MEMORANDUM 2026-14

Draft Language Options for Mergers and Acquisitions and Additional Public Comment

This Memorandum[1] presents additional public comment and revisions to the draft language options on Mergers and Acquisitions based on the Commission's feedback at its December 4, 2025, meeting.[2]

Following consideration of numerous written and oral public comments,[3] the Commission directed staff to cease work on Option One[4] and present revised options for the next Commission meeting that incorporate Professors Lande and Newman and former Federal Trade Commission (FTC) Commissioner Slaughter's suggested amendment[5] to variations of Options Two; Two and Three combined; and Two, Three, and Four combined.[6] The Commission also directed the staff to present further information on the phrase "appreciable risk" and the Herfindahl-Hirschman Index (HHI). In addition, the Commission expressed interest in adding language clarifying that courts are not bound by federal caselaw when interpreting any new merger statute, similar in concept to the purpose statement used in the Commission's recommendation on Single Firm Conduct.[7]

The underlying argument for this potential Mergers and Acquisitions recommendation is that California currently lacks a broad, state-level merger statute and can only review

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

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be posted after the meeting and/or without staff analysis.

This Memorandum was compiled with the assistance of the Commission's Antitrust Study consultant, Cheryl Johnson. The staff would also like to recognize the Mergers and Acquisitions Working Group members, Profs. John Kwoka, Richard J. Gilbert, Prasad Krishnamurthy, D. Daniel Sokol, and Guofu Tan, for their important and foundational work.

[2] Minutes (December 2025), p. 5. The Commission's feedback was based on Memorandum 2025-42.

[3] Memorandum 2025-42 and the First, Second, Third, Fourth, and Fifth Supplements thereto; video (December 2025) 3:32:40.

[4] Option One largely mirrored the federal Clayton Act. 15 U.S.C. § 18; see Memorandum 2025-31, pp. 3-5, provides further explanation.

[5] Memorandum 2025-42, pp. 14-16; EX 92-97.

[6] Minutes (December 2025) p. 5.

[7] Video (December 2025) 3:22:40; Memorandum 2026-10, EX 15-17.

mergers under its own laws for a few specific industries.[8] Any challenge to a merger affecting the California economy generally must be brought under federal merger law, in federal courts, applying federal jurisprudence. Section 7 of the federal Clayton Act (Clayton Act), which is the primary federal merger statute, prohibits those mergers whose effects "may be substantially to lessen competition, or to tend to create a monopoly."[9] This reaches not only the immediate effects of a merger, but the likely future impacts of the merger on competition.[10] While the Clayton Act's operative language prohibiting mergers whose effect "may be substantially to lessen competition,"[11] has not changed since 1914, there is widespread acknowledgement that judicial interpretation has eroded its original meaning.[12] Some argue the standard as interpreted by the courts now requires proof that the merger "will probably" or is "likely" to cause harm, rather than the original which was construed as requiring evidence of only "a reasonable probability" or "a reasonable likelihood" of competitive harm.[13]

[8] See, for example, Corp. Code §§ 5914-5930 (nonprofit health facilities), §§ 14700-14707 (retail grocery firms and retail drug firms), and Health & Safety Code §§ 127507-12507.6 (health care).

[9] 15 U.S.C. § 18; see also Memorandum 2025-31 for a fuller discussion of merger law.

[10] Memorandum 2024-25, p. 2; see also *St. Alphonsus Med. Ctr – Nampa Inc. v. St. Luke's Health Sys., Ltd*. (9th Cir. 2015) 778 F.3d 775, 783.

[11] The second prong of the Clayton Act's Section 7, "tend to create a monopoly" has been largely ignored by the judiciary in the last few decades. For a fuller discussion of the second prong, see "The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7. Robert H. Lande, John M. Newman and Rebecca Kelly Slaughter. Volume 103, Issue 4, Texas Law Review.

[12] See Memorandum 2024-25, pp. 2, 18; Seventh Supplement to Memorandum 2024-24, EX 2.

