

MEMORANDUM 2026-21  
**Draft Language Options for Mergers and Acquisitions and Additional Public  
Comment**

---

This Memorandum<sup>1</sup> presents additional public comment and revisions to the draft language options on Mergers and Acquisitions based on the Commission’s feedback at its March 20, 2026, meeting.<sup>2</sup>

Following consideration of numerous written<sup>3</sup> and oral public comments, the Commission directed staff to explore rationales and philosophies for challenging mergers relative to the phrase “may be substantially to lessen competition” from the federal Clayton Act,<sup>4</sup> and to present language clearly explaining the standard and possible alternatives. This memorandum explores and presents additional merger options in accordance with the Commission’s specifications.<sup>5</sup>

PUBLIC COMMENTS RECEIVED IN RESPONSE TO MERGERS AND ACQUISITIONS  
DRAFT LANGUAGE ..... - 2 -

    LIST AND ORGANIZATIONAL DESCRIPTIONS OF PUBLIC COMMENTS RECEIVED..... - 2 -

BACKGROUND ..... - 2 -

EVOLUTION OF THE FEDERAL MERGER STANDARD ..... - 3 -

    PHILADELPHIA NATIONAL BANK’S PRESUMPTION..... - 5 -

    THE PRESUMPTION WEAKENS..... - 6 -

    COMPETITION RETURNS?..... - 9 -

DRAFT MERGERS AND ACQUISITION OPTIONS WITH REVISIONS..... - 10 -

    BASIC MERGER FRAMEWORK ..... - 10 -

*Basic Merger Framework and Federal Merger Guidelines* ..... - 14 -

*Basic Merger Framework, Federal Merger Guidelines, and “Appreciable Risk”* ..... - 16 -

---

<sup>1</sup> 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](http://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.

<sup>2</sup> Memorandum [2026-16](#), p. 4.

<sup>3</sup> Memorandum [2026-14](#) and the [First](#), [Second](#), and [Third](#) supplements thereto.

<sup>4</sup> [15 U.S.C. § 18](#).

<sup>5</sup> This memorandum was prepared with the assistance of the Commission’s Antitrust Expert, Ms. Cheryl Johnson.

REASONABLE PROBABILITY ..... - 18 -  
PURPOSE STATEMENT ..... - 18 -

**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.

<u><i>Exhibits</i></u>	<u><i>Exhibit pages</i></u>
<b>Proposed Options</b> .....	<b>1</b>
<b>Robert E. Rutkowski (12/4)</b> .....	<b>5</b>

Robert Rutowski did not note an affiliation with an organization or institution in his letter. Rutowski 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.”<sup>6</sup>

**BACKGROUND**

At its March 20, 2026, meeting the Commission requested the staff to research the philosophy behind and explore possible variations of the standard for evaluating the lawfulness of a merger. This standard is expressed by the phrase “may be substantially to lessen competition” from Section Seven of the federal Clayton Act (Clayton Act).<sup>7</sup>

The Commission also requested the staff to:

- Clarify the federal standard, particularly the term “may be”
- Include the citation for *Philadelphia National Bank* in proposed language
- Include the Single Firm Conduct purpose statement as a separate section<sup>8</sup>
- Not directly refer to Merger Guideline 1 from the 2023 Federal Merger Guidelines, but that the test should be considered persuasive authority

---

<sup>6</sup> EX 5.

<sup>7</sup> [15 U.S.C. § 18](#).

<sup>8</sup> Memorandum [2026-16](#), p. 4. The staff notes that only three Commissioners were able to be present when this request was made.

## EVOLUTION OF THE FEDERAL MERGER STANDARD

The original Clayton Act was passed in 1914 to bolster the 1890 Sherman Antitrust Act<sup>9</sup> by preventing monopolies before they occur. This was at a time when industry consolidation was increasing and concern for preserving competition was paramount.<sup>10</sup>

The original Clayton Act made a merger whose effect “may be to substantially lessen competition” unlawful:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition **may be to substantially lessen competition** between the corporation whose stock is so acquired and the corporation making the acquisition or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.<sup>11</sup> (emphasis added)

As described in the Senate Report for HR 15657, the bill enacting the original Clayton Act, this phrase was intended “to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.”<sup>12</sup> Its probabilistic phrase “may be” thus authorized challenges to mergers whose future competitive harm was not actual but still reasonably probable.

In 1950, the Clayton Act was amended<sup>13</sup> due to frustration over “the extent to which the American economy has become concentrated and centralized in the hands of a few giant corporations.”<sup>14</sup> Because the original Clayton Act was limited to corporate stock acquisitions by and between competitors, the 1950 amendments broadened the act to cover more types of mergers -- asset acquisitions as well as mergers between firms in different markets.<sup>15</sup> The amendments also grammatically corrected “may be to substantially lessen competition” from the original act to “may be substantially to lessen competition.”<sup>16</sup>

---

<sup>9</sup> *Sherman Anti-Trust Act*, Milestone Documents, National Archives.

<sup>10</sup> *The Clayton Antitrust Act*, History, Art, and Archives, U.S. House of Representatives.

<sup>11</sup> [Pub. L. 63-212](#).

<sup>12</sup> [S. Rep. No. 63-698](#), 2d Sess., p. 1 (1914).

<sup>13</sup> Cellar-Kefauver Antimerger Act of 1950, 64 Stat. 1225 (1950).

<sup>14</sup> Sen.Rep. No. 81-1775, 2d Sess., p. 4295 (1950). The Report notes that in 1946, “one-tenth of one percent of the total number of all American corporations ... owned 49 percent of all the assets of all American corporations.” *Id.* at p. 4295. A recent study notes that the same one-tenth of one percent now owns 88 percent. S. Kwon, K. Zimmerman, & Yueran Ma, *100 Years of Rising Corporate Concentration* (July 16, 2024) Harvard Law School Forum on Corporate Governance; *Brown Shoe Co. v. U.S.* (1962) 370 U.S. 294, 317-18, 332.

