FIRST SUPPLEMENT TO MEMORANDUM 2025-43

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

This Memorandum[1] presents analysis of additional public comments received on Memorandum 2025-32 regarding draft legislation to address Misuse of Market Power (MMP) in California. The staff also requests additional feedback from the Commission on misuse of market power options relating to Single Firm Conduct (SFC) and Mergers.[2]

At its June 26, 2025 meeting, the Commission requested the staff to draft language for SFC that would create a presumption that shifts the burden of proof to the defendant after the plaintiff presents a prime facie case.[3] The staff believes this presumption can be addressed in the context of MMP, which is why it is included in this supplemental memorandum.

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.

[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] See also Memorandum 2025-32.

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

PUBLIC COMMENTS RECEIVED RELATING TO MISUSE OF MARKET POWER OPTIONS

The public comments received by the Commission after its June 26, 2025 meeting expressly responding to the draft options in Memorandum 2025-32, and not listed in Memorandum 2025-43, are listed below and appended to this memorandum.

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

California Chamber of Progress

This comment was submitted by Robert Singleton, Senior Director of Policy and Public Affairs, California and US West. According to their website:

> Chamber of Progress is a center-left tech industry policy coalition promoting technology's progressive future. We work to ensure that everyone benefits from technological leaps, and that the tech industry operates responsibly and fairly. Our corporate partners do not have a vote on or veto over our positions. We do not speak for individual partner companies and remain true to our stated principles even when our partners disagree.

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.

Institute for Local Self-Reliance, *Democracy Policy Network*, *California Nurses Association*, *Economic Security California Action*, *Small Business Majority*, *UDW/AFSCME Local 3930*, *Writers Guild of America West*, *American Economic Liberties Project*, *End Poverty in California*

This comment was submitted by the Institute for Local Self-Reliance and joined by the organizations listed above (ILSR and Partners). According to its website:

> The Institute for Local Self-Reliance is a national research and advocacy organization that partners with allies across the country to build an American economy driven by local priorities, accountable to people and the planet.

Writers Guild of America West

This comment was submitted by Erica Knox, Director of Research and Public Policy; Shelagh Wagener, Political and Legislative Director; and Jennifer Suh, Senior Research and Public Policy Analyst for the Writers Guild of America West (WGAW). According to its website, WGAW is:

> … a labor union representing the thousands of creators who write scripted series, features, news programs, and other content. Founded in 1933, the Guild negotiates and administers contracts that protect the creative and economic rights of our members. We are involved in a wide range of programs that advance the interests of writers, and are active in public policy and legislative matters on the local, national, and international levels.

Opposition to Misuse of Market Power Generally

The Chamber of Progress urges the Commission to reconsider the proposed draft MMP

provisions.[4] The Chamber of Progress believes that the options presented in Memorandum 2025-32 would impose overbroad restraints on trade that would chill procompetitive conduct. More specifically, they assert:

> The Memorandum's definition of restraints of trade is fatally overbroad: by categorically branding routine, efficiency-enhancing practices: bundling, loyalty rebates, exclusive deals, self-preferencing, and even refusals to interoperate, as presumptive "misuse" once a firm is dominant, it sweeps in precisely the conduct that benefits consumers through lower prices, better integration, and faster innovation.
>
> Loyalty rebates lower costs for price-sensitive families and spur network effects in hotels, ride-sharing, and retail platforms. Product bundling enhances functionality, lowers transaction costs, and enables platform integration, as seen in software suites and cloud services. Platforms leverage self-preferencing to offer lower prices and faster performance across products.
>
> Stripping away the rule-of-reason forces firms either to abandon procompetitive strategies or to marshal complex economic defenses against a blanket prohibition, chilling investments in multi-product offerings, data-driven improvements, and platform enhancements.
>
> Conflating legitimate competition with exclusionary abuse, the Commission's draft departs sharply from precedent under both the Sherman Act and the Cartwright Act. It replaces evidence-based legal analysis with a rigid and overly punitive regime that would disadvantage precisely the firms driving growth and innovation in California's economy. (Footnotes omitted).[5]

The Chamber of Progress also asserts that those options would result in widespread adverse industry effects:

> Key California industries: healthcare, logistics, entertainment, and digital services, would see investments slow or halt. Common vertical arrangements, integration strategies, or service bundling that reduce costs and improve consumer access would face heightened legal exposure, even where they enhance output and competition.
>
> A recent study by CCIA finds that implementing Abuse of Dominance statutes modeled on the New York Bill across seven key states, including California, could reduce California's GDP by 10.2 percent ($554 billion) and cost 1.2 million jobs over ten years. Nationwide, the impact could reach $1.7 trillion in foregone GDP and 3.5 million fewer jobs.
>
> Small and medium-sized businesses would face significant overdeterrence: nearly 5 percent of small-firm M&A and 29 percent of medium-firm transactions could be deterred, shrinking the pipeline of innovation and exit opportunities that fuel entrepreneurship. The draft's blanket ban on practices such as self-preferencing would disrupt products that are optimized for small to medium businesses. For

[4] EX 1
[5] EX 2

example, Google's AdWords exemplifies how self-preferencing can lower entry barriers, letting small businesses reach consumers efficiently via affordable digital advertising.

In a state where 82% of startup exits occur via acquisition, the draft's chilling effect on mergers would threaten venture funding, slow R&D, and diminish the return on innovation. This would weaken California's leadership in fields from climate tech to AI.

