#B-750

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Antitrust Law: Mergers and Acquisitions

October 2026

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative recommendation. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY **December 15, 2026**

Submit comments to Sharon Reilly, sreilly@clrc.ca.gov

The Commission will often substantially revise a proposal in response to comments it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission

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SUMMARY OF TENTATIVE RECOMMENDATION

In 2022, the Legislature passed Assembly Concurrent Resolution 95 (2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks)), which tasked the California Law Revision Commission with a substantive review of California's antitrust laws. Specifically, the Legislature directed the Commission to study and report on three antitrust topics:

> (1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.
>
> (2) Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.
>
> (3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.

To assist the Commission, the staff retained an antitrust expert and assembled eight Working Groups comprising leading antitrust academics and practitioners to examine various aspects of antitrust law. After considering these reports, presentations by the Working Groups, and public comment, the Commission recommends that California's laws be revised. This tentative recommendation reflects only its deliberations on in mergers and acquisitions and includes ancillary language describing the proposed statute's purpose.

ANTITRUST LAW: MERGERS AND AQUISITIONS

STUDY BACKGROUND ..... - 1 -
LEGISLATIVE ASSIGNMENT AND COMMISSION PROCESS ..... - 1 -
Premerger Notification ..... - 3 -
MERGERS AND ACQUISITIONS ..... - 4 -
CURRENT FEDERAL AND CALIFORNIA LAW ..... - 4 -
Evolution of Federal Merger Law ..... - 6 -
Philadelphia National Bank's Presumption ..... - 9 -
2023 Federal Merger Guidelines ..... - 12 -
PUBLIC COMMENTS URGING MERGER REFORM AND CAUTIONING AGAINST MERGER REFORM ..... - 13 -
NEED FOR A MERGER PROVISION IN CALIFORNIA LAW ..... - 13 -
BACKGROUND ON TENTATIVE RECOMMENDATION ..... - 14 -
OPERATIVE PROVISION ..... - 14 -
CONCLUSION ..... - 18 -
PROPOSED LEGISLATION ..... - 19 -

ANTITRUST LAW: MERGERS AND AQUISITIONS

STUDY BACKGROUND

Legislative Assignment and Commission Process

The Legislature enacted Assembly Concurrent Resolution 95[1] in 2022, which directed the California Law Revision Commission to study California's antitrust laws and determine the following:

> (1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.
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> (2) Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.
>
> (3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.

To facilitate the Commission's understanding of these issues, the staff retained an antitrust expert[2] and assembled eight Working Groups of leading academics and practitioners to examine different aspects of antitrust law. These economists and attorneys were selected to represent a range of perspectives on Single Firm Conduct (SFC), Mergers and Acquisitions, Concerted Action, Consumer Welfare Standard, Technology Platforms, Enforcement and Exemptions, Concentration in California, and Artificial Intelligence.[3]

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[1] 2022 Cal. Stat. res. ch. 147 (ACR 95, Cunningham & Wicks).

[2] CLRC Staff Memorandum 2023-37, pp. 2-4 (summary of Cheryl Johnson's qualifications and terms of the consultant agreement).

Also note that this recommendation often refers to Memoranda in footnotes, which are Staff Memoranda that were provided to the Commission throughout the study and provide further background and analysis.

[3] The working groups were composed of the following individuals: *Single Firm Conduct*: Professor Aaron Edlin, UC Berkeley Law; Professor Doug Melamed, Stanford Law School; Sam Miller, UC Law San Francisco (visiting scholar); Professor Fiona Scott Morton, Yale School of Management; and Professor Carl Shapiro, UC Berkeley Law; *Mergers and Acquisitions*: Professor Richard Gilbert, UC Berkeley Economics; Professor Prasad Krishnamurthy, UC Berkeley Law; Professor John Kwoka, Northeastern University, Economics; Professor Daniel Sokol, USC Gould School of Law, Marshall School of Business; and Professor

The Working Groups produced their reports independently of the Commission and each is different in form and substance. After the Working Groups finished their individual reports, they circulated them to the other Working Groups for comments prior to submitting them to the Commission. Although the groups were initially directed not to advocate for ultimate results,[4] the groups interpreted this direction variously.[5]