[13] Seventh Supplement to Memorandum 2024-24, EX 2.

PUBLIC COMMENTS RECEIVED IN RESPONSE TO MERGERS AND ACQUISITIONS DRAFT LANGUAGE

List and Organizational Descriptions of Public Comments Received

The following public comment is responsive to Mergers and Acquisitions and was received after the Commission's December 4, 2025, meeting. The comment is appended to this memorandum.

Robert Rutowski did not note an affiliation with an organization or institution in his letter. Robert supports antitrust reform, stating, "The California Law Revision Commission should recommend new reforms that prevents monopolization before it occurs, and which puts the burden on dominant corporations to show how further contracting the economy is consistent with a new generation of opportunity and shared references."[14]

MERGERS AND ACQUISITIONS DRAFT OPTIONS

Option Two With Revisions: Philadelphia National Bank

This memorandum revises Option Two from Memorandum 2025-42[15] and adds the suggestion from Professor Robert H. Lande, Professor John M. Newman, and former FTC Commissioner Rebecca Kelly Slaughter (Antitrust Authors) to distinguish the second prong of the Clayton Act, "tend to create a monopoly."[16] The Antitrust Authors argued that the federal judiciary's decades-long disregard of the "tend to create a monopoly" prong is central to the current state of market consolidation, and Congress originally intended both prongs to be mutually reinforcing to protect against abuses.[17] The Antitrust Authors further noted that the language remains good law, if infrequently used, and has been successfully deployed to California's defense.[18] They suggest "By simply splitting the two distinct prohibitions into two separate sentences, the California legislature could make clear that it is adopting the balanced, effective, sliding-scale approach long forgotten by federal enforcers."[19] The Commission was persuaded by their arguments and directed the staff to

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[14] EX 1.

[15] For a discussion of public comments on the option that were considered at the Commission's December 4, 2025 meeting, see Memorandum 2025-42, pp. 11-17 and the First, Second, Third, Fourth, and Fifth Supplements thereto.

[16] Memorandum 2025-42, pp. 14-16, EX 92.

[17] Memorandum 2025-42, pp. 14-16, EX 92.

[18] Memorandum 2025-42, pp. 14-16, EX 92.

[19] Memorandum 2025-42, pp. 14-16, EX 92, 96.

include this suggestions in revisions to Options Two, Three, and Four.[20]

Revised Option Two reads as follows:

> **Section XXX is added to the Business and Professions Code to read:**
>
> (a) 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 the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition~~, or to tend to create a monopoly or monopsony~~ in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) 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 the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (c) A merger that may produce a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. [21]
>
> (d) In interpreting this section, the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission shall be considered persuasive authority and understood to complement and be harmonized with this section.
>
> (e) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Option Two presents merger language that largely tracks the Clayton Act's basic standards and should ameliorate concerns that significant differences in federal and state merger review standards would cause confusion and uncertainty in the business community.[22] However, closely paralleling the federal merger language also risks importing the decades of federal jurisprudence that has limited the Clayton Act's effectiveness in challenging mergers and preventing undue market power and

[20] Minutes (December 2025).

[21] The staff is recommending striking this sentence because it will appear in the Commission Comments.

[22] Some of the members of the Mergers and Acquisition Working Group were unwilling to endorse any state merger legislation that differed from federal law and argued that California should also agree to follow any future changes in federal law. Memorandum 2025-42, pp. 8-9.

concentration. The staff notes, though, that federal merger law is not binding on California courts, and the Commission could tie the merger statute to the Single Firm Conduct purpose provision, which allows state courts to consider federal law but not follow it unless it is consistent with California law.[23]

Would the Commission like the staff to make revisions or conduct further analysis on this option? Would the Commission like to choose this option with or without changes?

Options Three with Revisions: Philadelphia National Bank and Federal Merger Guidelines

This option combines Options Two, as revised, and Option Three, which codifies specific language from the federal Merger Guidelines[24] drawn from *United States v. Philadelphia National Bank,*[25] and adds new language instructing how to rebut the presumptions.[26] This option is drafted so the legality of merger or acquisition can be evaluated against either Option Two or Three.

