MEMORANDUM 2025-43

Public Comment Analysis and Draft Language Options for Misuse of Market Power

This Memorandum[1] presents analysis of public comments received on Memorandum 2025-32 regarding draft legislation to address misuse of market power in California, as requested by the Commission at its June 26, 2025 meeting.[2]

Memorandum 2025-32 presented two options for draft language to address misuse of market power to be added to the Cartwright Act, with the advantages and disadvantages of adopting each.

The staff received no public comments in support of the misuse of market power options. The staff requests Commission feedback on the two draft options and whether the Commission would like the staff to make revisions or conduct further analysis.

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 MISUSE OF MARKET POWER PROVISIONS

The public comments received by the Commission after its June 26, 2025, meeting expressly responding to the draft options in Memorandum 2025-32 are listed below and appended to this memorandum.

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

[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, p. 6.

Coalition of Business Associations and Chambers of Commerce (7/29/25)

This comment was submitted on behalf of the following coalition of business associations and chambers of commerce: Los Angeles County Business Federation, Silicon Valley Leadership Group, La Cañada Flintridge Chamber of Commerce, Torrance Area Chamber of Commerce, Employers Group, Los Angeles County Taxpayers Association, Multicultural Business Alliance, California African American Chamber of Commerce, San Jose Chamber of Commerce, San Mateo County Economic Development Association, Chamber San Mateo County, Central Valley Business Federation, Valley Industry & Commerce Association, Los Angeles Area Chamber of Commerce, San Diego Regional Chamber of Commerce, and Bay Area Council.

California Life Sciences (7/31/2025)

This comment was submitted by Sam Chung, the Vice President of State Government Relations at California Life Sciences (CLS). According to its website:

> [CLS] is the state's leading advocacy organization for the life sciences. CLS advances public policy that promotes innovation and improves access to transformative technologies. With offices in South San Francisco, San Diego, Sacramento, Los Angeles, and Washington DC, CLS has spent the past 30 years supporting organizations of all sizes, from early-stage innovators and startups to established leaders in the fields of biotechnology, pharmaceuticals, and medical technology. CLS' core mission is to advocate for a world class life sciences ecosystem in California, whose innovation leads to healthier lives around the world.

California Chamber of Commerce (8/14/2025)

This comment was submitted by Eric Enson of Crowell & Moring LLP on behalf of the California Chamber of Commerce. According to its website "[t]he California Chamber of Commerce is the largest broad-based business advocate to government in California, working at the state and federal levels for policies to strengthen California."

Opposition to Misuse of Market Power Generally

The Coalition of Business Associations and Chambers of Commerce (Coalition), California Life Sciences (CLS), and California Chamber of Commerce (CalChamber) submitted comments specifically opposing the misuse of market power options.

Broadly, these entities agree that current law provides sufficient opportunities for the state to enforce existing federal antitrust laws, there is no demonstrated need for reform, and any deviation from the current antitrust legal environment would create uncertainty, deterring investment and stunting job creation.

The Coalition objects to the framing of substantial market share as an inherently negative concept, preferring instead it be viewed as indicating consumer support:

> The Commission's proposal mistakenly equates market share with anticompetitive harm. In a competitive market, a market share often simply reflects consumer preference—a clear sign that a company has offered a superior product or service that customers value. Presumptively labeling this success as suspicious punishes popularity gained through meeting consumer needs and fundamentally misunderstands the essence of competition. This approach abandons the established, evidence-based principles of antitrust law, which rightly focus on harm to consumers.[3]

CLS notes that market share is difficult to measure and changes frequently in the life sciences sector:

> Many firms operate in narrow therapeutic areas, and high development costs naturally limit market participation, making market shares in those specific segments artificially high. At the same time, multiple modalities often compete against each other, so that the actual level of competition is significantly more than might be indicated by the shares in narrow segments. Further, market size and commercial success shift rapidly due to scientific advancements, regulatory approvals, and investment cycles. Under these circumstances, rigid thresholds for "market power" (e.g., share percentage or asset size) risk chilling procompetitive conduct. This type of regulatory restriction will slow the progress of treatments in the pipeline from reaching patients.[4]

CalChamber points out that the $500B and 30% market share tests in both options "are arbitrary and capture a large number of firms and the proposals will increase costs and may drive some of the most successful companies out of California."[5]

The Coalition and CLS oppose the rebuttable presumption framework, arguing it reverses longstanding practice and CLS states it would "dramatically change the risk calculus and decrease competition."[6] CalChamber joins them in objecting to the business practices targeted in both options, arguing that curbing these practices would only harm consumers.[7]

Comments on Option One: Misuse of Market Power: Presumptions

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

Section XX is amended to read:

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[3] EX 1-2.
[4] EX 5.
[5] EX 19.
[6] EX 5.
[7] EX 20.

(a) A person with substantial market power is presumed to violate Section X or Y[8] if the person engages in the following conduct:
   (1) Leveraging substantial market power in one market into a separate market[9]
   (2) Bundling,[10] tying,[11] using loyalty rebates,[12] or refusing to interoperate[13]
   (3) Denying use of essential facilities or resources[14]
   (4) Refusing to deal[15]
   (5) Engaging in predatory pricing tactics such as pricing below costs[16]
   (6) Imposing exclusivity as a condition of doing business[17]
   (7) Self-preferencing,[18] or
   (8) Acquiring, directly or indirectly, the whole or any part of the stock, or

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

[9] Memorandum 2024-26, p. 12 suggested declaring presumptively unlawful "using data from the covered platform to support another business line."

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

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

[12] Loyalty rebates were among the items listed as potential single firm anticompetitive conduct in Memorandum 2024-15, p. 15.