<sup>15</sup> William J. Baer, Assistant Atty. Gen., Antitrust Div., U.S. Dept. of J., *Origins of the Species: The 100 Year Evolution of the Clayton Act*, Remarks at ABA Clayton Act 100th Anniversary Symposium, 2014 WL 6882765, at \*1 (Dec. 4, 2014); ; *U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321, 342 (“Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7”).

<sup>16</sup> William J. Baer, Assistant Atty. Gen., Antitrust Div., U.S. Dept. of J., *Origins of the Species: The 100 Year*

The Clayton Act as amended reads:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition **may be substantially to lessen competition**, or tend to create a monopoly.<sup>17</sup> (emphasis added).

The Senate Report on HR 2734, the bill carrying the 1950 amendments to the Clayton Act, further explained the amendments' intent to be prophylactic required a future-looking prediction of a merger's probable future competitive effects:

The words 'may be' appear in the bill in defining the effect on competition of the forbidden acquisitions. Acquisitions are forbidden only where in any line of commerce in any section of the country the effect 'may be' substantially to lessen competition or to tend to create a monopoly.

The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the **reasonable probability** of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act.

The words 'may be' have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.<sup>18</sup> (emphasis added)

Accordingly, Congress understood "may be" only required evidence of a "reasonable probability" that the acquisition would substantially lessen competition or tend to create a monopoly.

This standard was also understood by the legal community and reaffirmed in subsequent caselaw. The Supreme Court noted in *Brown Shoe Co. v. U.S.*:<sup>19</sup>

Because (section) 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a **reasonable probability** that the

---

*Evolution of the Clayton Act*. Remarks at ABA Clayton Act 100th Anniversary Symposium, 2014 WL 6882765, at \*3 (Dec. 4, 2014) (The Amendment unsplit an infinitive in the original Act, correcting "may be to substantially lessen competition" to "may be substantially to lessen competition.").

<sup>17</sup> [15 U.S.C. § 18](#).

<sup>18</sup> Sen. Rep. No. 81-1775, 2d Sess., p. 4298 (1950).

<sup>19</sup> 370 U.S. 294.

merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.<sup>20</sup> (emphasis added)

While “may be” does not require certainty about the future harm from a merger, it does require some likelihood.<sup>21</sup> In addition to cases interpreting “may be” as requiring “reasonable probability,”<sup>22</sup> some have also interpreted it to require an “appreciable danger”<sup>23</sup> or “reasonable likelihood” of such effects.<sup>24</sup>

As noted by Judge Posner in *FTC v. Elders Grain, Inc.*: “Of course, the word ‘may’ should not be taken literally, for if it were, every acquisition would be unlawful. But the statute requires a prediction, and doubts are to be resolved against the transaction.”<sup>25</sup> Thus, “may be” occupies space between a mere possibility and something less than actual demonstrated harm.

### **Philadelphia National Bank’s Presumption**

In 1963, the United States Supreme Court case *Philadelphia National Bank*<sup>26</sup> recognized that mergers occurring in highly concentrated markets were inherently likely to have anticompetitive effects and were therefore illegal. The court recognized the difficulty in proving anticompetitive effects in these markets and expressed concerns about plaintiffs getting mired in the effort to produce evidence:

---

<sup>20</sup> (1957) 370 U.S. 294, 325.

<sup>21</sup> See also *FTC v. Procter & Gamble Co.* (1967) 386 U.S. 568, 577 (Section 7 deals only with probabilities, not with certainties...if “the enforcement of Section 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated.”)

<sup>22</sup> *Brown Shoe Co. v. U.S.* (1957) 370 U.S. 294, 325; *F.T.C. v. Microsoft Corp.* (9th Cir. 2025), 136 F. 4th 954, 964; *F.T.C. v. Warner Communications Inc.* (9th Cir. 1984) 742 F.2d 1156, 1160; *Crown Zellerbach Corp. v. F.T.C.* (9th Cir. 1961) 296 F.2d 800, 823 (“the key words here quoted are ‘may be’; in other words, we are dealing with a question of the *reasonably probable* results of the merger so far as competition in the market is concerned”) (original italics); *U.S. v. Crocker-Anglo Nat. Bank* (N.D. Ca. 1963) 223 F.Supp. 849, 856.

<sup>23</sup> *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke’s Heath System, Ltd.* (9th Cir. 2015) 778 F. 3d 775, 778 (no requirement of proof of anticompetitive effects; “all that is necessary is that the merger create an appreciable danger of such consequences, quoting *Hosp. Corp. of Am v. F.T.C.* (7th Cir. 1986) 807 F.2d 1381, 1389). In *Hosp. Corp. of Am. v. F.T.C.*, the analysis depended heavily on weighing extraordinarily complex issues and the economic and technological ferment in the hospital industry...,” Judge Posner concluded “Regarding the weighing of such imponderables as this, much must be left to the judgement of the Commission.” *Id.* at 1391.

<sup>24</sup> *U.S. v. Penn-Olin Chemical Co.* (1964) 378 U.S. 158, 170, 175 (“We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce.” After surveying the evidence presented, the court noted, “Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do.”); *U.S. v. Marine Bancorporation Inc.* (1974) 418 U.S. 602, 622-23; *Crown Zellerbach Corp. v. F.T.C.* (9th Cir. 1961) 296 F. 2d 800, 823 (using both reasonable probability and reasonable likelihood).

<sup>25</sup> *F.T.C. v. Elders Grain, Inc.* (7th Cir. 1989) 868 F.2d 901, 906.

<sup>26</sup> *U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321.