While the Working Groups prepared their reports, the Commission received an overview of antitrust law during a sequence of lectures from January through December 2023.[6] Representatives of each Working Group presented their reports to the Commission over a series of Commission meetings in 2024.[7] Following each presentation, the Commission heard from panels of individuals and organizations providing different perspectives on the same topics addressed by the Working Groups. Throughout the Antitrust Law Study process, the Commission received and considered robust public commentary from a wide range of individuals and organizations, with approximately 152 written submissions as of October 2026 representing a wide array of perspectives.[8] In addition, the Antitrust and Consumer Protection Section of the California Lawyers Association dedicated its Spring 2023 Competition Law Journal to articles relevant to the Commission's antitrust study.[9]

Guofu Tan, USC Dornsife, Economics; *Concerted Action*: Professor Peter Carstensen, University of Wisconsin School of Law; Professor Josh Davis, UC Law San Francisco; Professor Joseph Farrell, UC Berkeley Economics; Professor Christopher Leslie, UC Irvine School of Law; Julie Pollock, Berger Montague; Sarah Van Culin, Zelle LLP; and Judith Zahid, Zelle LLP; *Consumer Welfare Standard:* Professor Jorge Contreras, University of Utah College of Law; Professor Warren Grimes, Southwestern Law School; Professor Douglas Melamed, Stanford Law School; Heather Nyong'o, Cleary Gottlieb; and Professor Barak Orbach, University of Arizona, James E. Rogers College of Law; *Technology Platforms:* Abiel Garcia, Kesselman Brantly Stockinger LLP; David Kesselman, Kesselman Brantly Stockinger LLP; Professor Mark Lemley, Stanford School of Law; Professor Justin McCrary, Columbia Law School; Brantley Pepperman, Quinn Emanuel; Professor Steve Tadelis, UC Berkeley Economics; and Kevin Teruya, Quinn Emanuel; *Enforcement and Exemptions:* Kathleen Foote, California Department of Justice, Antitrust Section (ret.); Professor Roger Noll, Stanford Economics (emeritus); Marc Seltzer, Susman Godfrey LLP; and Dena Sharp, Girard Sharp; *Concentration in California:* Dean Harvey, Leiff Cabraser Heimann & Bernstein; Cheryl Johnson, California Department of Justice (ret.); Diana Moss, Progressive Policy Institute; Professor Barak Richman, Duke Law School; and Shana Scarlett, Hagens Berman; *Artificial Intelligence:* Abiel Garcia, Kesselman Brantly Stockinger, LLP; David Kesselman, Kesselman Brantly Stockinger, LLP; Professor Sam Miller, UC Law San Francisco; Diana Moss, Progressive Policy Institute; and Professor Fiona Scott Morton, Yale School of Management. For additional biographical information, see CLRC Staff Memoranda 2023-22, EX 1; 2023-16, EX 1-5; 2023-11, EX 1-6; and 2023-07, EX 1-9.

[4] CLRC Staff Memorandum 2023-7, p. 1.

[5] See, e.g., CLRC Staff Memoranda 2024-15, pp. 14-18 and 2024-26, pp. 11-12.

[6] See Antitrust Law Study Page and CLRC Staff Memoranda 2023-7, 2023-37, 2023-49.

[7] Single Firm Conduct: CLRC Staff Memorandum 2024-15; Mergers and Acquisitions: CLRC Staff Memorandum 2024-25; Concerted Action: CLRC Staff Memorandum 2024-34; Consumer Welfare Standard: CLRC Staff Memorandum 2024-33; Technology Platforms: CLRC Staff Memorandum 2024-26; Enforcement and Exemptions: CLRC Staff Memorandum 2024-35; Concentration in California: CLRC Staff Memorandum 2024-14; Artificial Intelligence: CLRC Staff Memorandum 2024-47.

[8] A list of written public comments with links can be found in the Index of Public Comments on the Antitrust Law Study Page.

[9] California Lawyers Association, *Competition,* Vol. 33, No.1 (Spring 2023).

At its January 23, 2025 meeting, the Commission directed staff to analyze revisions to California's antitrust laws related to single firm conduct (SFC), misuse of market power,[10] technology companies, and merger law.[11] At its September 2025 meeting, the Commission voted to bifurcate its SFC recommendation (which included discussions of misuse of market power[12] and technology companies[13]) from its deliberations on mergers and acquisitions, and directed staff to draft a Tentative Recommendation on Single Firm Conduct for its meeting in December 2025.[14] At its January 30, 2026 meeting, the Commission approved the Staff Draft Final Recommendation,[15] which was introduced later that year by Assembly Member Aguiar-Curry as AB 1776.[16] AB 1776 was amended several times during the legislative process, passed the legislature, and was signed into law on September 30, 2026.[17]

At its August 17, 2026 meeting,[18] the Commission directed the staff to draft a Tentative Recommendation proposing draft statutory language to regulate mergers and acquisitions. The Commission further specified that this language should be distinct from federal law.[19]

Premerger Notification

In addition to crafting a state-level broad merger provision, the Commission was initially interested in exploring language that would give California its own premerger notification laws.[20] However, the Commission deferred consideration in deference to Senate Bill 25.[21] That legislation, which becomes operative on January 1, 2027, creates the California Uniform Antitrust Premerger Notification Act, which requires any person who is required to file a notification pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976[22] to additionally file a copy of

[10] Misuse of market power is based on the idea that conduct by parties with significantly more power than their rivals can have a disproportionate impact on the competitive process by leveraging their size to increase market share rather than by producing a better product or service.