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

[14] Discrimination against rivals, which includes denying use of essential facilities or resources, were among the items listed as potential single firm anticompetitive conduct in Memorandum 2024-15, p. 15; see also Jerrold Nadler, Chair, Committee on the Judiciary; David N. Cicilline, Chair, Subcommittee on Antitrust, Commercial, and Administrative Law, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, p. 336, originally released October 2020, adopted by Committee April 2021, Published July 2022.

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

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

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

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

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

other share capital of another person.[19]

(b) A person's substantial market power may be established by direct evidence, indirect evidence, or a combination of the two.

(1) A person with a share of thirty percent or more of a relevant market shall be presumed to have substantial market power.

(2) A person with assets, net annual sales, or a market capitalization[20] greater than $500,000,000,000, as adjusted for inflation on the basis of the Consumer Price Index, is presumed to have substantial market power.[21]

(c) A person with substantial market power may rebut this presumption by a preponderance of the evidence that the pro-competitive benefits outweigh the anticompetitive harm.[22]

The Commission did not receive any comments specifically in favor of or opposed to Option One.

Would the Commission like the staff to make revisions or conduct further analysis on this option despite not having received comments expressly in support?

Comments on Option Two: Misuse of Substantial Market Power

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

Section XX is amended to read:

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

(b) A person's substantial market power may be established by direct evidence, indirect evidence, or a combination of the two.

(1) A person with a share of thirty percent or more of a relevant market shall be presumed to have substantial market power.

(2) A person with assets, net annual sales, or a market capitalization greater than $500,000,000,000, as adjusted for inflation on the basis of the Consumer Price Index, shall be presumed to have substantial market

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

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

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

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

power.

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

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

Although they view this as slightly better than Option One, CLS noted it creates new problems:

> The market definition and presumption issues remain, and the *de minimis* standard is vague and not recognized in antitrust law. The addition of this provision would do little to offset the increased uncertainty created by the rest of the standard.[23]

Would the Commission like the staff to make revisions or conduct further analysis on this option despite not having received comments expressly in support?

Respectfully submitted,

Sarah Huchel
Chief Deputy Director

Sharon Reilly
Executive Director

[23] EX 5.

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

Subject: Proposed Antitrust Changes Hurt California's Residents, Businesses, and Economy

Dear Chair and Honorable Members of the California Law Revision Commission,

We the undersigned organizations and businesses are writing to express our profound concerns regarding the California Law Revision Commission's (Commission) proposed changes to California's antitrust laws. While we appreciate your dedication to fostering a fair and competitive marketplace, we believe these proposals risk fundamentally undermining established antitrust principles, ultimately harming consumers, stifling innovation, and severely damaging California's economic competitiveness.

Our core concerns are as follows:

Punishing Success, Not Harmful Conduct. The Commission's proposal mistakenly equates market share with anticompetitive harm. In a competitive market, a market share often simply reflects consumer preference—a clear sign that a company has offered a superior product or service that customers value. Presumptively labeling this success as suspicious punishes popularity gained through meeting consumer needs and fundamentally misunderstands the essence of competition. This approach abandons the established, evidence-based principles of antitrust law, which rightly focus on harm to consumers.

Prohibiting Everyday, Pro-Consumer Business Practices. Your proposals would cast a shadow of suspicion over many standard business activities that directly benefit consumers. Practices like offering bundled products at lower prices, providing volume discounts and loyalty rebates, or designing integrated product ecosystems (often called "self-preferencing") would be presumed unlawful. Forcing innovators to second-guess these consumer-friendly activities would lead to higher prices, reduced functionality, and less choice for Californians. Imagine a company improving its own mapping service within its mobile operating system; this innovation should be celebrated, not targeted by litigation for "self-preferencing."

Guilty-Until-Proven Innocent: The Dangerous "Burden-Shifting" Framework. The proposal to establish a rebuttable presumption of illegality reverses a foundational principle of law. Instead of the government proving anticompetitive harm, companies would be forced to prove their innocence, creating a permanent cloud of litigation risk over everyday business decisions - chilling innovation.

Existing Law Works. The current, proven antitrust framework works because it focuses on harmful conduct, not a company's size or popularity. Federal authorities are actively enforcing existing antitrust laws against a range of companies - with nearly half the S&P 500 by market cap under scrutiny. The Commission has identified no gap in existing law that requires a radical new system that would punish companies simply for being successful and chosen by consumers. When business tactics like bundling or predatory pricing are used to harm competition and create monopolies at consumer expense, Section 2 of the Sherman Act provides clear guidance and established case law for regulators and courts.

Threatening California's Investment Climate. A state's legal and regulatory environment significantly influences where the private sector invests and locates. If California adopts proposals that expose companies to undefined but potentially costly antitrust risks, the state could deter businesses from investing in startups and new ventures. Misguided proposals could scare away investment and job creation. It's crucial to note that no other state has deviated from the nation's bipartisan consensus that antitrust law protects consumers, not particular competitors. And when a handful of state legislators were urged by outside groups to push European "abuse of dominance" standards, industry-wide opposition was clear. This proposed radical change would make California a national outlier, undermining our position as a global innovation leader.

We urge the Commission to carefully reconsider these proposals and refrain from adopting changes that would undermine the very principles of competition they seek to uphold. We firmly believe that maintaining a clear focus on actual consumer harm and preserving the established, evidence-based framework of antitrust law is crucial for fostering innovation, promoting economic growth, and ensuring a vibrant and competitive marketplace in California.