> **Section XXX is added to read:**
>
> (a) 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 the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition~~, or to tend to create a monopoly or monopsony~~ in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) 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 the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (c) A merger that may produce a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive

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[23] Memorandum 2026-11, p. 5. This is further explored under the "Purpose Statement" portion of this Memorandum.

[24] The federal Merger Guidelines provide direction to the market about the federal agencies' enforcement priorities. Of note, the 2023 Guidelines "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise." 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, p. 3.

[25] (1963) 374 U.S. 321.

[26] For a discussion of public comments considered at the Commission's December 4, 2025 meeting on this option see Memorandum 2025-42, pp. 17-20 and the First, Second, Third, Fourth, and Fifth Supplements thereto.

effects.

(d) A merger shall be presumed to violate (a) or (b) if it results in:

(i) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points; or

(ii) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.[27]

(e) A defendant may rebut the presumption in (d) by demonstrating by a preponderance of the evidence that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis and that any potential anticompetitive effects are clearly outweighed by the ~~distinct~~ cognizable[28] procompetitive benefits of the transaction in the same relevant market.

(d) In interpreting this section, the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission shall be considered persuasive authority and understood to complement and be harmonized with this section.

(e) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

United States v. Philadelphia National Bank involved a proposed merger between two banks that would have resulted in a combined 30% market share. The U.S. Supreme Court relied heavily on Congress' concerns about increasing economic concentration in enacting the Clayton Act[29] and declared the merger illegal because 30% would result in an "inherently anticompetitive tendency" in the market.[30] This framework came to be known as the "structural presumption" because of its decisive role in merger cases.[31] This test lightens the burden of proving illegality of a merger:

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[27] This subdivision mirrors Section 2, 2.1: Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market, 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, pp. 5-6.

[28] This change is to align the language with the 2023 Merger Guidelines, p. 33.

[29] (1963) 374 U.S. 321, 362-363.

[30] *Id.* at 325. The defendants also failed to present sufficient evidence to "rebut the inherently anticompetitive tendency manifested by [the amount of market share]" that would "clearly [show] that the merger is not likely to have … anticompetitive effects." (at 363, 366). The court noted that market shares below 30% might also pose a threat to competition. *Id.* at 364, 365. "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." The court noted further, "Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of [section] 7 nor the legislative history suggests that any particular percentage share was deemed critical."

The court noted that market shares below 30% might also pose a threat to competition.

[31] Memorandum 2024-25, p. 18.

> only with respect to mergers whose size makes them inherently suspect in light of Congress' design in Section 7 to prevent undue concentration. Furthermore, the test is fully consonant with economic theory. That '[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share', is common ground among most economists and was undoubtedly a premise of congressional reasoning about the antimerger statute.[32]

Philadelphia Bank has never been overturned, though some federal courts have ceased to accord such weight to the plaintiff's initial showing of concentration due to the rising influence of the Chicago School,[33] which promoted the efficiencies of bigger businesses above the competitive process.[34]

This option adds Option Three to the previous option by codifying Merger Guideline 1, which specifically address mergers in concentrated markets, as was the case in *Philadelphia Bank*. The Guidelines attempt to quantify the standards in the Clayton Act to Herfindahl-Hirschman Index (HHI) levels.

HHI was devised independently by Albert O. Hirschman and Orris C. Herfindahl in 1945 and 1950, respectively, and is a widely used and respected measurement of concentration.[35] The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Under the Merger Guidelines, Markets with an HHI greater than 1,800 are considered "highly concentrated," and a change of more than 100 points is a significant increase.[36]

> When exceeded, these concentration metrics indicate that a merger's effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger. This presumption of illegality can be rebutted or disproved. The higher the concentration

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[32] *United States v. Philadelphia National Bank* (1963) 374 US 321, 363.