As written, this draft is incompatible with California's economic future, and we urge the Commission to reject a framework that comes at the expense of consumers and innovation.[6] (Footnotes omitted)

Support of Misuse of Market Power Generally in Mergers

WGAW supports shifting the burden of proof for large firm acquisitions to the merging parties to relieve under-resourced government agencies.[7]

IBT Coalition supports shifting the burden of proof for companies with a market capitalization of $100 billion or more to prove by "clear and convincing evidence" that a merger or acquisition does not violate the state's merger standard:[8]

> Establishing this presumption allows for more efficient resource allocation among the CA DOJ and the merging parties, particularly given the former's limited funding and information disadvantages relative to these firms. A cut off of $100 billion is also appropriate in that it identifies companies that are (1) well-resourced to affirmatively take on this burden of proof; and (2) have market power over a substantial number of workers, consumers, and small- and medium-sized businesses, among other market participants, such that any acquisition above a certain threshold has the potential to result in significant anticompetitive harm.[9]

They suggest the following language:

> A merger in which the acquiring company or the person being acquired has a market capitalization of $100 billion is illegal under Section X(a) unless the defendant establishes by clear and convincing evidence that, in any line of commerce or in any activity affecting commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, would not be to (1) create an appreciable risk of lessening competition, or (2) tend to create a monopoly or monopsony.[10]

Comments on Option One: Misuse of Market Power: Presumptions

This option establishes a rebuttable presumption that conduct by companies with

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[6] EX 2
[7] EX 27
[8] This is also addressed in Memorandum 2025-42, pp. 23-24.
[9] EX 19
[10] EX 20

substantial market power violates antitrust law.[11] For ease of reference the staff is restating the option in this supplemental memorandum.

Section XX is amended to read:

(a) A person with substantial market power is presumed to violate Section X or Y[12] if the person engages in the following conduct:
  (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.

(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, is presumed to have substantial market power.

(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. 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.

ISLR and Partners urge the Commission to adopt Option One, stating:

> We believe Option 1 is the stronger legal standard; … By listing such presumptive illegal conduct and clear, bright-line ways to demonstrate market power, Option 1 would provide useful clarity to prosecutors, judges and the private sector alike. Not only would such clarity help streamline prosecution of anti-competitive corporate abuses, it would act as a strong deterrent for corporations with substantial market power, helping to prevent abuses and pushing markets toward deconcentration.
>
> Therefore, we strongly encourage the Commission to adopt staff's proposed Misuse of Market Power Option 1 and to include that standard in its legislative recommendations.[13]

[11] See Memorandum 2025-43, pp 3-5.
[12] X and Y are intended to reference the Single Firm Conduct and Mergers provisions, respectively.
[13] EX 23

Comments on Option Two: Misuse of Market Power: Presumptions

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.[14] For ease of reference the staff is restating the option in this supplemental memorandum.

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 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.

ISLR and Partners oppose adopting Option Two, because its "more complex evidentiary standard" is likely to "hamper enforcement."[15]

Support of Misuse of Market Power Generally in SFC

The IBT Coalition suggested deeming exclusive dealing or tying by firms with

[14] See Memorandum 2025-43, pp 5-6.
[15] EX 23

"substantial market power" as *per se* illegal:

> (a) 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;
>
> (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.[16]

This provision is drafted to preclude procompetitive justifications for the conduct, effectively making it a non-rebuttable presumption. The staff notes this departs significantly from federal law, which reserves per se treatment for limited circumstances.[17]

The IBT Coalition does suggest language containing a rebuttable presumption for certain restraints, with a focus on labor concerns:

> (a) Except as provided in paragraph (b), 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:
>
> (1) Any restraint on another person's ability to exercise their full freedom of association to obtain acceptable terms and conditions of employment;
>
> (2) 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 employees, or to otherwise agree to negotiate with its employees collectively over terms and conditions of employment; and
>
> (3) Any restraint that the attorney general determines, through rulemaking, poses a substantial risk of harming competition that is not already presumed illegal.

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[16] The Commission decided not to pursue a suggestion that would give the Attorney General rulemaking authority at its June 26, 2025 meeting. Memoranda 2025-34, p. 6 and 2025-30, p. 13.

[17] See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc*. (2007) 551 U.S. 877, 886 which stated "Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics, supra,* at 723, 108 S.Ct. 1515 (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, *GTE Sylvania, supra,* at 50, 97 S.Ct. 2549, and "lack ... any redeeming virtue," *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* (1985) 472 U.S. 284, 289, 105 S.Ct. 2613, 86 L.Ed.2d 202 (internal quotation marks omitted)."

(b) Paragraph (a) shall not apply if the defendant establishes, by clear and convincing evidence, that the pro-competitive benefits of the challenged restraint are achievable only through that conduct; and outweigh the anticompetitive effects of the challenged restraint.[18] (footnotes omitted)

The IBT Coalition recommends the following language to prove "substantial market power:"

(a) 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.
  (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, 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.[19] (footnotes omitted)

The staff notes that much of this language on proof of market influence is reflective of existing federal and state law,[20] but codifying these principles might be helpful.

Does the Commission have feedback on the IBT Coalition's burden shifting proposals for SFC?

DRAFT PROPOSAL CREATING REBUTTABLE PRESUMPTIONS FOR SFC

The Commission requested staff to propose draft language that creates a rebuttable

[18] EX 11

[19] EX 13

[20] *Ohio v. Am. Express Co*. (2018) 138 S. Ct. 2274, 2284 ("The plaintiffs can make this showing directly or indirectly"); A plaintiff may provide direct evidence of "actual detrimental effects," such as an impact on prices. *F.T.C. v. Ind. Fed'n of Dentists* (1986) 476 U.S. 447, 460 (quoting 7 P. Areeda, Antitrust Law 1511, p. 429 (1986)). See also *Law v. Nat'l Collegiate Athletic Ass'n.* (10th Cir. 1998)134 F.3d. 1010, 1019. A plaintiff may alternatively use a "surrogate for detrimental effects," such as an inquiry into "market definition and market power[.]" *Ind. Dentists*, 476 U.S. at 460-61 (quoting Areeda, 1511, p. 429). But when "adverse effects are directly observable . . . [s]urrogates for those effects are not needed." *Chicago Pro. Sports Ltd. Partnership v. Nat'l Basketball Ass'n* (N.D. Ill. 1991) 754 F. Supp. 1336, 1363, aff'd, (7th Cir. 1992) 961 F.2d 667.