Sincerely,

Los Angeles County Business Federation (LA BizFed)
Silicon Valley Leadership Group
La Cañada Flintridge Chamber of Commerce
Torrance Chamber of Commerce
Employers Group
LA County Taxpayers Association

Multicultural Business Alliance
California African American Chamber of Commerce
San José Chamber of Commerce
San Mateo County Economic Development Association
Chamber San Mateo County
Central Valley Business Federation
Valley Industry and Commerce Association (VICA)
Los Angeles Chamber of Commerce
San Diego Regional Chamber of Commerce
Bay Area Council

July 31, 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: Memo 2025-32: Draft Language on Misuse of Market Power

Dear Chairperson Carrion and Honorable Commissioners,

We write on behalf of California Life Sciences (CLS), representatives of the life sciences industry, which directly employs over 400,000 Californians and encompasses more than 1,300 organizations across California. This includes pharmaceutical, biotechnology, and medical technology companies, as well as academic research institutions all committed to advancing innovation and improving health outcomes worldwide. We wish to express our concerns regarding the California Law Revision Commission's (CLRC) draft language on misuse of market power outlined in Staff Memo 2025-32. Introducing novel language regarding the misuse of market power into California's antitrust laws could have a significant negative impact on life sciences companies; jeopardizing California's global leadership in biotechnology and the ability for companies to continue to produce innovative treatments for patients who have no other options.

California's life sciences ecosystem is dynamic and interdependent. It thrives through a complex web of relationships: academic researchers make groundbreaking discoveries; federal institutions such as the NIH funding basic science; start-ups translating this research into pharmaceutical innovations; large firms shepherding these innovations through development and clinical trials; and venture capital providing critical funding to bridge high-risk phases. Preserving the integrity of this ecosystem is essential for the pipeline of medical innovations and novel treatments coming from the life sciences sector. This is precisely why CLS wishes to highlight several concerns with the language related to the misuse of market power presented in Memo 2025-32 and how they might impact our sector.

First, option one would establish a presumption that certain conduct is inherently anticompetitive if undertaken by a company with "substantial market power." Shifting the burden of proof would represent a fundamental and unwarranted transformation in antitrust law. Some of the business practices at issue are commonplace, everyday commercial strategies that are routinely pro-competitive and good for consumers, such as loyalty discounts and discounted bundles. Changing the law to decrease these practices will harm competition and patients. Even those enumerated practices that may seem troubling at first blush often have procompetitive impacts. For example, below-cost pricing is frequently used by new entrants or by established companies introducing a new product or service, and usually results in greater competition, more consumer or patient choice, and lower prices. To the extent such practices may create competitive risk, it is only in limited circumstances, and when engaged in by companies with market power. Such circumstances are already covered by existing antitrust jurisprudence. Importantly, the limits imposed by the antitrust laws for those and other commercial practices are well-established and well-understood, so our members can know what is and is not acceptable under the law. This allows companies all throughout the value chain to feel comfortable competing aggressively in the marketplace, using a full array of commercial strategies. Shifting the burden of proof would dramatically change the risk calculus and decrease competition in these important markets.

Just as important, it is particularly difficult to properly define markets in highly competitive and dynamic industries such as life sciences. Many firms operate in narrow therapeutic areas, and high development costs naturally limit market participation, making market shares in those specific segments artificially high. At the same time, multiple modalities often compete against each other, so that the actual level of competition is significantly more than might be indicated by the shares in narrow segments. Further, market size and commercial success shift rapidly due to scientific advancements, regulatory approvals, and investment cycles. Under these circumstances, rigid thresholds for "market power" (e.g., share percentage or asset size) risk chilling procompetitive conduct. This type of regulatory restriction will slow the progress of treatments in the pipeline from reaching patients.

Option two draws heavily from New York's proposed Twenty-First Century Anti-Trust Act, which has failed to pass twice and has been heavily criticized for reasons like those raised here. It retains the problematic presumptions but attempts to soften the impact by targeting behavior that is "likely to harm competition in more than a de minimis way." While slightly less problematic than option one, this option would create similar problems. The market definition and presumption issues remain, and the *de minimis* standard is vague and not recognized in antitrust law. The addition of this provision would do little to offset the increased uncertainty created by the rest of the standard.

For reasons outlined, both approaches to addressing the misuse of market power raise concerns for life sciences. To better illustrate how these proposals might decrease competition and harm innovation, we have laid out several sector-specific scenarios and how the language in each option could result in chilling of procompetitive conduct that benefits patients.

Scenario One:
A pharmaceutical firm offers a legacy therapy along with a new biologic as part of a bundled offering at a discount to hospitals, at the request of the hospitals. Under both option one and option two, this conduct could be presumed illegal even if it leads to lower costs or better health outcomes. Even under option two, if the bundled discount results in more hospitals buying the bundle from the Pharmaceutical firm instead of its competitors, those competitors might argue that the bundle has anticompetitive impacts. Even though the bundle is decreasing prices and helping more patients receive treatment, the Pharmaceutical firm has to face a presumption of illegality. This risk will chill conduct like bundling and discounts that are routinely procompetitive and beneficial to patients.

Scenario Two:
A large pharmaceutical firm acquires a promising small biotech to expand into a specific segment of gene therapy treatments. The small biotech has limited options for expansion without the proposed deal. Under either options one or two, this conduct would be presumed to be an unlawful misuse of market power if the pharmaceutical company is either very large or has >30% of whatever gene therapy market is defined by enforcers. Because of the difficulty in accurately predicting such rapidly shifting market segments, and the difficulty in overcoming a presumption interest in the deal would be chilled. Not only would this application of the proposed law decrease innovation and slow the flow of investment, but it is also entirely unnecessary. Transactions may already be reviewed under existing antitrust laws and assessed under existing standards for antitrust transactions. There is no need to add the increased risk associated with an allegation of misuse of market power – especially with a built-in presumption.