[11] CLRC Staff Memorandum 2025-11; Minutes of Commission Meeting on January 23, 2025, p. 4.

[12] CLRC Staff Memorandum 2025-32, pp. 2-3. The options presented in the memorandum included a provision that would impact mergers and acquisitions, but the Commission decided against including misuse of market power in its Recommendation. Minutes of Commission Meeting on June 26, 2026, p. 6.

[13] The Commission decided against drafting language that would be specific to technology companies and instead decided on broad language that covered conduct in all industries. *Antitrust Law: Single Firm Conduct* (Preprint – March 2026), p. 8; Minutes of Commission Meeting on January 23, 2025, p. 4.

[14] Minutes of Commission Meeting on September 18, 2025, p. 5.

[15] Minutes of Commission Meeting on January 30, 2026, pp. 4-5.

[16] AB 1176 (Aguiar-Curry), as amended March 23, 2026.

[17] 2026 Cal. Stat. ch. 826 (AB 1776, Aguiar-Curry); see also CLRC Staff Memorandum 2026-36, pp. 5-16.

[18] CLRC Staff Memorandum 2026-34, p. 4.

[19] *Id.*

[20] Minutes of Commission Meeting on January 23, 2025, p. 4; see also CLRC Staff Memorandum 2025-11, pp. 10-11.

[21] 2026 Cal. Stat. ch. 3 (SB 25, Umberg); CLRC Staff Memorandum 2025-31, p. 1.

[22] 15 U.S.C. § 18a. The Hart-Scott-Rodino Antitrust Improvements (HSR) Act of 1976 established the

the federal form with the Attorney General if the person's principal place of business is in California or has annual net sales in California of at least 20% of the threshold specified in the federal act.

MERGERS AND ACQUISITIONS

Current Federal and California Law

The Mergers and Acquisitions Working Group explored how California and federal antitrust laws treat anticompetitive conduct in the context of mergers and acquisitions. Their report explains:

> We note that at present the Cartwright Act,[23] the key antitrust statute for the State of California, lacks a specific merger provision, although the state Attorney General's office has exercised enforcement powers under the Clayton Act both on national mergers as well as on mergers of state and local importance.[24]

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> The precise purposes of the merger statutes have long been a matter of debate. The legislative histories of the Clayton and Cellar-Kefauver Acts make clear that one purpose involves the straightforward economic benefits of competition, such as consumer choice, business opportunities, and innovation. But the Congressional debate that preceded these statutes suggests that Congress also intended the antitrust laws to assist in protecting democracy, opportunity, and societal values from the threat perceived from the unchecked growth of trusts and by mergers that create dominant firms and monopolies. [25]

While mergers can be powerful engines for innovation and have real consumer benefits, some can negatively impact the economy by reducing competition, raising prices, or thwarting the development of new businesses.[26]

California does not have a broad, state-level merger statute[27] and can only review mergers under state law for certain industries.[28] Otherwise, the California Attorney General (AG) may act alone or partner with other states or federal agencies to

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federal premerger notification program, which provides the Federal Trade Commission and the Department of Justice with information about large mergers and acquisitions before they occur. Premerger notification involves completing a "Notification and Report Form for Certain Mergers and Acquisitions," with information about each company's business. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. See Federal Trade Commission, Premerger Notification Program.

[23] Bus. & Prof. Code §§ 16700 - 16770.

[24] CLRC Staff Memorandum 2024-25, p.1.

[25] CLRC Staff Memorandum 2024-25, p.2.

[26] Memorandum 2024-14, p. 12.

[27] Fourteen states have a state-level merger statute. See Memorandum 2024-21, EX A-3.