presumption, or burden shifting mechanism, for SFC. The staff notes the Commission expressed concerns about new and untested rules, arbitrary thresholds to define the criteria for burden shifting,[21] and that attempts to address such conduct in legislation at both the federal and state levels has been unsuccessful to date.[22]

After studying the issue further, the staff concludes that broad language without specific thresholds to target specific companies and specific conduct could reach parties whose conduct may not be anticompetitive, and but proposing a more narrowly drafted option requires establishing a series of arbitrary lines that will necessarily include some and exclude others. If Commission would like staff to draft language reflecting the latter, is there specific conduct the Commission would like staff to target, and/or market or financial thresholds to narrow the universe of affected parties?

The staff requests Commission feedback on whether to draft a broad or very specific provision for MMP for SFC.

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Deputy Chief Director

[21] See Memorandum 2025-43, p. 2, noting that the comments submitted in opposition to MMP language believe that because 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.

[22] June 26, 2025 meeting video.

CHAMBER OF PROGRESS

July 31, 2025

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

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

Dear Chair Carrion and Members of the Commission:

On behalf of the Chamber of Progress - a center-left tech industry association supporting inclusive innovation - I respectfully urge the Commission to reconsider its proposed draft merger provisions outlined in *Draft Language on Misuse of Market Power*[1] (Memorandum 2025-32). The proposed framework would impose sweeping restrictions that risk chilling procompetitive conduct, deterring innovation, and inflicting significant economic harm across the state.

Overbroad Restraints of Trade Chill Procompetitive Conduct

The Memorandum's definition of restraints of trade is fatally overbroad: by categorically branding routine, efficiency-enhancing practices: bundling, loyalty rebates, exclusive deals, self-preferencing, and even refusals to interoperate, as presumptive "misuse" once a firm is dominant, it sweeps in precisely the conduct that benefits consumers through lower prices, better integration, and faster innovation.

Loyalty rebates lower costs for price-sensitive families and spur network effects in hotels, ride-sharing, and retail platforms. Product bundling enhances functionality, lowers transaction costs, and enables platform integration, as seen in software suites and cloud services. Platforms leverage self-preferencing to offer lower prices and faster performance across products.

Stripping away the rule-of-reason forces firms either to abandon procompetitive strategies or to marshal complex economic defenses against a blanket prohibition, chilling investments in multi-product offerings, data-driven improvements, and platform enhancements.

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

Conflating legitimate competition with exclusionary abuse, the Commission's draft departs sharply from precedent under both the Sherman Act and the Cartwright Act. It replaces evidence-based legal analysis with a rigid and overly punitive regime that would disadvantage precisely the firms driving growth and innovation in California's economy.

Adverse Widespread Industry Effects

Key California industries: healthcare, logistics, entertainment, and digital services, would see investments slow or halt. Common vertical arrangements, integration strategies, or service bundling that reduce costs and improve consumer access would face heightened legal exposure, even where they enhance output and competition.

A recent study by CCIA finds that implementing Abuse of Dominance statutes modeled on the New York Bill across seven key states, including California, could reduce California's GDP by 10.2 percent ($554 billion) and cost 1.2 million jobs over ten years. Nationwide, the impact could reach $1.7 trillion in foregone GDP and 3.5 million fewer jobs.[2]

Small and medium-sized businesses would face significant overdeterrence: nearly 5 percent of small-firm M&A and 29 percent of medium-firm transactions could be deterred, shrinking the pipeline of innovation and exit opportunities that fuel entrepreneurship. The draft's blanket ban on practices such as self-preferencing would disrupt products that are optimized for small to medium businesses. For example, Google's AdWords exemplifies how self-preferencing can lower entry barriers, letting small businesses reach consumers efficiently via affordable digital advertising.

In a state where 82% of startup exits occur via acquisition, the draft's chilling effect on mergers would threaten venture funding, slow R&D, and diminish the return on innovation. This would weaken California's leadership in fields from climate tech to AI.[3]

As written, this draft is incompatible with California's economic future, and we urge the Commission to reject a framework that comes at the expense of consumers and innovation.

Sincerely,

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[2] *Economic Costs of Imposing Abuse of Dominance Standards at the State Level*, CCIA / Analysis Group, 2024, p.24

[3] *Unlocking Antitrust: Antitrust Is Not a Public Utility Regulation Program*, U.S. Chamber of Commerce, 2022, p.13

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

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

September 3, 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 Mergers as set forth in Memorandum 2025-31, "Draft Language for Merger Provisions."[1] Below, we set forth suggested language to implement the recommendations set forth in our August 20 submission[2] for the Merger provision, along with an explanation of why we support this language.

I. Merger Provision: Adopt 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 as well as our recommended changes. These changes are critical for addressing mergers that may result in anticompetitive effects for workers.

A. Adopt the "Appreciable Risk" standard

We support adoption of the "appreciable risk" standard included in Option Four. A departure from the federal standard of "may be substantially to lessen competition," is necessary in the face of federal precedent that has slowly but surely chipped away at the incipiency standard. As it stands today, courts often interpret the language of Section 7 of the Clayton Act as requiring certainty, or near-certainty, that the effect of a merger would be substantially to lessen competition. This standard ratchets up the burden of proof for plaintiffs to a degree that only the most egregious of mergers are blocked, while a significant number of anticompetitive mergers are allowed to proceed.

The "appreciable risk" standard, which is included in Senator Klobuchar's Competition and Antitrust Law Enforcement Reform Act (CALERA), would effectively address this problem

[1] 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.