Scenario Three:
A genetic sequencing company has successfully grown and scaled their business based on the creation of a proprietary database. Through legal business actions this company has become one of the largest and most well-respected sequencing companies in the country. Under both options one and two, if the sequencing company holds market power, even though it was amassed legally, and refuses to license its

proprietary database, that could be presumed to be a misuse of market power. This outcome would clearly harm competition and punish innovation, and if the database had intellectual properly protections, options one and two would undermine intellectual property rights.

Life sciences companies rely on stable, objective, and well-established regulatory frameworks. Dramatically shifting the current paradigm on market power misuse, as proposed by options one and two, would inject risk and uncertainty into a sector already managing high research and development (R&D) costs and regulatory complexity. It could expose companies to opportunistic lawsuits, raise compliance costs, and prompt firms to move operations out of California in search of more predictable legal environments.

California's current antitrust environment has historically encouraged life sciences companies to invest here. The state's regulatory consistency, combined with its robust research infrastructure, has made it a global hub for biotech innovation—fueling job creation, R&D investment, and medical breakthroughs. The misuse of market power language proposed in Memo 2025-32 threatens this successful model.

We appreciate this opportunity to express our concerns and will continue to work with the Commission to address them. If you have any questions, please feel free to contact me at schung@califesciences.org.

Sincerely,

Sam Chung
Vice President, State Government Relations
California Life Sciences

August 14, 2025

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

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

Dear Chairperson Carrion and Commissioners:

Mergers and acquisitions are critical aspects – and indicators – of a healthy economy. Mergers enable companies to access new markets, expand their customer base and diversify their offerings. Mergers also allow companies to acquire and invest in new technologies, products or services that may not thrive without sufficient funding and fostering. Frequently, mergers allow for increased production volumes and economies of scale that reduce costs and inefficiencies, all of which can inure to the benefit of consumers and workers as better, but cheaper, products and services are developed and employment opportunities expand.

But the CLRC Staff's June 16, 2025 Memorandum 2025-31 providing options for a California merger law (the "Merger Memo") seems premised on a view that merger enforcement policy has failed to protect competition in California and that anticompetitive mergers are approved – perhaps routinely – either because they are not challenged or when they are challenged, the challenges fail in court. No evidence, however, has been provided to support these views. A generalized concern about potential increases in industry concentration or about perceived shortcomings in merger enforcement policy is understandable, but it is no substitute for rigorous analysis of current policy or the costs and benefits of changes to that policy. Indeed, California should not take the unprecedented step of creating its own merger regime simply because "[p]eople think it is too hard to block a merger these days," as was advocated at the Commission's June 2025 Meeting.[1]

In any event, the proposals set forth in the Merger Memo are unlikely to make merger reviews in California more accurate or less expensive than those in the federal system. To the contrary, the proposals come with a huge price tag and, for the most part, rely on lax presumptions that do not call for a robust examination of the likely anticompetitive and

[1] June 2025 Meeting at 5:23:21.

procompetitive aspects of contemplated mergers. California has the most innovative technology sector on the planet, a critical innovation ecosystem in life sciences, the largest manufacturing base in the country and numerous vibrant industries that have thrived due, in larger part, to mergers and acquisitions evaluated under existing federal law. There is no question that federal merger law should be rigorously enforced, but "departing" from federal merger law is a mistake.

The CLRC Staff's June 19, 2025 Memorandum 2025-32 addressing potential approaches for a misuse of market power law (the "Market Power Misuse Memo") is also problematic. The proposals in the Market Power Misuse Memo deem common business practices to be presumptively unlawful if performed by hundreds of different types of companies that fall within the proposals' arbitrary thresholds without ever asking if these companies actually possess or wield market power. Not only will these proposals increase costs and stifle competition, they may drive some of the world's most successful companies out of California.

The California Chamber of Commerce ("CalChamber"),[2] and its more than 14,000 members, thanks the Commission for the opportunity to comment further on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber looks forward to continuing to work with the CLRC in attempting to develop policies that ensure a strong and dynamic business environment that benefits all Californians.

Potential Merger Law Provisions

The Merger Memo provides four options for a merger provision to be included in the Cartwright Act. As set forth below, all four options are problematic and bad for California, for several reasons. Some of the problems relate to a California-specific merger provision generally, and others relate to the specific options presented in the Merger Memo.

Option One for a potential Cartwright Act merger provision uses a substantive test based on Section 7 of the Clayton Act, the primary merger control provision under federal law:

> No person shall acquire … stock or other share capital, or … the whole or any part of the assets of another person where the effect of such … may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.[3]

[2] CalChamber is being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with BRG.

[3] Merger Memo, pp. 3 – 4.

Option Two adds two provisions to Option One and is based on the presumption "that highly concentrated markets are inherently uncompetitive."[4] One of these provisions creates a presumption of illegality for a merger resulting in a firm with an "undue" share of the market and resulting in a significant increase in market concentration:

> A merger that may produce a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive [effect]. This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321.[5]

The second provision in Option Two indirectly specifies the criteria for an undue post-transaction market share and increase in concentration by referring to the Merger Guidelines jointly issued by the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in 2023 (the "2023 Merger Guidelines").[6] The 2023 Merger Guidelines are not law, but are a description of current enforcement policy at the DOJ and FTC.[7]

Market concentration is measured in the 2023 Merger Guidelines via the Herfindahl-Hirschman Index ("HHI"), which is defined to be the sum of the squares of the market shares of the firms in the market.[8] Option Two adopts the 2023 Merger Guidelines presumption of illegality when a proposed transaction results in an HHI above 1,800 and the increase in the HHI due to the transaction would be at least 100, or if the market share of the merged firm would be greater than 30% and the increase in the HHI would be more than 100.[9]

[4] Merger Memo, p. 5.