[28] See, e.g., Corp. Code §§ 5914 – 5926 (nonprofit health facilities), §§ 14700 – 14707 (retail grocery firms and retail drug firms), and Health & Safety Code §§ 127507 – 12507.6 (health care).

challenge a merger in federal court under Section 7 of the Clayton Act.[29] (Although partnering with federal agencies to sue under federal law is not required, a state going alone in a merger challenge often faces defendants who raise evidence of federal inaction to suggest federal approval of the merger, thereby casting doubt on the state's case.[30])

The Clayton Act prohibits mergers whose effects "may be substantially to lessen competition, or to tend to create a monopoly."[31] This includes not only the immediate effects of a merger, but likely future impacts as well.[32] To determine whether a merger is lawful, courts generally apply a three-part burden shifting framework. Typically, the plaintiff must first establish a prima facie case[33] that the contested merger may substantially lessen competition or tend to create a monopoly. This can be done with direct evidence, such as increased prices or decreased quality, or indirectly, "by proving that the defendant possessed the requisite market power within a defined market."[34] Once the prima facie case is established, the burden shifts to the defendant to present evidence that plaintiff inaccurately predicts the merger's effect on future competition and/or fails to consider other factors, such as procompetitive benefits, that ameliorate the initial finding.[35] If successful, the burden goes back to the plaintiff to show additional evidence of anticompetitive effects and merges with plaintiff's ultimate burden of proof.[36]

While the Clayton Act's operative language prohibiting mergers whose effect "may be substantially to lessen competition,"[37] has not changed since 1914, there is

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[29] 15 U.S.C. §§ 12–27.

[30] C. Bartholomew, *Playing Nicely with Others: How and Why Antitrust Enforcers Should Work Together*, 85 Antitrust L.J. 241 (2023); see also Memorandum 2024-35, pp. 12-13.

[31] 15 U.S.C. § 18. Mergers are sometimes also challenged under Section 2 of the Sherman Act.

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

[33] CLRC Staff Memorandum 2024-25, p. 2; see, e.g., *U.S. v. AT&T, Inc*. (D.C. Cir. 2019) 916 F.3d 1029, 1032, explaining that a prima facie case can demonstrate a "reasonable probability" of harm to competition either through "statistics about the change in market concentration" or a "fact-specific" showing (quoting *Brown Shoe Co. v. U.S.* (1962) 370 U.S. 294, 323, fn. 39).

[34] *Law v. Nat. Collegiate Athletic Assn.* (10th Cir. 1998) 134 F.3d 1010, 1019; see also *Orson, Inc. v. Miramax Film Corp.* (3d Cir. 1996) 79 F.3d 1358, 1367 ("Due to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make. Accordingly, the courts allow proof of the defendant's 'market power' instead. Market power—the ability to raise prices above those that would prevail in a competitive market—is essentially a 'surrogate for detrimental effects.'" (quoting *United States v. Brown Univ. in Providence in State of R.I.* (3d Cir. 1993) 5 F.3d 658, 668)).

[35] See *United States v. Gen. Dynamics Corp*. (1974) 415 U.S. 486, 498; *United States v. Baker Hughes* (D.C. Cir. 1990) 908 F.2d 980, 990, quoting *General Dynamics* and describing its holding as permitting rebuttal based on a "finding that 'no substantial lessening of competition occurred or was threatened by the acquisition.'"

[36] *U.S. v. AT&T, Inc*. (D.C. Cir. 2019) 916 F.3d 1029, 1032.

[37] Because the second prong of the Clayton Act's Section 7, "tend to create a monopoly" has been largely ignored in the last few decades, the discussion in this draft tentative recommendation will focus on "may be substantially to lessen competition." For a fuller discussion of the second prong, see Robert H. Lande, John M. Newman and Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 Tex. L.Rev. 785 (2025).

widespread acknowledgement that judicial interpretation has eroded its original meaning.[38] 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 interpretation requiring evidence of only "a reasonable probability" or "a reasonable likelihood" of competitive harm.[39]

Evolution of Federal Merger Law

The original Clayton Act was passed in 1914 to bolster the 1890 Sherman Antitrust Act[40] by preventing monopolies before they occur. This was at a time when industry consolidation was increasing and concern for preserving competition was paramount.[41]

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.[42] (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."[43] Its probabilistic phrase "may be" authorized challenges to mergers whose future competitive harm was not yet actual but still reasonably probable.

In 1950, the Clayton Act was amended[44] due to frustration over "the extent to which the American economy has become concentrated and centralized in the hands of a few giant corporations."[45] 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

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

[39] Seventh Supplement to CLRC Staff Memorandum 2024-24, EX 2.

[40] *Sherman Anti-Trust Act,* Milestone Documents, National Archives.