[33] See Memorandum 2025-16, p.4, fn. 18. "Chicago School advocates believed that antitrust enforcement, particularly lawsuits challenging vertical restraints and monopolization, was distorting "legitimate" competition in the market. To correct these alleged distortions, Chicago School theorists advanced legal presumptions (adopted by the Supreme Court and lower courts) that served to protect antitrust defendants from liability. "They include the one-monopoly rent theory, which presumes that firms cannot increase their profits by using vertical restraints such as tying and bundling to extend their monopoly power into adjacent markets; the related presumption that vertical mergers are unlikely to harm consumers; the beliefs that predatory pricing is unlikely to be a profitable strategy and that prices above short-run average variable cost are necessarily procompetitive; and the presumption that antitrust enforcement risks costly false positive errors of overenforcement, while monopoly power is temporary so that false negatives are unlikely." See Gilbert, Antitrust Reform: An Economic Perspective."

[34] See Memoranda 2024-25, pp. 3, 6; 2024-26, p. 4.

[35] Paolo M. Adajar, Ernst R. Berndt, and Rena M. Conti, *The Surprising Hybrid Pedigree of Measures of Diversity and Economic Concentration* (November 2019) National Bureau of Economic Research, Working Paper 26512, p. 9. This article also notes in its abstract, "Our research provides support for the continued use of HHI as a measure of concentration, provided one recognizes its link to market power is equivocal."

[36] 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, p. 5.

> metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it.[37]

By pointing to the Merger Guidelines as persuasive authority, subdivision (d) establishes quantifiable metrics for the otherwise vague terms "undue concentration" and "significant increase." The Merger Guidelines, while not law, were adopted by the federal agencies following rigorous national vetting[38] and have been relied on by courts.[39] This option gives direct guidance to courts as to how to evaluate mergers based on recognized metrics, giving greater certainty to the market.

While some may take comfort in a bright line numerical standard, others may exploit its rigidity by defining a market in such a way that the HHI numbers circumvent the restriction.

One commentator noted:

> The HHI is a crude measure of concentration that critically relies on market definition. Many antitrust cases involve parties disputing what defines the relevant market (e.g., what are the defining characteristics of the product market for Apple's iPhones: all mobile phones, all smartphones, or just smartphones of a certain caliber?). How one demarcates the relevant market will impact the HHI value—a more expansive definition might lower the HHI for a market or the DHHI for a merger, and vice versa.[40]

Further, focusing on these metrics may cause courts to lose sight of the underlying competitive issues, prohibiting transactions that exceed the limits but remain competitive.

There are additional arguments that this Merger Guideline does necessarily reflect an interpretation of *Philadelphia Bank*:

> The 2023 Guidelines also provide that the structural presumption is triggered by transactions that would create a firm with a market share exceeding 30% while increasing the market's HHI by more than 100. These triggers for the presumption did not appear in the 2010 [Horizontal Merger Guidelines]. The 30% figure is derived from the Supreme Court's 1963 decision in *United States v. Philadelphia National Bank*. That decision, however, did not address HHI changes and instead grounded the presumption in a combination of the 30% threshold and a

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[37] *Id.* pp. 5-6.

[38] "The 2023 Merger Guidelines are the culmination of a nearly two-year process of public engagement and reflect modern market realities, advances in economics and law, and the lived experiences of a diverse array of market participants." Federal Trade Commission and Justice Department Release 2023 Merger Guidelines, December 18, 2023.

[39] See, e.g., *Federal Trade Commission v. Kroger Company* (D. Ore 2024) 2024 WL 5053016; *Federal Trade Commission v. Tapestry Inc.* (S.D.N.Y. 2024) 755 F. Supp. 3d 386.

[40] Will Macheel, *An Explainer on How Market Concentration is Measured*, ProMarket, June 24, 2004. "DHHI" means the change in HHI ("D" stands for "delta").