[5] Merger Memo, pp. 5 – 6 (footnote omitted).

[6] The provision is, "In interpreting this section, the 2023 Merger Guidelines … shall be considered persuasive authority and understood to complement and be harmonized with this section." Merger Memo, p. 6.

[7] See, for example, *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 412 n.3 (S.D.N.Y. 2024). ("In this opinion, the Court considers statements in the 2023 Merger Guidelines to the extent that the Court finds them persuasive – recognizing, of course, that the Guidelines are nonbinding."). The Merger Memo states, "The Merger Guidelines provide direction to the market about the federal agencies' enforcement priorities." Merger Memo, p. 5, fn. 32.

[8] For example, if there are four firms in a market that have shares of 40%, 30%, 20%, and 10%, the HHI for this market would be $(40)^2 + (30)^2 + (20)^2 + (10)^2 = 1{,}600 + 900 + 400 + 100 = 3{,}000$.

[9] 2023 Merger Guidelines, Guideline 1.

Option Three actually codifies Guideline 1 of the 2023 Merger Guidelines[10] into the merger provision by directly incorporating its HHI- and market share-based "Threshold for Structural Presumption:"

> A merger shall be presumed to substantially lessen competition or tend to create a monopoly or monopsony if it results in:
> (1) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points; or
> (2) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.[11]

Option Three also provides a standard to rebut the presumption of illegality:

> [D]emonstrating by a preponderance of the evidence that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis and that any potential anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market.[12]

Option Four introduces a new standard designed to present a more fundamental break from federal antitrust law. It uses the structure of Option One but changes the standard from prohibiting mergers whose effect "may be substantially to lessen competition" to "may be to create an appreciable risk of lessening competition more than a de minimis amount."[13] This standard is not used by antitrust regulators anywhere in the world and is taken from a proposed federal law[14] that was introduced into Congress several times, but never passed.

The Costs of Enforcing a Merger Provision Will Be Substantial.

Substantial State resources will be required to enforce a California merger provision. The DOJ and FTC expend considerable resources reviewing the mergers and acquisitions that are automatically reportable to the DOJ and FTC under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). As set forth in **Table 1**, HSR filings are significant every year.

[10] Merger Memo, p. 8.

[11] Merger Memo, pp. 7 – 8.

[12] Merger Memo, p. 8.

[13] Merger memo, pp. 10 - 11.

[14] This is the proposed Competition and Antitrust Law Enforcement Reform Act (CALERA) that was introduced by Sen. Klobuchar.

Table 1
Annual Number of HSR Filings

Fiscal Year	Count of Filings
2021	3,520
2022	3,152
2023	1,805
2024	2,079
2025 YTD	1,519

Note: 2025 YTD is October 2024 – June 2025.

Sources: Hart-Scott-Rodino Annual Report Fiscal Year 2023, available at https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf; Premerger Notification Program HSR Transactions by Month, available at https://www.ftc.gov/enforcement/premerger-notification-program.

In addition to transactions reported under the HSR Act, the DOJ and FTC can investigate and take enforcement actions against transactions that were not reportable. While there are transactions that do not impact California directly (e.g., a hospital merger in Georgia or a grocery store acquisition in New England), given the size and scope of the California economy, many transactions have a California component, and the California AG will be required to review hundreds, if not thousands, of transactions annually for compliance with any California merger law. The resources necessary to accomplish this feat will be substantial, likely requiring hundreds of professional staff.

Increased costs, however, go far beyond just a review of merger filings. California will also need to staff up large teams to investigate and challenge mergers and acquisitions. The DOJ and FTC staff these types of investigations with large teams of attorneys and economists. California will need to do the same at great cost given the time, expense and mixed results that come with robust merger enforcement. Data provided by the DOJ indicates that between 2021 and 2024, 26 mergers were investigated by the DOJ, but abandoned by the parties during the investigation, 13 were settled during the investigation, three were abandoned and two were settled after a complaint was filed, and seven were litigated by DOJ, of which four were won by DOJ and three were lost.[15] Similar data for 2021 to 2023 from the FTC indicate that 21 mergers were settled pre-complaint, ten were abandoned post-complaint, two were litigated that the FTC won, and two were litigated that the FTC lost.[16]

Another type of cost is difficult to measure, but very real: The mergers that are never consummated due to a fear of government enforcement actions. While some of these

[15] Antitrust Division Workload Statistics FY 2015 – 2024, available at https://www.justice.gov/archives/opa/media/1385471/dl. Data are based on fiscal years.

[16] Hart-Scott-Rodino Annual Report Fiscal Year 2021, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf; Hart-Scott-

transactions may be problematic, there is another set that may be procompetitive, but never see the light of day. An overly restrictive merger enforcement policy based on the kind of market share and market concentration presumptions proposed in the Merger Memo and not on a transaction's merits would likely deter some beneficial, procompetitive mergers.

A California Merger Provision Should Not Be Tied to the 2023 Merger Guidelines.

The 2023 Merger Guidelines are the most recent summary of federal merger enforcement policy. Seven different versions came before it, starting in 1968, and each has dramatically different policy positions.[17]

One of the largest changes in these merger policy guidance documents over time has been to move past market structure and focus on the reasons why a transaction might harm competition. The 1968 Guidelines, for example, state that the DOJ attaches "primary importance to the market shares of the merging firms" and describes two situations when a more detailed analysis of competition is needed: when a "disruptive" firm is acquired and when an acquired firm has a small share, but "unusual competitive potential" (e.g., an entrant with a patent on a significantly improved product). By comparison, the 1992 Guidelines shifted the focus to the nature of competition and the effects of a merger on how firms compete, meaning a competitive analysis was front and center when evaluating mergers. The various iterations of the guidelines issued between 1982 and 2010 represented a steady progression of refining merger analysis. But the 2023 Merger Guidelines provided a sharp break from that steady progression by placing more significance on market structure, harkening back to the 1968 Guidelines.