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

by providing a clear statement that state courts are to apply a true incipiency standard. The plain language of this standard would disallow a court from requiring a plaintiff to show that a proposed merger "*will*" lessen competition, replacing inappropriately burdensome certitude[3] with something more like a *cognizable possibility.*

The phrase "appreciable risk" would clearly be administrable for courts as they already have experience applying the concept of appreciability in other areas of law[4] and, to some degree, in antitrust cases.[5] Dictionary definitions, which are frequently relied on by courts in statutory interpretation, further support the conclusion that Courts are likely to interpret and apply this language consistent with the incipiency standard.[6] For example, Merriam-Webster defines "appreciable" as "capable of being perceived or measured"[7] and also provides several relevant definitions of "risk," as 1) "possibility of loss or injury" or 2) "someone or something that creates or suggests a hazard."[8] Similarly, The American Heritage Dictionary defines "appreciable" as "[p]ossible to estimate, measure, or perceive,"[9] and provides relevant definitions of "risk" including 1) "[t]he possibility of suffering harm or loss; danger" and "[a] factor, thing, element, or course involving uncertain danger; a hazard."[10] Such definitions provide workable elements for both court interpretation and jury instructions.

B. Codify *Philadelphia National Bank* Presumption and the 2023 Merger Guidelines Presumptions

We support codifying the *Philadelphia National Bank* presumption and the structural presumptions set forth in the 2023 Merger Guidelines from the Department of Justice (DOJ) and

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[3] *Cf. Fed. Trade Comm'n v. Microsoft Corp*., 681 F. Supp. 3d 1069, 1090 (N.D. Cal. 2023), *aff'd*, No. 23-15992, 2025 WL 1319069 (9th Cir. May 7, 2025) (finding that plaintiff failed to meet a burden of showing that competition "would *probably* be substantially lessened" by proposed transaction) (emphasis added).

[4] *See, e*.g., CACI No. 1400. No Arrest Involved - Essential Factual Elements, Judicial Council of California Civil Jury Instructions (2025 edition), https://www.justia.com/trials-litigation/docs/caci/1400/1400/ (instruction regarding restraint "for some appreciable time," which can be "as brief as 15 minutes").

[5] *See, e.g., United States v. Yellow Cab Co*. 332 U.S. 218, 225 (1947) (In determining whether the complaint charges a violation of § 1 or § 2 of the Sherman Act, "[i]t is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint, or a conspiracy."); *id*. at 225-226 (finding that "interstate purchases of replacements of some 5,000 licensed taxicabs in four cities" is "an appreciable amount of commerce under any standard.").

[6] Cal. Law Revision Comm'n, *Memorandum 2025-31: Draft Language for Merger Provisions,* at 11 (June 16, 2025), https://clrc.ca.gov/pub/2025/MM25-31.pdf. *See also* Sen. No. 130 119th Cong. 1st Sess. §2(b)(2) (2025), available at https://www.congress.gov/bill/119th-congress/senate-bill/130/text?s=1&r=1&q=%7B%22search%22%3A%22antitrust%22%7D.

[7] *Appreciable,* Merriam-Webster, https://www.merriam-webster.com/dictionary/appreciable (last visited Sep. 3, 2025).

[8] *Risk,* Merriam-Webster, https://www.merriam-webster.com/dictionary/risk (last visited Sep. 3, 2025).

[9] *Appreciable,* The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=appreciable (last visited Sep. 3, 2025).

[10] *Risk*, The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=risk (last visited Sep. 3, 2025).

the Federal Trade Commission (FTC) (the "Merger Guidelines" or the "Guidelines"),[11] consistent with elements of Options Two and Three. Codifying both presumptions reflects the fundamental principle that mergers in concentrated markets with substantial increases in concentration or market shares are likely to result in a substantial lessening of competition or tend to create a monopoly or monopsony.

The general presumption along with specific concentration and market share thresholds, as set forth in our draft text, offer greater predictability for market participants and streamline merger review and enforcement. Because merger review and litigation can be very expensive and time-consuming for the California Department of Justice ("CA DOJ"), private enforcers, and the courts, burden shifting presumptions, like these, provide for a more efficient allocation of costs and resources.

C. Designate the Merger Guidelines as Persuasive Authority

We support the inclusion of statutory language that directs courts to treat the Merger Guidelines as persuasive authority as set forth in Option Two. In December 2023, the DOJ and FTC finalized the Merger Guidelines following multiple listening sessions and a public comment period that elicited more than 5,000 comments from consumers, workers, state attorneys general, academics, businesses, trade associations, practitioners, and entrepreneurs. In a show of bipartisan support for the Guidelines, on February 18, 2025, the incoming Republican Chair of the FTC and the Acting Assistant Attorney General of the Antitrust Division at the DOJ announced that they would remain as the framework for the agency's merger review analysis.[12]

The Guidelines reflect best practices and are firmly rooted in the law. Where some prior iterations downplayed concerns related to market structure, the 2023 Merger Guidelines give appropriate weight to these concerns, drawing on extensive legal precedent and the agencies' practical experience, including the FTC's history of market studies. Critically, the Guidelines recognize that "[l]abor markets frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers," such as "high switching costs and search frictions associated with finding, applying, interviewing for, and acclimating to a new

[11] *Merger Guidelines: U.S. Department of Justice and the Federal Trade Commission,* U.S. Dep't of Just. & Fed. Trade Comm'n, § 2.1, Guideline 1, (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[12] *FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ's Joint 2023 Merger Guidelines Are in Effect*, Fed. Trade Comm'n (Feb. 18, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-dojs-joint-2023-merger-guidelines-are-effect; Omeed Assefi, *Use of the 2023 Merger Guidelines,* U.S. Dep't of Just. Antitrust Div. (Feb. 18, 2025), https://www.justice.gov/atr/media/1389861/dl?inline.