This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which **produces a firm controlling an undue percentage share of the relevant market,**<sup>27</sup> **and results in a significant increase in the concentration of firms in that market** is so inherently likely to **lessen competition substantially** that it must be enjoined in the absence of **evidence clearly showing that the merger is not likely to have such anticompetitive effects.**<sup>28</sup> (citation omitted; emphasis added)

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 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. [footnotes omitted]<sup>29</sup>

To reduce plaintiffs' evidence burden, the Court created a structural presumption<sup>30</sup> that presumed illegality if the plaintiffs could demonstrate that the resulting merger would probably result in a highly concentrated industry. Once the plaintiff made this showing, then the burden of proof switched to the defendants to "clearly [show] that the merger is not likely to have such anticompetitive effects."<sup>31</sup>

### **The Presumption Weakens**

*Philadelphia National Bank's* presumption governed the regulation of mergers until a combination of events changed the trajectory of antitrust cases. First, the Expediting Act was repealed<sup>32</sup> in 1974, which had previously fast-tracked certain cases to the Supreme Court. This was followed by the Hart-Scott-Rodino Act in 1976,<sup>33</sup> which required merging companies to file notices with the Federal Trade Commission and the U.S. Department of Justice for certain acquisitions, resulting in fewer court cases and more merger

---

<sup>27</sup> In this case, the merger would have resulted in a single bank controlling at least 30% of the relevant market.

<sup>28</sup> *U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321.

<sup>29</sup> (1963) 374 U.S. 321, 364.

<sup>30</sup> The "structural presumption" is known as such for its "almost decisive role it accorded to market concentration." Memorandum [2024-25](#), p. 18.

<sup>31</sup> *U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321, 363. The case did not establish a bright line, but noted under the facts of that case, a merger resulting in 30% of the relevant market was unlawful.

<sup>32</sup> Pub. L. No. [93-528](#). The Expediting Act allowed antitrust cases to be directly appealed to the U.S. Supreme Court under certain circumstances.

<sup>33</sup> [15 U.S.C. § 18a](#).

settlements.<sup>34</sup> Two years later, Robert Bork published “The Antitrust Paradox,”<sup>35</sup> which shifted the Supreme Court towards the Chicago School’s analysis of antitrust theory, narrowing antitrust enforcement.

The “Chicago School” of antitrust policy was popularized in the 1970s and argued for a narrowly tailored enforcement standard focused on economic metrics such as price, output, and efficiency.<sup>36</sup> The Chicago School justified inaction and nonintervention by arguing against many of the principles supporting the early antitrust framework:

... 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

---

<sup>34</sup> See Sara Y. Razi, *Facing Reality: Litigating the Fix When Pre-Merger Negotiations Fail*, Columbia Business (2024) 40 L.Rev. 39, 41 (“The reason is that the vast majority of mergers that were subject to remediation got ‘fixed’ via a settlement with the DOJ Antitrust Division or FTC during the course of a Hart-Scott-Rodino Act (‘HSR Act’) investigation of a prospective merger, avoiding the need for litigation.”); Jeffrey Oliver, *Remedy Riddle: The Enduring and Consequential Contest over What A Merger Remedy Is*, Antitrust, Fall 2020, 78, 79 (“One purpose of the HSR Act was to do away with the prolonged, inefficient post-merger battles and negotiations exemplified by *du Pont* and *Ford*. Under the HSR Act, merging parties must notify the agencies and observe a waiting period prior to closing. This allows the agencies to assess the competitive merits of the transaction, including potential remedies, prior to closing. **This led, throughout the 1980s and ‘90s, to numerous agency consent decrees setting out remedies negotiated with merging parties out of court.**”) (emphasis added).

<sup>35</sup> Bork, *The Antitrust Paradox: A Policy at War With Itself* (1978). “Bork’s book and many of his articles are often not merely footnotes in Supreme Court opinions but are incorporated into the textual analysis of the Court. In opinions themselves, the Supreme Court writes, ‘As then-Professor Bork explained’ (*Matsushita* 1986) and ‘As Judge Bork has noted’ (*NCAA* 1984), among other references. It is difficult in any field of Supreme Court jurisprudence to find a single source of comparable influence.” Priest, *Bork’s Strategy and the Influence of the Chicago School on Modern Antitrust Law* (2014) 57 J.L. & Econ. S1.

<sup>36</sup> Memorandum 2025-30, fn. 54: The “Chicago School” of antitrust policy was popularized in the 1970s and emphasized the risks of over intervention. Instead, it argued for a narrowly tailored enforcement standard focused on economic metrics such as price, output, and efficiency. As a result, decades of rather passive antitrust enforcement are associated with this policy named after a group of scholars from the University of Chicago including Robert Bork, Richard Posner and Milton Friedman. McKenna, *What Made the Chicago School so Influential in Antitrust Policy?* Chicago Booth Review (Aug. 7, 2023). See also F. McKenna, *What Made the Chicago School So Influential in Antitrust Policy?*, Chicago Booth Review (Aug. 7, 2023); Bork, *The Antitrust Paradox: A Policy at War With Itself* (1978); Priest, *Bork’s Strategy and the Influence of the Chicago School on Modern Antitrust Law* (2014) 57 J.L. & Econ. S1. The author notes, “Bork’s book and many of his articles are often not merely footnotes in Supreme Court opinions but are incorporated into the textual analysis of the Court. In opinions themselves, the Supreme Court writes, ‘As then-Professor Bork explained’ (*Matsushita* 1986) and ‘As Judge Bork has noted’ (*NCAA* 1984), among other references. It is difficult in any field of Supreme Court jurisprudence to find a single source of comparable influence.” *Id.*

positive errors of overenforcement while monopoly power is temporary so that false negatives are unlikely.”<sup>37</sup>

Despite broad criticism,<sup>38</sup> these concepts continue to have a profound influence on federal jurisprudence,<sup>39</sup> even resulting in a major shift in the 1982 Federal Merger guidelines, which described merger activity as part of “an important role in a free enterprise economy.”<sup>40</sup>

The widespread prevalence of Chicago School thinking resulted in narrowed criteria for evaluating mergers and increased the burden on plaintiffs to provide more certain evidence of anticompetitive effects, despite *Philadelphia National Bank* remaining good law.<sup>41</sup> Courts interpreting the standard required challengers to show probable anticompetitive effects with greater certainty than a “reasonable probability,” requiring proof as “likely,” “would likely,” “will probably” or even “would.”<sup>42</sup>

---

<sup>37</sup> Memorandum [2024-26](#), fn. 18, citing Gilbert, *Antitrust Reform: An Economic Perspective*.