[41] U.S. House of Representatives, History, Art, and Archives, *The Clayton Antitrust Act*.

[42] Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730.

[43] S. Rep. No. 63-698, 2d Sess., p. 1 (1914).

[44] Cellar-Kefauver Antimerger Act of 1950, 64 Stat. 1225 (1950).

[45] S. 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, & Y. 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.

mergers between firms in different markets.[46] The amendments also grammatically corrected "may be to substantially lessen competition" from the original act to "may be substantially to lessen competition."[47]

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.[48] (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.[49] (emphasis added)

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[46] William J. Baer, Assistant Atty. Gen., Antitrust Div., U.S. Dept. of Justice, *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").

[47] William J. Baer, Assistant Atty. Gen., Antitrust Div., U.S. Dept. of Justice, *Origins of the Species: The 100 Year Evolution of the Clayton Act*, Remarks at ABA Clayton Act 100th Anniversary Symposium, 2014 WL 6882765, at p. *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.").

[48] 15 U.S.C. § 18.

[49] S. Rep. No. 81-1775, 2d Sess., p. 4298 (1950).

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. United States*:[50]

> 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 merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.[51] (emphasis added)

While "may be" does not require certainty about the future harm from a merger, it does require some likelihood.[52] In addition to cases interpreting "may be" as requiring "reasonable probability,"[53] some have also interpreted it to require an "appreciable danger"[54] or "reasonable likelihood" of such effects.[55]

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

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[50] (1957) 370 U.S. 294.

[51] *Id.* at 325.

[52] See also *F.T.C. 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.").

[53] *Brown Shoe Co.*, 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. Cal. 1963) 223 F.Supp. 849, 856.

[54] *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Heath System, Ltd*. (9th Cir. 2015) 778 F.3d 775, 788 (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 p. 1391.

[55] *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).

the transaction."[56] 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*[57] 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:

> 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,[58] 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.[59]** (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][60]

To reduce plaintiffs' burden of proof, the Court created a structural presumption[61] 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."[62]

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[56] *F.T.C. v. Elders Grain, Inc.* (7th Cir. 1989) 868 F.2d 901, 906.

[57] *U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321.

[58] In this case, the merger would have resulted in a single bank controlling at least 30% of the relevant market.

[59] *Philadelphia Nat. Bank,* 374 U.S. 321.

[60] *Id.* at 364.

[61] The "structural presumption" is known as such for its "almost decisive role it accorded to market concentration." CLRC Staff Memorandum 2024-25, p. 18.

[62] *Philadelphia Nat. Bank*, 374 U.S. at 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.

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[63] in 1974, which had previously fast-tracked certain cases to the Supreme Court. This was followed by the Hart-Scott-Rodino Act in 1976,[64] which required merging companies to file notices with the Federal Trade Commission and the United States Department of Justice for certain acquisitions, resulting in fewer court cases and more merger settlements.[65] Two years later, Robert Bork published "The Antitrust Paradox,"[66] which shifted the U.S. 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.[67] The Chicago School justified inaction and nonintervention by arguing against many of the principles supporting the early antitrust framework:

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[63] Pub. L. No. 93-528. The Expediting Act allowed antitrust cases to be directly appealed to the U.S. Supreme Court under certain circumstances.

[64] 15 U.S.C. § 18a.

[65] See S. Razi, *Facing Reality: Litigating the Fix When Pre-Merger Negotiations Fail* (2024) 40 Columbia Bus. 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."); J. 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.").

[66] 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.

[67] CLRC Staff 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. 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); *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & Econ. at 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.*

> … 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."[68]

Despite broad criticism,[69] these concepts continue to have a profound influence on federal jurisprudence,[70] 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."[71]

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*

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[68] CLRC Staff Memorandum 2024-26, fn. 18, citing Gilbert, Antitrust Reform: An Economic Perspective.

[69] CLRC Staff Memorandum 2024-26, pp. 4-6; CLRC Staff Memorandum 2024-33, pp. 6-7; CLRC Staff Memorandum 2024-15, pp. 6-7.

[70] CLRC Staff Memorandum 2024-26, fn. 18, citing Gilbert, *Antitrust Reform: An Economic Perspective*; CLRC Staff Memorandum 2024-33, pp. 6-7; CLRC Staff Memorandum 2024-15, pp. 6-7; see also Professor John Newman, June 19, 2024 (Seventh Supplement to CLRC Staff 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. F.T.C.* (5th Cir. 2023) 88 F.4th 1036,1048 (is likely); *F.T.C. v. Atlantic Richfield Co*. (4th Cir. 1977) 549 F.2d 289, 294-95 (demanding clear proof of possible entry but for the merger); *Tenneco, Inc. v. FTC* (2d Cir. 1982) 689 F.2d 346, 352 (must show potential competitor "would likely" enter).