job."[13] Finally, the Guidelines provide important guidance on how to assess rebuttal evidence, including the prospect of entry by other firms and procompetitive efficiencies.[14]

Courts' frequent deference to the federal agencies' merger guidelines provides additional support for why it is not only appropriate, but also good policy, for the Commission to expressly designate the 2023 Merger Guidelines as persuasive authority. Doing so will provide a valuable, transparent framework for how the law is likely to be applied by enforcers and the courts. Although merger cases are not frequently litigated, in the short time since they were issued, it is notable that at least ten federal court decisions have identified the 2023 Merger Guidelines as useful and persuasive authority.[15]

D. Direct the California Department of Justice to Prioritize Workers in Merger Review

We support the addition of language that would (1) provide explicit direction to the CA DOJ to consider a merger's effects on labor markets and workers; and (2) formalize a role for workers in the CA DOJ's merger review process. For these provisions, we recommend the Commission adopt language that is similar to "New York's 21st Century Anti-Trust Act" bill.[16]

An effective merger enforcement regime must prioritize the investigation of potential anticompetitive effects of mergers on workers, in addition to consumers. And a thorough investigation of a merger's potential for anticompetitive effects in labor markets can only be achieved when workers have a seat at the table. Including our recommended provisions ensures that workers and their representatives are empowered to participate in the merger review process by sharing their unique industry knowledge, expertise, and point of view.

E. 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 merging parties to prove by "clear and convincing" evidence that a merger does

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[13] *Merger Guidelines,* U.S. Dep't of Just. & Fed. Trade Comm'n, § 2.10, Guideline 10, (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[14] *Merger Guidelines,* U.S. Dep't of Just. & Fed. Trade Comm'n, § 3, (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[15] Federal courts that have favorably cited the 2023 Merger Guidelines include *Ambilu Tech. AS v. U.S. Composite Pipe S.,* 2024 WL 993284 (M.D. La. Mar. 7, 2024)*; Innovative Health LLC v. Biosense Webster, Inc.,* 2025 WL 1712388 (C.D. Cal. Apr. 22, 2025)*; Tevra Brands LLC v. Bayer HealthCare LLC,* 2024 WL 2261946, (N.D. Cal. May 16, 2024)*; FTC v. Cmty. Health Sys., Inc.,* 2024 WL 2854690 (W.D.N.C. June 5, 2024) *(op. vacated, appeal dismissed on other grounds); In re Essar Steel Minnesota LLC,* 2024 WL 4047451 (Bankr. D. Del. Sept. 4, 2024)*; Fed. Trade Comm'n v. Tapestry, Inc.,* 755 F. Supp. 3d 386, 412 (S.D.N.Y. 2024)*; Fed. Trade Comm'n v. Meta Platforms, Inc.,* 775 F. Supp. 3d 16 (D.D.C. 2024)*; Pennsylvania v. Ctr. Lane Partners, LLC,* 2024 WL 4792043 (W.D. Pa. Nov. 14, 2024)*; Fed. Trade Comm'n v. Kroger Co.,* 2024 WL 5053016 (D. Or. Dec. 10, 2024)*;* and *Steves & Sons, Inc. v. Jeld-Wen, Inc.,* 2024 WL 5174825 (E.D. Va. Dec. 19, 2024).

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

not create an appreciable risk of lessening competition or tend to create a monopoly or monopsony.[17] Establishing this presumption allows for more efficient resource allocation among the CA DOJ and the merging parties, particularly given the former's limited funding and information disadvantages relative to these firms. A cut off of $100 billion is also appropriate in that it identifies companies that are (1) well-resourced to affirmatively take on this burden of proof; and (2) have market power over a substantial number of workers, consumers, and small- and medium-sized businesses, among other market participants, such that any acquisition above a certain threshold has the potential to result in significant anticompetitive harm.

II. Recommended Merger Provision Language

Section X is added to read:

(a) VIOLATION.—No person shall acquire, directly or indirectly the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where, in any line of commerce or in any activity affecting commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to ***(1)*** create an appreciable risk of lessening competition ~~**more than a de minimis amount**~~, or ***(2)*** tend to create a monopoly or monopsony.[18]

(b) GENERAL PRESUMPTION.—Except as provided in paragraph (c), a merger that may produce a firm controlling an undue percentage share of the relevant market and result***ing*** in a significant increase in the concentration of firms in that market ***is illegal under Section X(a) including a merger that would result in***~~**—shall be deemed to substantially lessen competition**~~**.**[19]

(1) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points;[20] or
(2) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.

(c) EXCLUSION.—Paragraph (b) shall not apply if the defendant establishes by clear and convincing evidence that, in any line of commerce or in any activity affecting

[17] 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.

[18] This reflects Paragraph (a) of Option Four with suggested changes.

[19] This reflects Paragraph (b) of Option Two with suggested changes.

[20] This subdivision, and the one that directly follows, reflects paragraph (c)(1)-(2) of Option Three with no edits. As explained in footnote 44 of Memorandum 2025-31, this language mirrors section 2, 2.1: Guideline 1 of the Merger Guidelines.

commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, would not be to (1) create an appreciable risk of lessening competition, or (2) tend to create a monopoly or monopsony

(d) MEGA-MERGERS.—A merger in which the acquiring company or the person being acquired has a market capitalization of $100 billion is illegal under Section X(a) unless the defendant establishes by clear and convincing evidence that, in any line of commerce or in any activity affecting commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, would not be to (1) create an appreciable risk of lessening competition, or (2) tend to create a monopoly or monopsony.

(e) For purposes of this Section, an appreciable risk of lessening competition in any line of commerce or in any activity affecting commerce in any section of the state may not be offset by purported benefits in a separate line of commerce or activity.