<sup>38</sup> Memorandum [2024-26](#), pp.4-6; Memorandum [2024-33](#), pp. 6-7; Memorandum 2024-15, pp. 6-7.

<sup>39</sup> Memorandum [2024-26](#), fn. 18, citing Gilbert, *Antitrust Reform: An Economic Perspective*; Memorandum 2024-33, pp. 6-7; Memorandum 2024-15, pp. 6-7; see also Professor John Newman, June 19, 2024 ([Seventh Supplement](#) to Memorandum 2024-24, EX. 1); *F.T.C. v. Tempur Sealy Intl, Inc.* (S.D. Tex. 2025) 768 F.Supp. 3d 787, 812-813 (must show “likely”); *U.S. v. UnitedHealth Group, Inc.* (D.D.C. 2022) 630 F. Supp. 3d 118, 129, 151-52 (using “would be likely” and “is likely”); *Illumina, Inc. v. FTC* (5th Cir. 2023) 88 F.4th 1036,1048 (is likely) *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 294-95 (4th Cir. 1977) (demanding clear proof of possible entry but for the merger); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (must show potential competitor “would likely” enter).

<sup>40</sup> Peter C. Carstensen, *The Philadelphia National Bank Presumption: Merger Analysis in an Unpredictable World* (2015) 80 Antitrust L.J. 219, 238. “The 1982 Merger Guidelines reflect[ed] a major shift in thinking about mergers: ‘Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets.’” (Quoting U.S. Department of Justice and the Federal Trade Commission, [1982 Merger Guidelines](#) (1982), p. 2.) In contrast, the 1968 Merger Guidelines echoed *Philadelphia National Bank*, stating:

Within the over-all scheme of the Department's antitrust enforcement activity, the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition. . . . Thus, for example, a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures, of an economically undesirable nature.

U.S. Department of Justice and the Federal Trade Commission, [1968 Merger Guidelines](#) (1968), pp. 1-2.

<sup>41</sup> Peter C. Carstensen, *The Philadelphia National Bank Presumption: Merger Analysis in an Unpredictable World* (2015) 80 Antitrust L.J. 219, 236; Professor John Newman, June 19, 2024 ([Seventh Supplement](#) to Memorandum 2024-24, EX 1)

<sup>42</sup> Professor John Newman, June 19, 2024 ([Seventh Supplement](#) to Memorandum 2024-24, EX. 1); *F.T.C. v. Tempur Sealy Intl, Inc.* (S.D. Tex. 2025) 768 F.Supp. 3d 787, 812-813 (must show “likely”); *U.S. v. UnitedHealth Group, Inc.* (D.D.C. 2022) 630 F.Supp. 3d 118, 129, 151-52 (using “would be likely” and “is likely”); *Illumina, Inc. v. FTC* (5th Cir. 2023) 88 F.4th 1036,1048 (is likely) *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 294-95 (4th Cir. 1977) (demanding clear proof of possible entry but for the merger); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (must show potential competitor “would likely” enter).

## Competition Returns?

In 2023, the U.S. Justice Department and Federal Trade Commission released updated Merger Guidelines (2023 Guidelines), which describe the agencies' framework and priorities in reviewing mergers and acquisitions. The 2023 Guidelines reflected public input requesting greater merger enforcement in reaction to market consolidation across industries.<sup>43</sup>

David Lawrence, Policy Director of the Antitrust Division, U.S. Department of Justice, reflected on the changes from the prior Guidelines:

I think the most significant change is the use of the word “competition.” The new Guidelines use the word “competition” about 300 times more than the old ones, and there is a reason for that: we wanted to hew very closely to the statutory text and to the binding Supreme Court precedent, which of course uses the word “competition” consistently. We felt strongly that a guidance document can describe how we enforce the law but should not try to rewrite it, so it seemed imperative to center everything on the text and focus on that word “competition,” which just required a lot of rephrasing throughout.<sup>44</sup>

The Overview of the 2023 Guidelines describe the purpose of the Clayton Act as follows:

Section 7 of the Clayton Act (“Section 7”) prohibits mergers and acquisitions where “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.

The staff notes that while the 2023 Guidelines may signal a reset of federal enforcement priorities toward protecting competition and away from market efficiencies, the shift has not been reflected in actual enforcement activities.<sup>45</sup>

---

<sup>43</sup> U.S. Dept. of J., Office of Public Affairs, [Justice Department and Federal Trade Commission Release 2023 Merger Guidelines](#) (Feb.6, 2025)

<sup>44</sup> [Conversation about 2023 DOJ/FTC Guidelines](#) (2024) 39 Fall Antitrust 23, 26.