[71] P. 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. Dept. of J. and the F.T.C., 1968 Merger Guidelines (1968) pp. 1-2.

Bank remaining good law.[72] 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."[73]

2023 Federal Merger Guidelines

In 2023, the United States Department of Justice 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.[74]

David Lawrence, Policy Director of the Antitrust Division, United States 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.[75]

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.[76]

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[72] P. 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 2).

[73] Professor John Newman, June 19, 2024 (Seventh Supplement to CLRC Staff Memorandum 2024-24, EX 2); *F.T.C.,* 768 F.Supp. 3d at 812-813 (must show "likely"); *UnitedHealth Group, Inc.*, 630 F.Supp. 3d at 151-52 (using "would be likely" and "is likely"); *Illumina, Inc.*, 88 F.4th at 1048 (is likely); *Atlantic Richfield Co*., 549 F.2d at 294-95 (demanding clear proof of possible entry but for the merger); *Tenneco, Inc.,* 689 F.2d at 352 (must show potential competitor "would likely" enter).

[74] U.S. Dept. of J., Office of Public Affairs, *Justice Department and Federal Trade Commission Release 2023 Merger Guidelines* (Feb. 6, 2025).

[75] *Conversation about 2023 DOJ/FTC Guidelines* (2024) 39 Fall Antitrust 23, 26.

[76] 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. Cal. Apr. 17, 2026) No. 2:26-cv-00976 TLN-CKD, 2026 WL 1049295, at p. *4; *U.S. v. Hewlett Packard Enterprise Co*., (N.D. Cal. Dec. 1, 2025) No. 25-cv-00951-PCP, 2025 WL 3454834, at pp. *1, 8; *U.S., et al. v. Live Nation Entertainment, Inc*. (S.D.N.Y. Oct. 1, 2025) No. 1:24-cv-3973-AS, described in a press release by California Attorney General Rob Bonta, Apr. 15, 2026.

Public Comments Urging Merger Reform and Cautioning Against Merger Reform

Throughout the Antitrust Law Study process, the Commission received numerous public comments that ranged from urging the Commission to draft a state level merger law that would restore competition in markets to comments insisting change will disrupt California's thriving economy.[77]

The Commission received numerous public options on the merger language they were considering.[78] Comments urging reform generally asserted that California needs a California-specific law to develop stronger legal standards to restore California workers' bargaining power[79] and enable small businesses to thrive.[80]

Conversely, individuals opposing any reform that deviates from federal merger law warn that California's innovative technology, life sciences, and manufacturing sectors thrive due to the current merger and acquisition climate, and any change may come "at enormous cost to the California economy.[81]

Need for a Merger Provision in California Law

The widespread recognition of the increasing inadequacy of state and federal antitrust laws to address concentration and inequality in the context of the modern economy prompted the California Legislature's request to study antitrust law reform.[82] The goal of antitrust law is to protect robust market competition in all markets,[83] and recent federal court rulings on mergers have made effectuating that purpose more difficult.[84]

The explosion of merger activity over the last decades has facilitated significant market consolidation and unusually high profit margins.[85] Though federal merger provisions have been largely unchanged since 1950, federal courts have made it more difficult to successfully challenge a merger by requiring greater and more certain proof of possible competitive harm; narrowly defining nascent, potential and

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[77] See Antitrust Law Study webpage, Index of Public Comments.

[78] CLRC Staff Memorandum 2026-29 and the First, Second, Third and Fourth Supplements thereto; CLRC Staff Memorandum 2026-21; CLRC Staff Memorandum 2026-14 and the First, Second, and Third Supplements thereto; CLRC Staff Memorandum 2025-42 and the First, Second, Third, Fourth, and Fifth Supplements thereto.

[79] See, e.g., Fourth Supplement to Memorandum 2026-29, EX 1.

[80] See, e.g., Second Supplement to Memorandum 2029-29, EX 26-28.

[81] See, e.g., Third Supplement to Memorandum 29-29, EX 1; Chamber of Commerce August 14, 2026, EX 1.

[82] 2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks).

[83] CLRC Staff Memorandum 2024-33, p. 7; see also Antitrust Division of the U.S. Dept. of Justice: *Antitrust Law*; Department of Justice, *Antitrust & Business Competition*.