Sincerely,

International Brotherhood of Teamsters

Teamsters California

United Food and Commercial Workers, Western States Council

California Federation of Labor Unions

September 12, 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

Dear Chair Carrion and Commissioners,

The undersigned signatories write in support of staff recommendations presented in Memorandum 2025-32, regarding incorporating a Misuse of Market Power provision into California's Cartwright Act. As a coalition, we have advocated for the California Law Revision Commission to advance recommendations that would strengthen California antitrust law by banning monopolization and dangerous mergers, in support of workers, small businesses and communities throughout the state. The staff analysis and recommendations outlined in the memorandum are thoughtful, thorough and well-researched, as has been the case with other staff recommendations presented during the Commission's study. The staff should be commended for its outstanding work during this process and guidance to this Commission and lawmakers considering whether and how to update and strengthen antitrust law in the state.

Strong, clear antitrust laws are crucial to making markets work. As coalition partners have stressed in prior letters supporting the Commission's study, there remains an urgent need to update California's antitrust laws, including through the addition of a Misuse of Market Power standard that would preserve and enhance fair markets for all Californians. As the largest "sub-national" economy in the world, California cannot rely solely on federal law or federal law enforcement to protect competition within its borders. This is particularly true today, as federal enforcement appears mired in philosophical chaos, and decades of judicial decisions importing the "consumer welfare standard" into existing law has prioritized consolidation of economic, social and political power over fairness, economic liberty, and broadly distributed economic benefits.

Memorandum 2025-32 includes recommendations and potential legislative text for a Misuse of Market Power standard incorporated in the Cartwright Act.[1] Simply put, the misuse of market power standard as described in 2025-32 would make clear that companies with significant power in an industry are prohibited from certain practices when those practices would harm, or threaten to harm, competition and the competitive process.[2] While staff's recommended Single Firm Conduct Option 2 alongside the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents, all of which ILSR supports, would introduce a strong monopolization standard into the Cartwright Act, we believe also recommending a Misuse of Market Power standard would add both clarity and enforceability to any monopolization standard, benefitting stakeholders in any antitrust action and better safeguarding taxpayers and residents in the state.[3]

Staff's proposed Single Firm Conduct Option 2, Enhanced Purpose Statement, Statement Rejecting Federal Principles and Statement Rejecting Federal Precedents offers a monopolization and attempted monopolization language that functionally improves upon the federal Sherman Act by incorporating a "restraint of trade" clause into claims of illegal monopolization. That clause is intended to prohibit actions, when taken by a monopolist or would-be monopolist, that restrain the freedom of trade and production to the detriment of competition. In its analysis of Single Firm Conduct Option 2 and the accompanying statements, staff correctly points out that "'restraints of trade' is intended to capture the broad range of anticompetitive conduct that may not fall within the currently restricted scope of federal law but is more broadly interpreted in state law for multiple actors."[4] Although several stakeholders have suggested that this concept lacks clarity and definition, the phrase "restraints of trade" is in fact a well-established legal concept under California law.

While we believe state judges are more than capable of both interpreting "restraints of trade" as established in California law, and using that language to differentiate the Cartwright Act from the federal Sherman Act, a Misuse of Market Power provision would dovetail with the recommended

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[1] "Massachusetts Again at the Forefront of Fighting Monopolies in the States," Ron Knox, ILSR, Aug 1, 2025

[2] As staff explains in Memorandum 2025-32, Misuse of Market Power is "based on the idea that conduct by parties with significantly more power than their rivals can have a disproportionate impact on the competitive process by leveraging their size to increase market share rather than by producing a better product or service."

[3] Option 2 in staff's Single Firm Conduct memorandum 2025-21 would add the following language to the Cartwright Act: "*Section 16720.1 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."

[4] CLRC Staff Memorandum 2025-21, p. 4

single firm conduct language and add an important layer of specificity and clarity to statute. By clearly defining which companies have market power and what specific kinds of conduct violate the law, a Misuse of Market Power standard would make government enforcement efforts against abuses of corporate power less costly and resource-intensive, and establish clear rules of the road for the private sector and legal practitioners.

Staff in 2025-32 offered two similar but separate options for potential Misuse of Market Power statutory language. Option 1 includes a non-exhaustive list of presumptively illegal practices for a company with substantial market power, and offers two ways to define that market power — via either market share or net annual sales/market capitalization. Option 2 largely mirrors Option 1, but instead defines those practices as illegal "if the purpose or effect of the conduct is likely to harm competition in more than a de minimis way." There are functional differences between these options, particularly regarding defenses available to companies accused of abusing their substantial market power. We believe Option 1 is the stronger legal standard; Option 2's requirement that plaintiffs prove conduct "is likely to harm competition in more than a de minimis way" may well hamper enforcement by injecting a more complex evidentiary standard into the law. By listing such presumptive illegal conduct and clear, bright-line ways to demonstrate market power, Option 1 would provide useful clarity to prosecutors, judges and the private sector alike. Not only would such clarity help streamline prosecution of anti-competitive corporate abuses, it would act as a strong deterrent for corporations with substantial market power, helping to prevent abuses and pushing markets toward deconcentration.

Therefore, we strongly encourage the Commission to adopt staff's proposed Misuse of Market Power Option 1 and to include that standard in its legislative recommendations.

Thank you again to both the Commissioners and staff for their continued outstanding work on this crucial study.