> "significant" increase in market concentration. The Court did not specify a minimum value for a "significant" increase in concentration, but the HHI increase in that case was roughly 600. The discrepancy between this figure and the Guidelines' use of the lower trigger of 100 has prompted some[41] to question whether the Guidelines' approach is firmly rooted in existing doctrine.[42]

Further, some may argue that requiring proof for rebutting the presumption that "anticompetitive effects are clearly outweighed by the cognizable procompetitive benefits of the transaction in the same relevant market" is too high a bar and not reflective of current law, which has never settled on the exact parameters of an efficiencies defense.[43]

Some may also argue that in referencing a specific version of a federal guidance document that updates frequently, California will inevitably fall out of step with federal practices. This could disrupt the market, causing confusion and additional expense for companies maintaining compliance with multiple regulatory schemes.[44] However, this can be addressed by acknowledging California is free to amend its law to conform with new Guidelines, and the Commission has stated its intent to create California-specific law.[45]

This option has the advantage of including both a vague and a prescriptive descriptor of illegality. As noted in Memorandum 2025-31,[46] the benefit of Option Two is that it is modelled on an existing body of law and guidance that businesses are currently subject to and familiar with. By combining Options Two and Three, California judges can look to *Philadelphia Bank* and its progeny to interpret California's merger regime, as well as how the Merger Guidelines are used. However, providing multiple criteria could create

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[41] Citing Shapiro, C. Evolution of the Merger Guidelines: Is This Fox Too Clever by Half? Rev Ind Organ 65, 147–175 (2024).

[42] J. Sykes, 2023 Merger Guidelines: Analysis and Issues for Congress, Congressional Research Service, pp. 2-3, March 28, 2024.

[43] See, e.g., *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.* (9th Cir. 2015) 778 F.3d 775, 789:

> … four of our sister circuits (the Sixth, D.C., Eighth, and Eleventh) have suggested that proof of post-merger efficiencies could rebut a Clayton Act § 7 prima facie case. (citations omitted) The FTC has also cautiously recognized the defense, noting that although competition ordinarily spurs firms to achieve efficiencies internally, "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." Merger Guidelines § 10; see also Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. Pa. L.Rev. 699, 699 (1977) ("Sometimes ... a merger will ... result in real increases in efficiency that reduce the average cost of production of the combined entity below that of the two merging firms."). However, none of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense; thus, even in those circuits that recognize it, the parameters of the defense remain imprecise.

[44] Memorandum 2025-42, EX 148.

[45] Minutes (January 2025), p. 4.

[46] *Id.* pp. 6-7.

confusion.

Would the Commission like the staff to make revisions or conduct further analysis on this option? Would the Commission like to choose this option with or without changes?

Option Four with Revisions: Philadelphia National Bank, Federal Merger Guidelines, and Appreciable Risk

This Option takes the framework from the Options Two and Three and changes the Clayton Act's first prong that prohibits mergers whose effect "may be substantially to lessen competition" to those whose effect "may be to create an appreciable risk of lessening competition more than a de minimis amount."[47]

Section XXX is added to read:

(a) 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 the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be ~~substantially to lessen competition~~ to create an appreciable risk of lessening competition more than a de minimis amount~~, or to tend to create a monopoly or monopsony~~ in any line of commerce or in any activity affecting commerce in any section of the state.

(b) 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 the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.[48]

(c) A merger that may produce a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market shall be deemed to ~~substantially to lessen competition~~ create an appreciable risk of lessening competition more than a de minimis amount in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

(d) A merger shall be presumed to violate (a) or (b) if it results in:

(i) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points; or

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[47] Memorandum 2025-42, EX 181. This language was used in Sen. Klobuchar's Competition and Antitrust Law Enforcement Reform Act (CALERA). Sen. No. 225, 117th Cong. 1st Sess. (2021). This bill was reintroduced as Sen. No. 130 119th Cong. 1st Sess. (2025).

For a discussion of public comments considered at the Commission's December 4, 2025 meeting on this option see Memorandum 2025-42, pp. 20-25 and the First, Second, Third, Fourth, and Fifth Supplements thereto.