<sup>45</sup> Several large mergers in concentrated industries recently have been approved by the U.S Department of Justice prompting state attorneys general to initiate or conduct their own challenges to the mergers despite these federal approvals. See, e.g. *In re Nexstar-Tegna Merger Litigation* (E.D.Ca. Apr. 17, 2026), No. 2:26-cv-00976 TLN-CKD, 2026 WL 1049295, at \*4; *U.S. v. Hewlett Packard Enterprise Co.*, (N.D. Cal. Dec. 1, 2025) Case No. 25-cv-00951-PCP, 2025 WL 3454834, at \*1,8; *U.S. v. Live Nation Entertainment, Inc.* (S.D.N.Y.) Case No. 24-cv-3973 described

## DRAFT MERGERS AND ACQUISITION OPTIONS WITH REVISIONS

Below are merger options based on feedback from the Commission at its March 20, 2026 meeting<sup>46</sup> and the options presented in Memorandum [2026-14](#).<sup>47</sup> This memorandum includes information from previous memoranda and public comments detailing the reasoning for the language in each of the options and their potential benefits and drawbacks.<sup>48</sup>

This section has three main sections : (1) the basic framework for a California mergers and acquisitions statute and two variations thereof; (2) an option for a new subdivision clarifying the term “may” and (3) a purpose statement drawn from the Single Firm Conduct final recommendation.

### Basic Merger Framework

The staff is again presenting the language from Revised Option Two from Memorandum [2026-14](#), which will serve as a base for the additional options.

#### **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 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. This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321.<sup>49</sup>

(d) In interpreting this section, the 2023 Merger Guidelines of the U.S.

---

in Statement of California Attorney General Rob Bonta, Apr. 15, 2026, at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-celebrates-historic-verdict-live-nationticketmaster-trial>.

<sup>46</sup> Memorandum [2026-14](#), p. 4.

<sup>47</sup> EX 1. These options are repeated for the benefit of the Commissioners absent at the March meeting.

<sup>48</sup> Memorandum [2026-14](#) and the [First](#), [Second](#), and [Third](#) Supplements thereto; Memorandum [2025-42](#), and the [First](#), [Second](#), [Third](#), [Fourth](#), and [Fifth](#) Supplements thereto.

<sup>49</sup> This sentence reflects the Commission’s request to include the citation for *Philadelphia National Bank*. Memorandum [2026-16](#), p. 4.

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.

This option 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. 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. This is mitigated by several further variations.

First, this option incorporates the recommendation from Professor Robert H. Lande, Professor John M. Newman, and former FTC Commissioner Rebecca Kelly Slaughter (Antitrust Authors), which distinguishes the second prong of the Clayton Act, “tend to create a monopoly.”<sup>50</sup> 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.<sup>51</sup> The Antitrust Authors further noted that the language remains good law, if infrequently used, and has been successfully deployed.<sup>52</sup> They suggested “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.”<sup>53</sup> The Commission was persuaded by their arguments and directed the staff to include this suggestions in future drafts.<sup>54</sup>

Second, this option codifies language from *Philadelphia National Bank*.<sup>55</sup> This case 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

---

<sup>50</sup> Memorandum [2025-42](#), pp. 14-16, EX 92.

<sup>51</sup> Memorandum [2025-42](#), pp. 14-16, EX 92.

<sup>52</sup> Memorandum [2025-42](#), pp. 14-16, EX 92.

<sup>53</sup> Memorandum [2025-42](#), pp. 14-16, EX 92, 96.

<sup>54</sup> [Minutes](#), December 2025, p. 5.

<sup>55</sup> (1963) 374 U.S. 321.

increasing economic concentration in enacting the Clayton Act<sup>56</sup> and declared the merger illegal because 30% would result in an “inherently anticompetitive tendency” in the market.<sup>57</sup> This framework came to be known as the “structural presumption” because of its decisive role in merger cases.<sup>58</sup> This presumption lightens the burden of proving an illegal merger because a plaintiff need only show that a merger results in a concentrated market and then the burden shifts to the defendant to present evidence clearly showing that the merger is not likely to have such anticompetitive effects.<sup>59</sup>

Given the costly and time-consuming nature of merger challenges, the restoration of the *Philadelphia National Bank* presumption is seen by many critical of the status quo as key to checking mergers in highly concentrated markets.<sup>60</sup> Professor Kwoka, a member of the Mergers & Acquisitions Working Group, further explained the *Philadelphia National Bank* approach:

...[*Philadelphia National Bank*] obviously was intended to create a very strong presumption against large mergers in concentrated markets. Such a standard would be consistent with economic evidence about the effects of such mergers, rendering the usual analysis of effects in those cases unnecessary. Indeed, given the pitfalls of specific-case analysis, there is likely a greater risk of incorrect determination from analysis than any error from application of the presumption.<sup>61</sup>

*Philadelphia Bank* has never been overturned, though some federal courts have ceased to accord significant weight to the plaintiff’s initial showing of concentration due to the rising influence of the Chicago School, as noted earlier in this memorandum. Including *Philadelphia National Bank*’s holding in state law will restore its precedence.

Finally, this option references the 2023 Federal Merger Guidelines as a persuasive authority, as requested by the Commission.<sup>62</sup> The guidelines provide detailed guidance

---

<sup>56</sup> (1963) 374 U.S. 321, 362-363.

<sup>57</sup> *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.”

<sup>58</sup> Memorandum [2024-25](#), p. 18.

<sup>59</sup> *U.S. v. Philadelphia Nat, Bank* (1963) 374 US 321, 363 (The burden is lightened “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.”)

<sup>60</sup> Memorandum [2025-42](#), EX 9-12.

<sup>61</sup> Memorandum [2025-41](#), EX 12.

<sup>62</sup> Memorandum [2026-16](#), p. 4.

about the Department of Justice and the Federal Trade Commission’s procedures and enforcement priorities. The guidelines are updated periodically by the federal antitrust enforcers and prepared after years of studies, public workshops, state collaboration and expert outreach.<sup>63</sup> The 2023 Guidelines establish quantifiable metrics intended to recapture the original intent of the Clayton Act, providing additional guidance beyond caselaw.