Sincerely,

Ron Knox
Senior Researcher and Policy Advocate
Institute for Local Self-Reliance

Democracy Policy Network
California Nurses Association
Economic Security California Action
Small Business Majority
UDW/AFSCME Local 3930
Writers Guild of America West
American Economic Liberties Project
End Poverty in California (EPIC)

WRITERS GUILD OF AMERICA WEST

September 12, 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 of the California Law Revision Commission

Dear Chairperson Carrion and Honorable Commissioners:

We commend the California Law Revision Commission (CLRC) and staff on their committed work to modernize and strengthen state antitrust law through Antitrust Law – Study B-750. We are pleased to provide comments on the draft language under consideration regarding single firm conduct (Memorandum 2025-21, "Draft Language for Single Firm Conduct Provision") and mergers (Memorandum 2025-31, "Draft Language for Merger Provisions"). In response to Memorandum 2025-21 on single firm conduct, we urge the Commission to vote on and approve Option Two in conjunction with the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and the Statement Rejecting Federal Precedents at the September 18, 2025 meeting. In response to Memorandum 2025-31 on merger provisions, we urge the adoption of Options Two, Three, and Four.

I. The Writers Guild of America West and the Media Industry

The Writers Guild of America West (WGAW) is a labor union that represents over 10,000 writers of movies, television and streaming series in the media and entertainment industry vital to California. The Guild has been advocating for more aggressive competition policy for decades, as our members experience the harms of working in a heavily concentrated market made possible by lax antitrust enforcement; several additional research reports and comment letters published by the WGAW in recent years can be found in the WGAW's June 12, 2024 comment to the CLRC.[1] Significant strengthening of state antitrust law, as captured in many of the reforms recommended by CLRC staff, is urgently needed.

Deregulation, antitrust underenforcement, and the erosion of Congressional intent by the courts have allowed for multiple waves of vertical and horizontal consolidation in the media industry. The 1993 repeal of the federal Financial Interest and Syndication Rules, for instance, unleashed a rash of mergers between TV networks and production studios, creating a landscape of

[1] Writers Guild of America West, "Writers Guild of America West Literature Submission and Comments RE: Antitrust Law – Study B-750 of the California Law Revision Commission," (Jun. 12, 2024), https://www.wga.org/uploadedfiles/news_and_events/public_policy/wgaw_comment_to_the_california_law_revision_commission_on_state_antitrust_law_reform.pdf.

vertically integrated conglomerates and a significant decline of independent content on broadcast networks.

Current competition policy has failed to stop numerous anticompetitive mergers in the media industry, resulting in just a few dominant firms that use their increased market power and vertical control to disadvantage competitors, raise prices for consumers, limit creative innovation, and push down wages for creative workers. Recent harmful media mergers include:

- Discovery-WarnerMedia: Less than a year after WarnerMedia acquired Discovery in 2022, the company cancelled or wrote off $2 billion in programming, which predominantly featured the experiences of women and communities of color despite stating publicly that it planned "to invest in more original content" and "create more opportunity for underrepresented storytellers and independent creators."[2] Now, only three years later, the company is planning to split into two firms that largely resemble Warner Bros. and Discovery before the merger.[3]
- Amazon-MGM: In 2022, Amazon acquired MGM, one of the few remaining mid-sized media companies not owned by a major conglomerate or focused on self-distribution. Amazon had already gained a sizeable footprint in media in a short time through anticompetitive behavior, and its acquisition of a legacy studio further consolidated its vertical control in the industry.[4]
- Disney-Fox: In 2019, Disney purchased Fox's film and TV studios, most of its cable networks, and its share of Hulu. Following the acquisition, Disney leveraged its increased market power to pull back content it had licensed from rival platforms, pressed creators and other workers to start foregoing future licensing revenue on Disney shows, and shuttered a former competitor it had acquired—Fox's animation studio.[5] The company eventually gained full control of Hulu, one the largest domestic streaming services, and now plans to shut down Hulu as a separate streaming service.[6]

In the industry's transition to streaming, consolidated firms like Disney and Netflix have pursued strategies of pure vertical integration and strategic acquisitions, producing content primarily to distribute globally on their own streaming platforms and raising barriers for independent producers and distributors. Big tech firms like Amazon have brought well-documented playbooks of anti-competitive business practices to the media industry, establishing and abusing gatekeeper positions between competitors and consumers.

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[2] AT&T, "AT&T WarnerMedia and Discovery, Inc. Creating Standalone Company by Combining Operations to Form New Global Leader in Entertainment," (May 17, 2021), https://investors.att.com/~/media/Files/A/ATT-IR-V2/press-release/press-release-17052021.pdf

[3] Writers Guild of America West, "Broken Promises Bulletin: How the Warner Bros. Discovery Merger Hurts Works and Diversity," (Jan. 2023), https://www.wga.org/uploadedfiles/news_and_events/public_policy/broken-promises-bulletin-1-23.pdf

[4] Writers Guild of America West, "The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media," (Aug. 2023), https://www.wga.org/uploadedfiles/news_and_events/public_policy/GatekeepersReport23.pdf.

[5] Writers Guild of America West, "Broken Promises: Media Mega-Mergers and the Case for Antitrust Reform," (Dec. 2021), https://www.wga.org/uploadedfiles/news_and_events/public_policy/broken-promises-merger-report.pdf.

[6] Alex Weprin, "Standalone Hulu App to Wind Down, Be Added to Disney+ In 2026," *The Hollywood Reporter* (August 6, 2025), https://www.hollywoodreporter.com/business/digital/disney-stop-reporting-subscribr-numbers-hulu-disney-plus-1236338393/.

Writers have seen their livelihoods deteriorate as their employers leverage oligopsony power to worsen compensation and employment practices. In 2023, the Writers Guild went on strike for nearly five months in response to these conditions and ultimately achieved significant gains, but the landscape of excessive concentration continues to worsen. In the streaming market, instead of dynamic competition, we see all the major firms raising prices and reducing content spending in parallel, leaving consumers to pay more for less. And despite these already anticompetitive conditions, Wall Street continues to call for further consolidation.[7]

Over the past few months, both Comcast-NBCUniversal and Warner Bros. Discovery have announced plans to spin off their linear networks to better position themselves for future M&A transactions.[8] Absent government intervention, more harmful mergers and anticompetitive conduct are on the horizon. The WGAW strongly believes that state antitrust law must be modernized to better protect markets.