[48] This structure differs slightly from the version presented in Memorandum 2025-42, which placed (c) immediately following (a). The staff reorganized the subsections in this version because *Philadelphia National Bank* speaks directly to the "substantially lessen competition" prong of the Clayton Act.

(ii) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.[49]

(e) A defendant may rebut the presumption in (d) by demonstrating by a preponderance of the evidence that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis and that any potential anticompetitive effects are clearly outweighed by the cognizable procompetitive benefits of the transaction in the same relevant market.

(d) In interpreting this section, the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission shall be considered persuasive authority and understood to complement and be harmonized with this section.

(e) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, ~~the substantial lessening of competition~~ an appreciable risk of lessening competition more than a de minimis amount. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to ~~substantially lessen competition~~ create an appreciable risk of lessening competition more than a de minimis amount.

This option represents a solution for those who argue that referencing the Merger Guidelines is not enough and, despite the decades of relevant jurisprudence, the Clayton Act's standard remains too vague to truly reinvigorate enforcement. Those who support changing the standard to "appreciable risk" argue that this change would "restore the Clayton Act's original prophylactic purpose"[50] because decades of judicial interpretation has eroded the original meaning of "substantially lessen competition."[51]

In *Brown Shoe Co. v. United States*,[52] the Supreme Court explained Congress' intent in adopting the Clayton Act was to prohibit mergers before markets succumb to concentration, "at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency" (emphasis added).[53] The Clayton Act's incipient standard, "may be substantially to lessen competition" would "brake this force at its outset and before it gathered momentum."[54]

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[49] This subdivision mirrors Section 2, 2.1: Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market, 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, pp. 5-6.

[50] Memorandum 2025-42, p. 22, EX 17.

[51] See Memorandum 2024-25, pp. 2, 18; Seventh Supplement to Memorandum 2024-24, EX 2.

[52] (1962) 370 U.S. 294.

[53] *Brown Shoe Co. v. U.S.* (1962) 370 U.S. 294, 317.

[54] (1962) 370 U.S. 294, p. 318; see also Peter C. Carstensen, Robert H. Lande, "The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors," 2018 Wisc. L.R. 783 (2018).

While this statutory standard has not changed, it arguably has been eroded through a series of judicial rulings that have been more demanding in the certainty of proof required to stop a merger.[55] These decisions have seemingly supplanted the prohibition against mergers that "may be substantially to lessen competition" with a higher burden of proof that a merger "is likely to substantially lessen competition" or "would probably substantially lessen" competition.[56] Some even argue the courts requires proof that the merger "will probably" or is "likely" to cause harm, rather than the prior construction requiring evidence of only "a reasonable probability" or "a reasonable likelihood" of competitive harm.[57]

This new standard consists of two parts: it modifies "may be" with "appreciable risk" and replaces "substantially" with "more than a de minimis amount." This latter phrase is meant to prevent the magnitude of harm from overshadowing the likelihood of harm, identified as the key impediment to enforcement under the Clayton Act.[58]

Many of the public comments endorsed Option Four as providing a necessary reset of the merger standard, allowing state courts to more effectively enforce case law preventing harmful mergers.[59] Others are opposed to Option Four as introducing a "new and untested legal standard" that they believe would cause substantial uncertainty. While Option Four is intended to reduce the burden of proof for proving unlawful mergers, opponents argue that there is no caselaw history for courts to draw upon when interpreting this new language.[60]

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[55] Memorandum 2025-42, EX 9-10; Memorandum 2025-31, p.3; Seventh Supplement to Memorandum 2024-24, EX 2.

[56] Fourth Supplement to Memorandum 2025-42, EX 3; Daniel Hanley, Basel Musharbash, "Toward a Merger Enforcement Policy that Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act," Duquesne Law Review, Vol. 63, No. 1 (Winter 2025); *FTC v. Microsoft Corp.* (N.D.Cal. 2023) 681 F.Supp.3d 1069, 1089, 1090.