This option does not require the 2023 Guidelines be followed, but rather states that they shall be considered persuasive authority and understood to complement California law. By designating the 2023 Guidelines as persuasive though not binding, courts interpreting California merger law would have the benefit of federal antitrust guidance that has sought to recapture the original intent of the Clayton Act and the basis to reject several outmoded and unfounded precepts that have limited past federal merger enforcement. Many stakeholders support referencing the 2023 Guidelines. In many instances, the guidelines have restored historical benchmarks and thresholds that were ignored during periods tolerant of increasing and unchecked market consolidation.<sup>64</sup> As explained by one reform advocate:

...the Guidelines are deeply rooted in over a century of binding federal law, and as such, do not reflect a point in time but rather a reflection of longstanding and forward-looking legal precedents. Further, the Guidelines were the result of a years-long vetting process and have already been relied upon by at least a dozen federal courts,<sup>65</sup> even where plaintiffs have lost – testament to their balance and durability.<sup>66</sup>

In contrast, others cite the major shifts in the Guidelines over the years as a reason to oppose it.<sup>67</sup> The California Chamber of Commerce opposes any tie to the guidelines due to

---

<sup>63</sup> “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.

<sup>64</sup> Citing Memorandum [2025-42](#), EX 156; see also EX 10 (the guidelines “update and rebalance federal enforcement by strengthening standards and enumerating specific antitrust offenses.”).

<sup>65</sup> Citing *Fed. Trade Comm. v. Tapestry, Inc.* (S.D.N.Y. 2024) 755 F.Supp.3d 386, 412; *Fed. Trade Comm. v. Kroger Co.* (D.Or. Dec. 10, 2024) No. 3:24-CV-00347-AN, 2024 WL 5053016, at \*13; *Fed. Trade Comm. v. Meta Platforms, Inc.* (D.D.C. 2024) 775 F.Supp.3d 16, 36; *Pennsylvania v. Centre Lane Partners, LLC* (W.D.Pa. Nov. 14, 2024) 2:24-CV-1501, 2024 WL 4792043, at \*6; *Tevra Brands LLC v. Bayer HealthCare LLC* (N.D.Cal. May 16, 2024) 19-cv-04312-BLF, 2024 WL 2261946, at \*5; *B & R Supermarket, Inc. v. Visa Inc.* (E.D.N.Y. Sept. 20, 2024) 17-CV-2738 (MKB), 2024 WL 4252031, at \*10; *Innovative Health LLC v. Biosense Webster, Inc.* (C.D.Cal. Apr. 22, 2025) 8:19-cv-01984-JVS-KE, 2025 WL 1712388, at \*6; *Ambilu Tech. AS v. U.S. Composite Pipe S.* (M.D.La. Mar. 7, 2024) 22-259-SDD-RLB, 2024 WL 993284, at \*7; *Steves & Sons, Inc. v. Jeld-Wen, Inc.* (E.D.Va. Dec. 19, 2024) 3:16cv545, 2024 WL 5174825, at \*9; *In re Essar Steel Minnesota LL* (Bankr. D.Del. Sept. 4, 2024) 16-11626 (CTG), 2024 WL 4047451, at \*17.

<sup>66</sup> [Fourth Supplement](#) to Memorandum 2025-42, EX 2. See also, Memorandum [2025-42](#), EX 10 (the guidelines “update and rebalance federal enforcement by strengthening standards and enumerating specific antitrust offenses.”).

<sup>67</sup> Memorandum [2025-42](#), EX 33-34. Similarly, California Life Sciences argues that the Merger Guidelines

“dramatically different policy positions” staked out in earlier versions, and that “there is no reason to expect that the merger guidelines will remain static going forward.”<sup>68</sup>

### **Would the Commission like the staff conduct further analysis on the basic framework?**

#### *Basic Merger Framework and Federal Merger Guidelines*

This option was previously presented in Memorandum [2026-14](#) as “Option Three with Revisions.”<sup>69</sup> This option builds on the Basic Framework by adding the 2023 Federal Merger Guidelines interpreting *Philadelphia National Bank*.<sup>70</sup>

Codifying Federal Merger Guideline 1 establishes quantifiable metrics based on Herfindahl-Hirschman Index (HHI) levels to define the terms in *Philadelphia National Bank*’s holding, “undue concentration” and “significant increase.” This direct guidance gives greater certainty to the market and avoids prolonged and expensive litigation interpreting the general terms in *Philadelphia National Bank*, which may streamline certain merger challenges.

In addition to codifying Merger Guideline 1, this option adds language instructing how to rebut the presumption based on the *Philadelphia National Bank* holding<sup>71</sup> and the Merger Guidelines.<sup>72</sup>

- (X) 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.<sup>73</sup>
- (XX) A defendant may rebut the presumption in (X) 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<sup>74</sup> procompetitive

---

“provide robust safeguards without introducing new uncertainty or deviating from established standards.” *Id.* at EX 6.148.

<sup>68</sup> Memorandum [2025-42](#), EX 147, pp. 6-7.

<sup>69</sup> Memorandum [2026-14](#), pp. 5-6.

<sup>70</sup> This proposed revision is based on subdivision (c) of Option Two. EX 1. [2023 Federal Merger Guidelines](#), pp. 5-6.

<sup>71</sup> (1963) 374 U.S. 321, 363, 366 (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.”).

<sup>72</sup> Guidelines 7-11, [2023 Merger Guidelines](#), U.S. Dept. of J. and the Federal Trade Commission.

<sup>73</sup> 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. Dept. of J. and the Federal Trade Commission, pp. 5-6.

<sup>74</sup> “Cognizable” aligns the language with the [2023 Merger Guidelines](#), p. 33.

benefits of the transaction in the same relevant market.