Another change over time has been the definition of a "highly concentrated market" and the threshold for competitive concerns in such a market. In the 1982 Guidelines, these were an HHI of 1,800 with an increase of 50; in the 2010 Guidelines, 2,500 and 100; and in the 2023 Merger Guidelines, 1,800 and 100.[18]

Rodino Annual Report Fiscal Year 2022, available at https://www.ftc.gov/system/files/ftc_gov/pdf/fy2022hsrreportcorrected.pdf; Hart-Scott-Rodino Annual Report Fiscal Year 2023, available at https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf; Federal Trade Commission Accomplishments June 2021–January 2025, available at https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-enforcement-actions-accomps-doc-appendix.pdf.

[17] Prior versions of the various merger guideline documents are available at https://www.justice.gov/archives/atr/guidelines-and-policy-statements. We refer to these by year, e.g., the "1992 Guidelines."

[18] 1982 Guidelines, § 1.A.1; 2010 Guidelines, p. 19; 2023 Merger Guidelines, Guideline 1. By comparison, the European Commission Merger Guidelines use 2,000 and 150 ("Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of

Given these changes over time, there is no reason to expect that the merger guidelines will remain static going forward. Rather, the Commission should anticipate that the guidelines will continue to change over time. While California would start with its merger enforcement program being closely tied to the 2023 Merger Guidelines, tying California law to a specific guidance document risks California law being out-of-date when prevailing thought changes and the guidelines are substantially revised again. While the Merger Memo states that California could update its law in response to future changes in the federal guidelines,[19] frequent changes in California merger law would increase uncertainty, business costs and compliance risks. Furthermore, any future guidelines changes might not be consistent with the California merger provision, and though the Legislature can update any Cartwright Act merger provision, if necessary, the approval of any such legislation may not be swift and is not guaranteed.

Option One Is Likely to Lead to Confusion and Inconsistent Results.

While Option One is expressly based on the text of Section 7 of the Clayton Act, the use of well-known and understood language may still cause confusion and inconsistent results. The chief reason is that merger challenges under Option One may be heard in California state courts, which have little, or no, antitrust experience. Given this lack of experience, state courts may interpret and apply merger standards differently than federal courts or even other state courts. Indeed, even the Merger Memo notes that "[m]erely adding language that provides the ability to challenge mergers in state courts is a significant change to California's antitrust law."[20] These concerns are, of course, compounded by the fact that the Commission is also considering broad language that may disassociate California antitrust law from decades of federal precedent. What is more, Option One is simply not necessary given the success California's AG, and private enforcers, have had using federal law to challenge mergers and acquisitions.

The Market Share and Market Concentration Presumptions Endorsed in Options Two and Three Will Not Improve the Accuracy of Merger Enforcement or Make it More Cost Effective.

Legal presumptions are generally used to improve judicial decision-making or reduce costs. The market share and market concentration presumptions in Options Two and Three, however, will not achieve either.

concentrations between undertakings (2004/C 31/03), ¶ 20, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02).

[19] Merger memo, p. 10 ("Further, some may argue that in referencing a specific version of a federal guidance document that updates frequently, California will inevitably fall out of step with federal practices. This could disrupt the market, causing confusion and additional expense for companies maintaining compliance with multiple regulatory schemes. This can be addressed by acknowledging California is free to amend its law to conform with new Guidelines." (footnote omitted)).

[20] Merger Memo, p. 4.

Merger enforcement has become more refined over the years as economic thinking and enforcement experience has advanced. In addition, merger enforcement has benefited from an explosion in the data available for analysis and from advances in the techniques used to analyze competition and volumes of business documents. Taken together, these advancements have improved and sharpened merger enforcement, enabling the DOJ and FTC to focus on challenging potentially anticompetitive transactions while not disrupting transactions that are unlikely to be anticompetitive – thereby reducing both false positives and false negatives.

But antitrust enforcement decision-making based on market share and market concentration presumptions are, by comparison, a blunt instrument. While the HHI is a straight-forward arithmetic calculation, it cannot capture the richness of the data and the information in documents available to an agency involved in a merger investigation. Merger analysis is a fact-intensive exercise, and no simple market structure presumption can adequately evaluate the nuances present in specific markets across the economy. Indeed, reducing important antitrust decisions to simple mathematical calculations risks chilling the vibrancy of the California economy because it would treat industries as diverse as tech, entertainment, healthcare, agriculture, biotech, manufacturing and tourism, among others, in a one-size-fits all manner. Creating a merger review regime that bases important decisions on back-of-the-envelope calculations is not a productive way to develop California law.

In fact, many transactions that have been investigated by the DOJ and FTC were not challenged even though their market structure characteristics exceeded the 2023 Merger Guidelines' presumptions. Challenging these transactions based on presumptions, as Options Two and Three suggest, would likely lead to false positives because, after a thorough investigation of the markets, competitors, and other information, the decision was made by the DOJ or FTC to not to initiate a challenge to these transactions in these markets.

A study of FTC horizontal merger investigations between 1996 and 2011 indicates that the FTC has often decided not to take enforcement actions involving mergers in markets that produce post-merger HHIs above the thresholds set forth in Options Two and Three. **Table 2** shows 1,204 FTC investigations in which HHI values were above 1,800 with increases above 100, which would be condemned under Options Two and Three. But the data shows that the FTC did not challenge transactions in 209 of these markets. This indicates that transactions exceeding the thresholds in Option Two and Three do not always translate into likely competitive effects after fuller assessments.