[57] Seventh Supplement to Memorandum 2024-24, Seventh Supp., EX 2, Memorandum 2025-42, EX 9-10; ("This 'standards creep' is understandable: every court would prefer a greater degree of certainty of an anticompetitive outcome before ruling against a merger. But merger control is almost always prospective, requiring the enforcement agency to predict the consequences of a particular transaction. In recognition of the inherent uncertainty of that process, the original Clayton Act required the agency to show only that the transaction "may" be anticompetitive, not that it "would" or even that it "would likely" do so. Unfortunately, the current re-interpretation of the original language is now widespread as trial courts in merger cases have come to require a higher degree of demonstration, sometimes bordering on near proof, that a prospective merger will result in the lessening of competition").

[58] Memorandum 2025-42, EX 26.

[59] Memorandum 2025-42, EX 162 ("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[59] with something more like a *cognizable possibility.*") Fourth Supplement to Memorandum 2025-42, EX 4 ("the standard is not new and draws on the text of the Clayton Act and federal interpretations, including *St. Alphonsus Medical Center-Nampa v. St. Luke's Health System, Ltd.* (9th Cir. 2015), 778 F. 3d 775, 778 ("all that is required is a merger create an appreciable danger of such consequences")." Second Supplement to Memorandum 2025-42, EX 2.

[60] Memorandum 2025-42, EX 11, EX 26. The staff notes that the Cartwright Act, Business & Professions Code

Critics contend changing a familiar standard comes with significant risks, though.[61] They argue that the federal standard does not need to be changed to more effectively police mergers, but rather additional state enforcement resources are needed.[62] While perhaps true, substituting a lesser standard could also make it easier to prove cases, freeing resources toward pursuing additional cases. Critics will also argue creating a new standard will cause significant disruption to businesses, creating uncertainty until a solid base of jurisprudence is built.[63]

Would the Commission like the staff to make revisions or conduct further analysis on this option? Would the Commission like to choose this option with or without changes?

Purpose Statement

The Commission raised the issue of including a purpose statement for a merger statute at its December 2025 meeting.[64] A purpose statement could clarify the differences between California and federal law, and note that while federal caselaw is persuasive, it is not binding on state courts interpreting state merger statutes, similar to what the Commission recommended for Single Firm Conduct language.

The staff believes the purpose statement used for the Single Firm Conduct recommendation can also apply to a proposed statute for Mergers and Acquisitions. The Commission approved the following purpose statement:[65]

> **Section 16730 is added to the Business and Professions Code, to read:**
>
> (a) The purpose of this section and Sections 16731 and 16732 is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.
>
> (b) Protecting competition includes protecting competition between businesses when they compete for workers by prohibiting anticompetitive business practices that impede workers' freedom to choose employment.
>
> (c) The California Supreme Court has determined that the Cartwright Act is

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Section 16727, presently contains the Clayton Act phrase "may be to substantially lessen competition" in the narrow context of tying prohibitions on commodities. This section does not apply more broadly to mergers, however. *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988). This code section was briefly discussed in Memorandum 2024-34, pp. 62-63.

[61] Memorandum 2025-31, p. 12.

[62] Memorandum 2025-42, pp. 6.

[63] Memorandum 2025-42, pp. 6-7, EX 6.

[64] Video (December 2025) 3:22:40.

[65] Memorandum 2026-11, pp. 4-5.

"broader in range and deeper in reach" than the federal Sherman Act;[66] courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing effective deterrence of antitrust violations;"[67] and that the Cartwright Act is not modeled on the Sherman Act.[68] Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery,[69] use of a proximate cause test for Cartwright Act standing,[70] recognition of broader harms and per se conduct,[71] lower actionable market shares,[72] structured rule of reason analysis,[73] and differing burdens of proof.[74]

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law, including this section.

(e) California agrees with the U.S. Department of Justice and Federal Trade Commission in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition as reflected in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.[75]

The timing of any potential legislation relating to mergers and acquisitions will impact how the proposed statute is drafted. If, for example, legislation is enacted in 2026 relating to SFC that includes the purpose statement, the language could simply be amended to include a cross-reference to the proposed mergers and acquisitions statute in subdivision (a).