HHI is a widely used and respected measurement of market concentration<sup>75</sup> devised independently by Albert O. Hirschman and Orris C. Herfindahl in 1945 and 1950, respectively. Courts have employed the HHI in merger cases for decades.<sup>76</sup> 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. HHI calculations consider the relative size and distribution of the firms in a market, increasing both as the number of firms in the market decreases and as the disparity in size among those firms increases.<sup>77</sup>

Under the 2023 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.<sup>78</sup>

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 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.<sup>79</sup>

This option has the advantage of including both the more general and a prescriptive descriptor of illegality. California judges can look to *Philadelphia Bank* and its progeny to interpret California’s merger regime, as well as how the 2023 Guidelines are used. Several public comments support codifying this approach to the structural presumption in *Philadelphia National Bank*.<sup>80</sup> However, others oppose codifying the 2023 Guidelines and using specific HHI metrics to measure market concentration as they believe they would introduce “rigidity” and truncate the full-blown antitrust and market analysis required

---

<sup>75</sup> Paolo M. Adajar, Ernst R. Berndt, & Rena M. Conti, *The Surprising Hybrid Pedigree of Measures of Diversity and Economic Concentration* (November 2019) Nat. Bur. 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.”

<sup>76</sup> See e.g. *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.* (9th Cir. 2015) 778 F.3d 775, 786 (HHI is a “commonly used metric for determining market share” citing *ProMedica Health Sys., Inc. v. FTC*, (6th Cir. 2014) 749 F.3d 559, 568; *H.J. Heinz*, (D.C. Cir. 2001) 246 F.3d 708, 716 *Chicago Bridge & Iron Co. N.V. v. FTC*, (5th Cir. 2008); 534 F.3d 410, 431; *FTC v. Univ. Health, Inc.*, (11th Cir. 1991) 938 F.2d 1206, 1211; see also [2023 Merger Guidelines](#), U.S. Dept. of J. and the Federal Trade Commission, 2.1 Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market, endnote 15 (“The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982”).

<sup>77</sup> *F.T.C. v. Edwards Lifesciences Corp.* (D.D.C., 2026) No. CV 25-2569 (RC), 2026 WL 228723, p. 22.

<sup>78</sup> [2023 Merger Guidelines](#), U.S. Department of Justice and the Federal Trade Commission, p. 5.

<sup>79</sup> *Id.* pp. 5-6.

<sup>80</sup> Memorandum [2025-42](#), pp. 17-18 and the [Fourth](#) Supplement thereto.

under the “rule of reason” test that produces a “richness of data and information.”<sup>81</sup> They further suggest that the language, which allows a defendant to rebut the presumption by clearly demonstrating the merger has little or no anticompetitive effects would block mergers that pose small, but not de minimis, harm.<sup>82</sup> California Life Sciences argues that the standard poses unique risks for life sciences companies where the merger activity is predominantly procompetitive.<sup>83</sup>

### **Would the Commission like the staff conduct further analysis on this option?**

#### *Basic Merger Framework, Federal Merger Guidelines, and “Appreciable Risk”*

This option was previously presented in Memorandum [2026-14](#) as “Option Four with Revisions.”<sup>84</sup> This section builds on the prior options and proposes revising the standard “may be substantially to lessen competition” by modifying “may be” with “appreciable risk” and replacing “substantially” with “more than a de minimis amount.” This amendment is intended to reduce the high evidentiary burden that some federal courts have read into the prior standard.

This language would revise subdivisions (a) and (e) of the Basic Framework as follows:

(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.

\*\*\*

(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.

Numerous public comments endorsed the appreciable risk standard as providing a

---

<sup>81</sup> Memorandum [2025-42](#), pp. 16-19, EX 5-6, 151.

<sup>82</sup> Memorandum [2025-42](#), pp. 19-20, EX 151-152.

<sup>83</sup> Memorandum [2025-42](#), p. 16, EX 5.

<sup>84</sup> Memorandum [2026-14](#), pp. 10-11.

necessary reset of “may be substantially to lessen competition.”<sup>85</sup> Supporters argue the change in wording is not intended to change the intent of Clayton standard as originally adopted in 1914, but rather to recapture it and “restore the Clayton Act’s original prophylactic purpose.”<sup>86</sup> They further argue that decades of federal judicial interpretations have demanded an increasingly greater quantum and certainty of proof of anticompetitive effects than intended by the original Clayton Act.<sup>87</sup> Thus, these decisions have effectively supplanted the original prohibition against mergers that “may be substantially to lessen competition” with a higher burden of proof that a merger “is likely to,” “will probably,”<sup>88</sup> or that is “almost certain” to substantially lessen competition.<sup>89</sup>

Critics contend that the appreciable risk standard introduces a “new and untested legal standard” that they believe would cause substantial uncertainty, and assert that there is no caselaw history for courts to draw upon when interpreting this new language.<sup>90</sup> They argue changing a familiar standard comes with significant risks<sup>91</sup> and will cause disruption to businesses, creating uncertainty until a solid base of jurisprudence is built.<sup>92</sup> Some assert more effective merger enforcement would come merely with additional state enforcement

---

<sup>85</sup> 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<sup>85</sup> 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 necessary is that the merger create an appreciable danger of such consequences”).” [Second Supplement](#) to Memorandum 2025-42, EX 2.

<sup>86</sup> Memorandum [2025-42](#), EX 181. This language was used 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).

<sup>87</sup> Memorandum [2025-42](#), EX 9-10; Memorandum [2025-31](#), p. 3; [Seventh Supplement](#) to Memorandum 2024-24, EX 2.

<sup>88</sup> [Fourth Supplement](#) to Memorandum 2025-42, EX 3, p. 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.

<sup>89</sup> [Seventh Supplement](#) to Memorandum, 2024-24, EX 2 (“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”).

<sup>90</sup> Memorandum [2025-42](#), EX 11. The staff notes that the Cartwright Act, Business & Professions Code [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.

<sup>91</sup> Memorandum [2025-31](#), p. 12.

<sup>92</sup> Memorandum [2025-42](#), pp. 6-7, EX 6.

resources.<sup>93</sup> While perhaps true, substituting a lesser standard could also make it easier to prove cases, freeing resources toward pursuing additional cases.

