framework that other states can follow in protecting competition and democracy.
- The Commission should take action now to provide clear direction to staff on merger language.

Thank you for considering these comments and for your continued work on this critical issue.

Sincerely,

Heidi Pickman
VP, Engagement and External Relations
CAMEO Network

September 8, 2025

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

Re: Antitrust Law, Study B-750, the Recent Ruling in Google's Anti-trust Case, and the Legislature Benefitting from the Commission's Single Firm Conduct Work

Dear Chair Carrion and Honorable Commissioners:

My name is Jordan Cunningham and, as a practicing attorney and former Republican Assemblymember, I co-authored with Democrat Assemblymember Buffy Wicks ACR-95, the resolution that is being implemented by Study B-750.

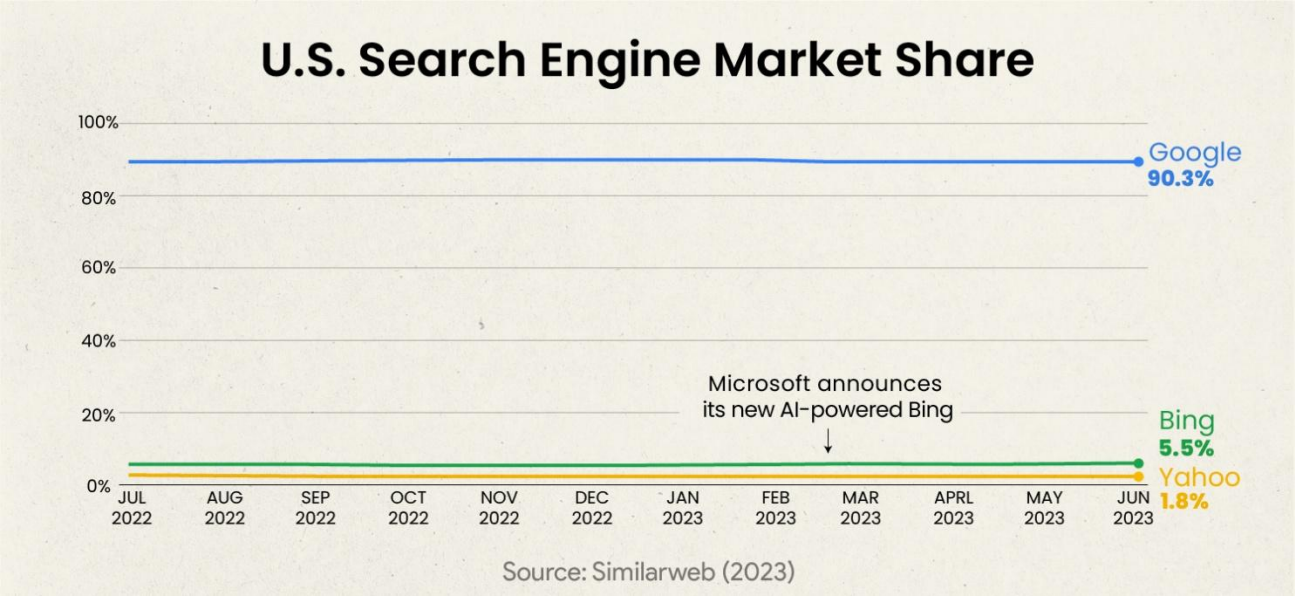
My understanding is that on September 18th the Commission has once more placed on its agenda consideration of the thoughtful legislative reforms drafted by staff -- proposals thoroughly informed by vast amounts of public input, your deliberations and instructions since March, and your own Working Group expert input -- to address what the Commission is calling "single firm conduct."

I write respectfully to urge you formally to vote to propose single firm conduct reforms to the Legislature on the 18th so the Legislature may consider at minimum those reforms next year. No better example of the urgency of the Commission's task of proposing reforms of California's antitrust law addressing single firm conduct to the Legislature exists than the recent ruling of the district court in Google's antitrust case on Tuesday, September 4th. Here is how *Business Insid*er described the ruling:

> In 2024, in what seemed like a landmark ruling, a federal judge said Google had an illegal monopoly in search.
>
> On Tuesday, that same judge unveiled Google's punishment, which amounts to … not too much, all things considered.
>
> There are plenty of places to find analysis of Judge Amit Mehta's ruling, but the fastest way to process it is to see what Wall Street thinks: Google stock is up 9% on Wednesday.
>
> And if you take a few more seconds, you can see how the specter of a major antitrust case has affected Google since the US government first filed suit in October 2020. Back then, a share of Google was worth about $80. On Wednesday, it's $231.
>
> That is: Google investors have spent years mostly ignoring the idea that the company could face severe punishment from US regulators. This week confirmed that they

were correct.

Federal antitrust law has now proven inadequate to addressing market dominance as painfully obvious as this, when the court had already found an illegal monopoly:



Even though the Legislature adjourns in September, the fall and winter is when the needed foundational work for legislation is done before the Legislature returns in January.

Your work has been exemplary. When it comes to single firm conduct, it is, respectfully, the right time for the Legislature to benefit from it.

Sincerely,

Jordan Cunningham,
Assemblymember (Ret., 2016-2022)