II. Single Firm Conduct

The Commission has engaged in critical work reviewing potential revisions to California antitrust law, focusing on a well-known shortcoming—the exclusion of single firm conduct (SFC) rules. Since the commencement of Antitrust Study B-750 nearly three years ago, the Commission convened an expert working group on SFC which released a comprehensive report more than 18 months ago. CLRC staff have drafted several SFC language proposals, with the most recent draft released this past June, and the public has been given ample opportunity to comment and engage in this process. The WGAW recommends no further delay, and urges the Commission to take immediate action at the September 18, 2025 meeting to approve staff's single firm conduct proposals.

Consistent with the letter we submitted alongside 13 labor unions and advocacy organizations in March and public comments delivered in April, the WGAW recommends the Commission adopt Option Two, the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and the Statement Rejecting Federal Precedents from Memorandum 2025-21 as a single package. The codification of the three statements clarifies that this change to California antitrust law will operate independently of federal precedents, and that protecting competition in labor markets is an essential component of antitrust law.

III. Mergers

Today, California lacks explicit statutory grounding in state law to challenge mergers. Enhancing California's antitrust law would enable state enforcers to try antitrust cases in state court and allow California judges to develop stronger legal standards. We urge the Commission to take advantage of this timely opportunity to adopt a broadly applicable merger statute. We recommend the Commission support a provision that incorporates Options Two, Three, and Four from Memorandum 2025-31.

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[7] Georg Szalai, "Wall Street's Hollywood Dealmaking Predictions for 2025 and Beyond," *The Hollywood Reporter* (Jan. 6, 2025), https://www.hollywoodreporter.com/business/business-news/media-merger-mania-2025-analyst-predictions-1236090562/.

[8] Alex Weprin, "RichCo vs. PoorCo: Not All Spinoffs Are Created Equal," *The Hollywood Reporter* (June 11, 2025), https://www.hollywoodreporter.com/business/business-news/nbcuniversal-warner-bros-discovery-spinoff-versant-1236262097/.

Options Two and Three revive the structural presumption standard established in *Philadelphia National Bank*, and codifies key sections of the federal 2023 Merger Guidelines. The WGAW strongly supported the revised 2023 Merger Guidelines[9] and we are pleased to see the Commission consider designating the Guidelines as a persuasive authority in interpreting this presumption and codifying select bright line standards.

While the WGAW supports these bright line standards for consumer markets, we recommend the Commission set lower bright light standards for labor markets. Numerous unique characteristics of the labor market for writers in the professional entertainment industry increase employer market power beyond what a pure market share or Herfindahl-Hirschman Index assessment would suggest,[10] an observation acknowledged in the 2023 Merger Guidelines regarding labor markets generally.[11] WGAW has seen powerful media companies without overwhelming market shares hold down wages and impose lower-quality employment terms on writers.

Option Four proposes a broader "appreciable risk" standard which would lower the burden of proof for what is considered a harmful merger and would allow state courts to establish improved case law distinct from overly permissive federal precedents. With these enhanced merger provisions in California antitrust law, state enforcers would be empowered to effectively and efficiently challenge harmful mergers in the media and entertainment industry, protecting Californians against higher prices, lower wages, less diverse content, and limits to creative innovation.

IV. Additional Recommendations

The Commission has the opportunity to modernize antitrust law in California, leading the nation in much-needed competition reform. The WGAW offers the following additional recommendations not captured by staff memoranda:

- Formalize deference to direct evidence of market power such as harms to labor and innovation.
- Shift the burden of proof for large firm acquisitions to the merging parties to relieve under-resourced government agencies.
- Empower the state's antitrust enforcers with clear jurisdiction to regulate anticompetitive behavior in concentrated markets including granting the state attorney general rulemaking authority to designate additional conduct as unlawful. As the Mergers and Acquisitions Working Group notes in their report, almost all states have statutes

[9] Writers Guild of America West and American Federation of Musicians, "Comment on Draft FTC-DOJ Merger Guidelines," (Sept. 18, 2023), https://www.wga.org/uploadedfiles/news_and_events/public_policy/wgaw-afm-comment-on-doj-ftc-draft-merger.pdf

[10] Demand for film and TV writers is irregularly timed, skills are highly varied, available opportunities are limited by genre type and job level, and idiosyncratic preferences play an outsized role in matching talent and employers.

[11] "The level of concentration at which competition concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets." U.S. Department of Justice and the Federal Trade Commission, "2023 Merger Guidelines," (Dec. 18, 2023) p. 27.

specifically authorizing their AGs to address anticompetitive business practices and consolidations.[12]

- Include the explicit consideration of mergers' effects on labor markets, workers, and collective bargaining agreements and formalize a role for workers in the California Department of Justice's merger review process.
- Conduct regular merger retrospectives and market investigations in key industries such as media and entertainment. Investigations must allow for corrective measures up to and including structural separation and unwinding mergers proven anticompetitive after the fact.

Thank you for the opportunity to comment on this critical study and for your work on this important subject. The task of updating state antitrust law to serve today's realities is long overdue, and urgently needed in this moment as federal antitrust enforcers fail to challenge anticompetitive conduct that harms workers and consumers. We urge the Commission to take these imperative steps to support a vibrant economy for all Californians.

Respectfully submitted,

Erica Knox
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Shelagh Wagener
Political and Legislative Director

Jennifer Suh
Senior Research and Public Policy Analyst

[12] Mergers and Acquisitions Working Group, "California Antitrust Law and Mergers," https://clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp2.pdf.