### **Would the Commission like the staff to conduct further analysis on this option?**

#### **Reasonable Probability**

In response to the Commission’s request to clarify “may,” the staff is proposing the Commission consider adding an additional subdivision to the Basic Framework, requiring the courts to require only a “reasonable probability” of anticompetitive effects. This is an alternative to the “appreciable risk” standard discussed above.

(X) In determining whether the merger or acquisition in question may be substantially to lessen competition or tend to create a monopoly or monopsony, courts shall not require more certainty of possible anticompetitive effects than a reasonable probability of the anticompetitive effects.

This sentence avoids the objections to changing the standard altogether and tracks the Senate Report analyzing the 1950 Celler-Kefauver amendments to the Clayton Act, which states only a “reasonable probability” of anticompetitive effects is required.<sup>94</sup> Further, this “reasonable probability” language has been used in numerous cases as a fair distillation of the original intent in the Clayton Act.<sup>95</sup>

### **Would the Commission like the staff conduct further analysis on this this option?**

#### **Purpose Statement**

At its March 30, 2026 meeting, the Commission directed staff to include a purpose statement for the merger statute,<sup>96</sup> establishing the independence of California merger law as was done with the Single Firm Conduct recommendation.<sup>97</sup>

A purpose statement helps clarify the differences between California and federal law, and importantly notes that while federal caselaw is persuasive, it is not binding on state courts interpreting state merger statutes.

The staff believes the purpose statement used for the Single Firm Conduct

---

<sup>93</sup> Memorandum [2025-42](#), pp. 6.

<sup>94</sup> Celler-Kefauver Antimerger Act of 1950, 64 Stat. 1225 (1950); Sen. Rep. No. 81-1775, 2d Sess., p. 4298 (1950). See discussion, *supra*, pp. 3-5.

<sup>95</sup> See e.g., *Brown Shoe Co. v. U.S.* (1957) 370 U.S. 294, 325; *F.T.C. v. Microsoft Corp.* (9th Cir. 2025), 136 F. 4<sup>th</sup> 954, 964; *F.T.C. v. Warner Communications Inc.* (9th Cir. 1984) 742 F. 2d 1156, 1160; *Crown Zellerbach Corp. v. F.T.C.* (9th Cir. 1961) 296 F.2d 800, 823 (“the key words here quoted are ‘*may be*’; in other words, we are dealing with a question of the *reasonably probable* results of the merger so far as competition in the market is concerned”); *U.S. v. Crocker-Anglo National Bank* (N.D. Ca. 1963) 223 F.Supp. 849, 856.

<sup>96</sup> Memorandum [2026-16](#), p. 4.

<sup>97</sup> Memorandum [2026-16](#), p. 4.

recommendation can also apply to a proposed statute for Mergers and Acquisitions.<sup>98</sup>

**Section X is added to the Business and Professions Code, to read:**

(a) The purpose of this section and Section X 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 "broader in range and deeper in reach" than the federal Sherman Anti-Trust Act (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920). The California Supreme Court has found the Cartwright Act is not modeled on the federal Sherman Anti-Trust Act and therefore interpretations of federal antitrust law are not conclusive (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1195). Further, California courts have recognized that the Cartwright Act departs from the Sherman Anti-Trust Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery, use of a proximate cause test for Cartwright Act standing, recognition of broader harms and per se conduct, lower actionable market shares, structured rule of reason analysis, and differing burdens of proof.

(d) Federal case law on the subject of this article is not binding on California state 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 United States Department of Justice and the 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 Federal Trade Commission and Department of Justice 2023 Merger Guidelines.<sup>99</sup>

**Section X is added to the Business and Professions Code, to read:**

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 (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758).<sup>100</sup>

---

<sup>98</sup> Memorandum [2026-11](#), pp. 4-5.

<sup>99</sup> [Antitrust Law: Single Firm Conduct](#) (Preprint – March 2026), pp. 23, 27.

<sup>100</sup> This section was originally part of the Purpose Statement (Memorandum [2026-10](#), p. 23), but was moved to its own section at the advice of Legislative Counsel ([First Supplement](#) to Memorandum 2026-12, pp. 3-4.).

As noted in the previous Memorandum, the timing of any potential legislation relating to Single Firm Conduct may impact the purpose statement and how the proposed statute is drafted.<sup>101</sup>

Respectfully submitted,

Sarah Huchel  
Chief Deputy Director

Sharon Reilly  
Executive Director

---

<sup>101</sup> Memorandum [2026-14](#), pp. 13-14.

## Exhibit 1

### Option Two

**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.

(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 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 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.<sup>1</sup>

(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<sup>2</sup> procompetitive benefits of the transaction in the same relevant market.

(f) 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.

(g) 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.

---

<sup>1</sup> 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.

<sup>2</sup> This change is to align the language with the [2023 Merger Guidelines](#), p. 33.

## Option Four

### 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.<sup>3</sup>~~

(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

(ii) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.<sup>4</sup>

(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.

(f) 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.

(g) 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

---

<sup>3</sup> 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.

<sup>4</sup> 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.

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.

**Subject:** Study B-750 – Recommendations on Merger Provisions  
**Date:** Thursday, December 4, 2025 at 8:33:21 AM Pacific Standard Time  
**From:** Robert Rutkowski  
**To:** Sharon Reilly

The Honorable Richard Simpson, Chair and Honorable Commissioners  
California Law Revision Commission  
c/o Legislative Counsel Bureau  
925 L Street, Suite 275  
Sacramento, CA 95814  
Sharon Reilly, Executive Director  
[sreilly@clrc.ca.gov](mailto:sreilly@clrc.ca.gov)

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

Yours sincerely,  
Robert E. Rutkowski

2527 Faxon Court  
Topeka, Kansas 66605-2086  
E-mail: [r\\_e\\_rutkowski@att.net](mailto:r_e_rutkowski@att.net)