Does the Commission want the staff to conduct further analysis of this provision? Does the Commission want any proposed mergers and acquisitions language to

[66] *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920.

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

[68] See Memorandum 2024-15, p. 8, n. 16, in which the SFC Working Group stated:

> As the California Supreme Court confirmed in the latter case of *Aryeh v. Canon Bus. Sols., Inc*., 55 Cal. 4th 1185, 1195 (2013), ("[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal anti-trust statutes but instead on statutes enacted by California's sister states around the turn of the 20th Century.").

[69] Bus. & Prof. Code § 16750.

[70] Antitrust standing under the Cartwright Act requires a plaintiff show that an antitrust violation was the proximate cause of its injuries. See *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723; Memorandum 2025-35, p. 10.

[71] Bus. & Prof. Code §§ 16720, 16727, 16729, 16750(a), 16600.1. Memorandum 2024-35, pp.13-14.

[72] *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326. In this case addressing exclusive dealing, among other things under the Cartwright Act, the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor.

[73] Memorandum 2024-35, p. 6; *In re Cipro Cases I & II*, (2015) 61 Cal.4th 116, 147-148.

[74] *In re Cipro Cases I & II*, (2015) 61 Cal.4th 116, 153-154.

[75] The language is currently being reviewed by the Office of Legislative Counsel and there may be technical revisions.

include this purpose statement?

Respectfully submitted,

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Re: Study B-750 – Recommendations on Merger Provisions

Dear Chairperson Carrion and Honorable Commissioners:

Ahead of a vote today on sweeping reforms to California's antitrust law – the culmination of a three-year long study initiated by the State Legislature in 2022 – labor, consumer, and legal advocacy groups submitted a letter calling for heightened scrutiny of corporate concentration across the state.

California may be the fifth largest economy in the world, but from Hollywood to healthcare, tech to agriculture, whole industries are at risk of succumbing to a worsening crisis of concentrated power and wealth inequality. As federal enforcers offer impunity to the highest bidder, California should crack down on corporations that stifle our economy by neutralizing their competitors. The California Law Revision Commission should recommend new reforms that prevents monopolization before it occurs, and which puts the burden on dominant corporations to show how further contracting the economy is consistent with a new generation of opportunity and shared prosperity.

It is not a coincidence that the state with the highest number of billionaires in the United States also has one of the worst and widening income gaps in the country. California's next reckoning depends on whether private equity profiteers and monopolists will be allowed to continue draining the state of its potential while working people are clobbered by a historic affordability crisis.

The California Law Revision Commission began its study of the state's antitrust law in early 2023, at the direction of the State Legislature. The Commission has already voted to recommend that California adopt its own merger provisions, which would allow the California Attorney General and plaintiffs to challenge anticompetitive mergers in state court, but has yet to articulate a specific policy approach.

The letter recommends the Commission endorse multiple policy recommendations, including:

An "appreciable risk" standard for preventing mergers before industries

have already undergone significant concentration;
Designation of the 2023 Merger Guidelines (developed under former Federal Trade Commission Chair Lina Khan and Department of Justice Assistant Attorney General Jonathan Kanter) as persuasive authority;
Creating a presumption of illegality where there is evidence of serial acquisitions, or "roll-ups," in the same or adjacent markets – a strategy common among private equity and Big Tech firms; and
Creating a presumption of illegality when the acquiring firm is presumptively dominant – i.e., a market cap greater than $600 billion.
Finally, the letter calls on the Commission to support legislation that would provide the California State Attorney General with contemporaneous pre-merger notification of potentially anticompetitive mergers, an approach the State has already taken for the healthcare and grocer industries. To alleviate the administrative burden on the Office of the State Attorney General, the letter recommends that any such legislation include a fee-based mechanism for the office to recover costs.

Full letter:
https://www.economicliberties.us/wp-content/uploads/2025/12/CLRC-Coalition-Ltr-re-Merger-Recommendations-11_19_25-2.pdf

Yours sincerely,
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