Table 2
FTC Enforcement Decisions in Markets with HHI values above 1,800 and HHI Increases above 100
1996 - 2011

Change in HHI	100-199	200-299	300-499	500-799	800-1199	1200-2499	2500+	Total
Enforced	21	33	78	145	147	278	293	995
Closed	16	24	36	49	39	38	7	209
Total	**37**	**57**	**114**	**194**	**186**	**316**	**300**	**1,204**

Note: An FTC investigation into a market is "enforced" if relief is sought and is "closed" if relief is not sought. See p. 2 of Horizontal Merger Investigation Data, fiscal years 1996 – 2011.

Source: Federal Trade Commission Horizontal Merger Investigation Data, fiscal years 1996 – 2011, p. 8, available at https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf.

Nor will relying on presumptions reduce merger enforcement costs. Dechert LLP has compiled and published data on merger enforcement investigations and litigation since 2011.[21] This data indicates that the average duration of significant U.S. merger investigations was 11.3 months in 2024, essentially unchanged from the average durations in 2020 (11.4 months), 2021 (11.4 months), and 2022 (11.8 months). The average durations in 2023 and 2024 look like those from prior years, as set forth in **Figure 1**.

Figure 1
Merger Investigation Duration

This data suggests that use of the 2023 Merger Guidelines, which included market structure presumptions like those proposed in Options Two and Three, did not result in

[21] Dechert, LLP, DAMITT 2024 Annual Report: Merger Enforcement at Low Tide on Both Sides of the Atlantic, but 2025 may Bring a Sea Change," January 30, 2025, available at https://www.dechert.com/knowledge/publication/2025/1/damitt-2024-annual-report.html.

significantly shorter merger investigations.[22] That is, the 2023 Merger Guidelines' focus on presumptions of illegality did not significantly reduce the time it takes to reach merger enforcement decisions and therefore likely did not have a significant effect on the costs of those merger investigations. Thus, we cannot expect that the presumptions in Options Two and Three will reduce California's costs for running a broad-based merger review and enforcement program.

In fact, the market share and market concentration presumptions in Options Two and Three could increase costs by increasing the importance of market definition in merger enforcement. In that the outcomes of a merger investigation may depend on market structure computations, like HHI and market share, they are inherently based on market definition. This fact will make market definition analysis itself more important, contentious, difficult, time-consuming and expensive.

Option Three Does Not Properly Account For Merger Efficiencies.

Though the Merger Memo places great emphasis on the 2023 Merger Guidelines, it diverges from them in its treatment of efficiencies under Option Three.

Mergers are generally recognized as having the potential to promote economic efficiency to the benefit of consumers, workers, businesses and the overall economy. The 2023 Merger Guidelines instruct that if adverse effects are anticipated from a transaction, the analysis must then focus on how any efficiencies may offset these anticipated adverse effects.

But this is not the standard used in Option Three. To the contrary, Part (d) of Option Three states:

> A defendant may rebut the presumption … by demonstrating by a preponderance of the evidence ***that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis*** and that any potential anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market.[23]

This limits the evaluation of efficiencies to mergers where anticompetitive effects are absent or *de minimis*. Thus, even if a proposed transaction would result in large and verifiable efficiencies sufficient to prevent the transaction from harming competition, Option Three would not take these efficiencies into account. Put another way, the merger efficiencies

[22] Dechert, LLP also provides data on the average time to litigate a merger case. These data are not reported here because the time to litigate is highly dependent on whether the litigation ended after a preliminary injunction hearing or a complete trial on the merits.

[23] Merger Memo, p. 8 (emphasis added).

analysis standard in Option Three would block a merger that raises small (but not *de minimis*) competitive harms in one market even if there were large and certain efficiencies or benefits created in other markets that could not otherwise be achieved. Such a standard is not in the best interest of California consumers, workers or the overall economy.

Option Four Is Altogether Different And Far Too Lax.

Option Four is a completely new standard that is intended to reduce the burden of proof necessary to challenge and halt a merger. This is explicit in the Merger Memo, which states that with Option Four the "volume and strength of evidence required to prove possible anticompetitive harms would be lower, which would make it easier for the state to address anticompetitive mergers."[24] This is undoubtedly true, but the use of a less rigorous standard also makes it more likely that enforcement errors are made and that economically beneficial transactions are blocked. In addition, as recognized in the Merger Memo, "[c]hanging a familiar standard comes with substantial risks…."[25] Moreover, Option Four, like all of the other merger options, is not limited to actions brought by the State, but instead allows private plaintiffs to file suit to hold up and block mergers, which is a practice that is regularly abused even under the federal standards. Adopting the kind of "appreciable risk" standard announced in Option Four has never been done and California should not be a testing ground for this type of law.

Potential Misuse of Market Power Provisions

The Market Power Misuse Memo offers two potential provisions related to the misuse of market power. Both are misguided. One establishes a presumption that certain conduct is a violation of law if it is engaged in by an entity with "substantial market power." The other states that this same conduct by an entity with "substantial market power" may be illegal if the purpose or effect of the conduct is likely to harm competition in more than a *de minimis* way. The list of conduct includes eight items. They are:

(1) Leveraging substantial market power in one market into a separate market;

(2) Bundling, tying, using loyalty rebates, or refusing to interoperate;

(3) Denying use of essential facilities or resources;

(4) Refusing to deal;

(5) Engaging in predatory pricing tactics such as pricing below costs;

[24] Merger Memo, p. 12 (citing to Memorandum 2025-11, p. 12).

[25] Merger Memo, p. 12.