[84] CLRC Staff Memorandum 2024-15, p. 13. See generally, Third Supplement to CLRC Staff Memorandum 2024-32, EX 84; A. Deluard, *Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities*, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108, 108-109 (2023).

[85] CLRC Staff Memoranda 2024-14, p. 1; 2024-25, p. 3.

maverick competitors; failing to recognize labor losses as a harm; and entertaining dubious claims of efficiencies.[86] The United States Department of Justice and Federal Trade Commission 2023 Merger Guidelines[87] attempted to counter many of these developments as noted above, but the guidelines lack the force of law and can be rejected by the courts and new leadership.

These are just a few reasons scholars and practitioners argue California should not be reliant on the federal merger regime and instead develop its own law.[88] Additionally, a California state merger law would allow state court judges to adjudicate challenges, who may bring a state-centric perspective to antitrust.

If California simply mirrors federal law, California will effectively import the decades of federal jurisprudence that has diluted the Clayton Act's original scope and strength. Accordingly, the Commission concluded that California should adopt a mergers provision that distinguishes itself from federal law and those decisions that unduly hinder the competitive marketplace.[89]

The Commission, however, decided against adopting completely new antitrust language.[90] Many stakeholders argued that a new, untested antitrust framework could be risky and invite uncertainty, potentially chilling innovation and business growth.[91] Further, antitrust provisions without federal precedent might also pose a significant challenge to state courts, which would be required to essentially build a new body of antitrust jurisprudence. As a result, the Commission settled on a hybrid approach that selectively draws on federal statutory and case law to ground the new California merger regime, while reflecting California's values and enforcement priorities by tailoring guidelines and definitions to California's specific concerns.

BACKGROUND ON TENTATIVE RECOMMENDATION

Operative Provision

The Commission evaluated and considered multiple options to address mergers and acquisitions within the Cartwright Act.[92] The Commission settled on a language that draws on Section 7 of the Clayton Act but with modifications reflecting California's values and enforcement priorities and that signify California is not bound to federal antitrust case law.

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[86] CLRC Staff Memorandum 2024-15, p. 13. See generally, Third Supplement to CLRC Staff Memorandum 2024-32, EX 84, A. Deluard, *Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities*, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108, 108-109 (2023).

[87] U.S. Dept. of Justice & Fed. Trade Com., 2023 Merger Guidelines (2023).

[88] See, e.g., Technology Platforms Working Group Presentation, June 20, 2024, transcript, p. 12.

[89] CLRC Staff Memorandum 2025-31, pp. 2-3; Minutes of Commission Meeting on January 23, 2025, p. 4.

[90] Minutes of Commission Meeting on June 26, 2025, p. 5.

[91] See, e.g., CLRC Staff Memorandum 2025-42, pp. 6-8.

[92] CLRC Staff Memoranda 2025-31, pp. 3-12; 2025-42, pp. 15-16; 2026-21, p. 18; Memorandum 2026-29.

The Commission approved the language below at its August 17, 2026 meeting, based on feedback from the Commission at its March 20, 2026 meeting[93] and the options presented in Memorandum 2026-29.

> **Section 16733 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) In determining whether the effect of a merger or acquisition may be substantially to lessen competition or tend to create a monopoly or monopsony, the standard of proof for determining the certainty of possible anticompetitive effects shall be a reasonable probability (*Brown Shoe v. United States* (1962) 370 U.S. 294).
>
> (d) 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.
>
> (e) In interpreting this section, the 2023 Merger Guidelines of the United States Department of Justice and the Federal Trade Commission shall be considered persuasive authority and understood to complement and be harmonized with this section.
>
> (f) 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 language largely tracks the Clayton Act's basic standards and should ameliorate concerns that significant differences in federal and state merger law will

[93] CLRC Staff Memorandum 2026-14, p. 4.

cause confusion and uncertainty. However the language does depart in some respects to clarify that the statute should be interpreted in accordance with California law and not merely copy federal jurisprudence.