(6) Imposing exclusivity as a condition of doing business;

(7) Self-preferencing; or

(8) Acquiring, directly or indirectly, the whole or any part of the stock, or other share capital of another person.[26]

The Market Power Misuse Memo declares that the possession of substantial market power could be established by direct or indirect evidence, and an entity would be presumed to have substantial market power if either of the following is true:

(1) The entity has a market share of thirty percent or more of a relevant market; or

(2) The entity has assets, net annual sales, or a market capitalization greater than $500,000,000,000.[27]

There are several issues with these proposals, however. In particular, the conduct deemed presumptively unlawful includes broad and common business conduct, the $500 billion and 30% market share tests are arbitrary and capture a large number of firms and the proposals will increase costs and may drive some of the most successful companies out of California.

The proposed conduct prohibitions are broad and far reaching. For instance, consider item number 8 banning "[a]cquiring, directly or indirectly, the whole or any part of the stock, or other share capital of another person." This is a broad prohibition on any merger or acquisition by any firm that meets the market capitalization or market share tests. Yet this prohibition is not limited to transactions in a market or markets in which the entity has substantial market power – or any amount of market power. It is instead a prohibition against all transactions by these types of firms even in markets where they have a low share or no presence at all.

For instance, suppose a pharmaceutical company is only one of two firms that produces a drug that treats a certain condition and that each firm has a 50% share of the market for therapies to treat that condition. This pharmaceutical company would be prohibited from acquiring a company that makes a drug that treats a different condition, even if the acquirer does not itself offer a drug to treat that other condition.

The self-preferencing ban is similarly broad. Consider an automobile manufacturer with more than $500 billion in assets or market capitalization, of which there are several. If that manufacturer uses its financing arm to promote financing consumer purchases of new or used cars it would be engaging in self-preferencing that would be presumptively illegal even if that market is competitive.

[26] Misuse of Market Power Memo, pp. 3 – 4 (footnotes omitted).

[27] Misuse of Market Power Memo, pp. 4 – 5 (footnote omitted). The $500,000,000,000 threshold is to be adjusted for inflation over time based on the Consumer Price Index.

Another concern is the fact that the $500 billion and 30% market share thresholds capture numerous firms. Over 100 firms with business in the United States have in excess of $500 billion in assets, annual net sales or market capitalization. This list includes at least five domestic banks, multiple foreign banking groups, investment banks, various pharmaceutical companies, retailers, oil companies and a number of tech companies. Still many other companies are near the $500 billion threshold and are likely to cross it as they continue to grow. All these entities would be presumptively blocked from making any acquisitions and could be unable to engage in common conduct such as exclusive dealing, bundling products or offering loyalty discounts due simply to their size.

The 30% market share threshold also covers a number of companies, some quite small. While a 30% share of a particular market can be viewed as healthy, it does not necessarily mean that these companies are of a particular size, are profitable or are able to wield market power. Indeed, oligopolies, which are markets that have a small number of competitors, but can be intensively competitive, frequently have companies with over 30% of the market, but each are constrained from meaningfully exercising market power because of the presence of the other similarly-sized competitors. Likewise, startups, while being very small, may possess over 30% of a market simply because they are among the first to launch into that space.

Moreover, these thresholds are completely arbitrary. The Market Power Misuse Memo states that the 30% market share threshold is a compromise between certain aspects of California law, the European Union dominance threshold and figures used in other antitrust reform proposals, such as CALERA.[28] The $500 billion tests are apparently a "compromise" between thresholds used in other antitrust reform proposals and were chosen by staff "to capture a range of industries and distinguish this provision from federal proposals."[29] But none of these thresholds are based on an empirical analysis of whether an entity has substantial market power or an ability to use it to the detriment of consumers, workers or competition.

Finally, but just as importantly, adding a misuse of market power provision to California law will have a significant financial impact. Law enforcement and litigation costs will, of course, increase, but they are not the only costs California will suffer. Rather, presumptive bans on acquisitions and other, common business conduct have the potential to drive firms out of the State, with adverse effects on state and local tax collection and the state's overall tax base. Indeed, all the types of companies mentioned above that are covered by the thresholds set forth in the Market Power Misuse Memo – prominent banks, pharmaceutical companies, retailers, oil companies, auto companies, tech companies and even small startups – will have to give serious consideration to whether remaining in California is tenable. Business disruptions or changes in business conduct or strategy due to new legislation are also costly for businesses as well as the consumers they serve and the workforces they employ.

[28] Market Power Misuse Memo, p. 5.

[29] Market Power Misuse Memo, p. 6.

Conclusion

As many have noted, the "vast majority of mergers raise no competitive concerns."[30] Indeed, economists have repeatedly concluded that most mergers drive innovation and competition.[31] Merger law enforcement, however, is critical to ensuring that the right balance is struck and is aimed at halting problematic mergers, but allowing procompetitive mergers. Yet the proposals in the Merger Memo do not strike this balance. They will not improve merger decision making over current, federal standards and they will not reduce the costs of merger enforcement. Likewise, the proposals in the Market Power Misuse Memo bring a blunt approach to addressing market power issues without even asking whether market power is present. CalChamber urges the Commission to move on from these proposals or, at the most, order further study.

Sincerely,

Eric P. Enson

Eric P. Enson

[30] "California Antitrust Law and Mergers," Merger and Acquisitions Working Group Report, p. 2.

[31] Robert Kulick, Ph.D., and Andrew Card, "Mergers Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications," NERA Economic Consulting, at 29, *available at* https://www.uschamber.com/assets/documents/NERA-Mergers-and-Innovation-Feb-2023.pdf ("[M]ergers, on average, are associated with an increase in R&D expenditure of between $9.27 billion and $13.52 billion per year in the most R&D intensive industries.").