Subdivisions (a) and (b) separate "may be substantially to lessen competition" from "tend to create a monopoly" to distinguish the second prong.[94] This is to address the federal judiciary's decades-long disregard of the "tend to create a monopoly" prong which some argue is central to the current state of market consolidation. Congress originally intended both prongs to be mutually reinforcing to protect against abuses,[95] and the language remains good law, and has been successfully, but infrequently deployed.[96] By splitting the two distinct prohibitions into two separate sentences, the statute makes clear that California is adopting the balanced and effective sliding-scale approach frequently forgotten by federal enforcers."[97]

Subdivision (c) clarifies the standard of proof for determining whether the effect of a merger or acquisition may be substantially to lessen competition or tend to create a monopoly or monopsony. This subdivision directs courts to only require "a reasonable probability" of the certainty of anticompetitive effects. The phrase "reasonable probability" is drawn from the legislative history of Section 7 of the Clayton Act[98] and reaffirmed in *Brown Shoe*.[99]

Subdivision (d) codifies language from *Philadelphia National Bank*.[100] 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 increasing economic concentration in enacting the Clayton Act[101] and declared the merger illegal because 30% would result in an "inherently anticompetitive tendency" in the market.[102] This framework came to be known as

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[94] The Clayton Act (15 U.S.C. § 18) states:

> 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 to tend to create a monopoly*. (Emphasis added)

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

[96] *Id.*

[97] *Id.* at pp. 14-16, EX 92, 96.

[98] Sen. Rep. No. 81-1775, 2d Sess., p. 4298 (1950).

[99] (1962) 370 U.S. 294.

[100] (1963) 374 U.S. 321.

[101] *Id.* at pp. 362-363.

[102] *Id.* at p. 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." *Id.* at pp. 363, 366. The court noted that market shares below 30% might also pose a threat to competition. *Id.* at pp. 364, 365. "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that

the "structural presumption" because of its decisive role in merger cases.[103] 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.[104] Including *Philadelphia National Bank's* holding in state law is intended to restore its precedence in merger practice.

Subdivision (e) references the 2023 Federal Merger Guidelines as a persuasive authority.[105] These Guidelines provide detailed information about the Department of Justice and the Federal Trade Commission's procedures and enforcement priorities and are updated periodically after years of studies, public workshops, state collaboration and expert outreach.[106] The 2023 Guidelines establish quantifiable metrics intended to recapture the original intent of the Clayton Act, providing additional guidance beyond caselaw. 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.

Subdivision (f) is drawn from the Clayton Act to create an exemption for persons acquiring stock or other assets for investment purposes, or forming subsidiaries or branches, if the effects do not substantially lessen competition.[107]

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."

[103] CLRC Staff Memorandum 2024-25, p. 18.

[104] *Philadelphia Nat, Bank*, 374 US at p. 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.").

[105] Minutes of Commission Meeting on March 20, 2026, p. 4.

[106] "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* (Dec. 18, 2023).

[107] Memorandum 2025-31, p. 4 (This language "creates an exemption for persons acquiring stock or other assets for investment purposes, or forming subsidiaries or branches, if the effects do not substantially lessen competition.").

CONCLUSION

Based on the foregoing review and analysis, the Commission recommends that California law should include a mergers and acquisition provision that is tailored to reflect California's values and enforcement priorities and is not bound to federal antitrust case law.

PROPOSED LEGISLATION

Bus. & Prof. Code § 16733 (added) Mergers and Acquisitions

SEC. ___. Section 16733 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) In determining whether the effect of a merger or acquisition may be substantially to lessen competition or tend to create a monopoly or monopsony, the standard of proof for determining the certainty of possible anticompetitive effects shall be a reasonable probability (*Brown Shoe v. United States* (1962) 370 U.S. 294).

(d) 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.

(e) 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.

(f) 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.

Comment. Subdivisions (a) and (b) are drawn from the first paragraph of Section 7 of the Clayton Act (15 U.S.C. § 18). They separate "may be substantially to lessen competition" from "tend to create a monopoly" to distinguish the second prong and acknowledge that Congress originally intended both prongs to be mutually reinforcing to protect against abuses.

Subdivision (c) clarifies in the standard for determining whether the effect of a merger or acquisition in question may be substantially to lessen competition or tend to create a monopoly or monopsony. This subdivision directs courts to require only "a reasonable probability" of the certainty of anticompetitive effects. The phrase "reasonable probability" is drawn from the legislative history of Section 7 of the Clayton Act Sen. Rep. No. 81-1775, 2d Sess., p. 4298 (1950); see also *Brown Shoe Co*., 370 U.S. 297.

Subdivision (d) codifies the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321 to restore it to its precedence in California law. This case created a "structural presumption" that 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. This subdivision in intended to restore its precedence in merger practice.

Subdivision (e) establishes the 2023 Federal Merger Guidelines as a persuasive authority. These guidelines provide detailed guidance to courts about the Department of Justice and the Federal Trade Commission's procedures and enforcement priorities.

Subdivision (f) is drawn from the Clayton Act to create an exemption for persons acquiring stock or other assets for investment purposes, or forming subsidiaries or branches, if the effects do not substantially lessen competition.