November 24, 2025

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

Re: Study B-750 – Recommendations on Merger Provisions

Dear Chairperson Carrion and Honorable Commissioners:

The undersigned organizations offer the following recommendations to the California Law Revision Commission (CLRC) as it considers making recommendations in furtherance of establishing a state framework for scrutinizing mergers.

Amid concerns regarding the integrity of federal enforcement of merger laws, California faces significant challenges in its own efforts to protect Californians from the harm of anti-competitive mergers. First, defendants have contested applicability of the Cartwright Act's prohibition against "trusts" to anticompetitive mergers, creating barriers for the Office of the State Attorney General (the "State AG") to challenge mergers in state court.[1] Second, merging parties are not obligated to file pre-merger notifications with the State AG, placing the office at a significant information disadvantage to challenge mergers even under federal law.

As set forth in Memorandum 2025-31, "Draft Language for Merger Provisions," the Commission has already voted to recommend that California adopt its own merger provisions but has yet to articulate a specific policy approach. In the first part of this letter, **the undersigned organizations provide additional support for Options Two, Three and Four** as set forth in Memorandum 2025-31, and are therefore aligned with experts and advocates across labor, consumer rights, and antitrust policy.

The second and third parts of this letter provide additional recommendations that the Commission should adopt in furtherance providing greater clarity to stakeholders and ease of administration. Those additional recommendations are as follows:

---

[1] CLRC Memorandum 2024-25, "Expert Report: Mergers and Acquisitions," accessible online: https://clrc.ca.gov/pub/2024/MM24-25.pdf

1) Create a rebuttable presumption that a merger is illegal where there is a history of serial acquisitions, or "roll-ups," in the same or adjacent markets;
2) Create a rebuttable presumption of illegality for acquisitions by presumptively dominant firms (i.e., those with a market cap greater than $600 billion); and
3) Require state pre-merger notification for firms with sufficient business in the State of California, consistent with the Uniform Law Commission's model legislation, and a fee-based cost recovery mechanism to cover anticipated costs to the Office of the Attorney General.

The additional presumptions would not deprive merging parties of any opportunity to defend their merger but would shift that burden based on verifiable market conditions. These recommendations and accompanying analysis are set forth in greater detail below.

I. Recommending Options Two, Three and Four.

Broadly speaking, we recommend that the Commission endorse elements of Options Two, Three, and Four, as set forth in Memorandum 25-31. In taking this position, we find alignment with recommendations set forth in a August 20, 2025 Letter to the Commission on behalf of the International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, and the California Federation of Labor.[2] We are also in alignment with recommendations set forth in a September 12, 2025 Letter to the Commission by the Writers Guild of America West[3] and the September 18, 2025 Letter to the Commission by UDW/AFSCME Local 3930.[4]

For the sake of preserving the thrust of those recommendations here, we summarize them below and respond to potential criticism of each approach, as anticipated by CLRC staff in Memorandum 25-31:

Option Two would (1) adopt the legacy presumption established by the United States Supreme Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), which states that mergers "that may produce a firm controlling an undue percentage share of the relevant market" are illegal "in the absence of evidence clearly showing the merger is not likely to have such anticompetitive effects," and (2) codify the 2023 merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission as "persuasive authority."

In response to potential concerns that the 2023 Merger Guidelines may fall out of step with evolving federal guidance, we submit that 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, even where plaintiffs have lost – testament to their balance and durability.[5]

---

[2] Memorandum 2025-42, at Ex 156.

[3] First Supplement to Memorandum 2025-42, at Ex 1.

[4] Second Supplement to Memorandum 2025-42, at Ex 1.

[5] See, *e.g.*, *Fed. Trade Comm'n v. Tapestry, Inc.,* 755 F. Supp. 3d 386, 412 (S.D.N.Y. 2024); *Fed. Trade Comm'n v. Kroger Co.,* No. 3:24-CV-00347-AN, 2024 WL 5053016, at *13 (D. Or. Dec. 10, 2024); *Fed. Trade Comm'n v. Meta Platforms, Inc.*, 775 F. Supp. 3d 16, 36 (D.D.C. 2024); *Pennsylvania v. Ctr. Lane Partners,* 2024 WL 4792043, at *6 (W.D. Pa. Nov. 14, 2024); *Tevra Brands LLC v. Bayer HealthCare LLC*, 2024 WL 2261946, at *5 (N.D. Cal. May 16, 2024); *B & R Supermarket, Inc. v. Visa Inc.*, 2024 WL 4252031, at *10

Option Three would codify specific language from the 2023 Merger Guidelines,[6] namely a presumption of illegality for mergers that would result in a market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more (indicating a "highly concentrated" market) and a change in HHI greater than 100 points; or any entity with a more than 30 percent market share and a change in HHI greater than 100 points. HHI is a universally accepted, *quantifiable* metric for calculating market concentration in federal antitrust litigation.

In response to potential concerns that the HHI levels or 30% market share threshold are too low, we submit that that the HHI threshold is a legacy of the 1982 Merger Guidelines, which lasted until an aberrant liberalization of that standard in 2010. Further, a 30% market share threshold also derives from *Philadelphia Nat'l Bank*.[7] Any concern that this threshold is too rigid is assuaged by the fact that this would be a rebuttable presumption, and staff's Memorandum 25-31 includes recommended language that provides much-needed clarity regarding the operation of defendants' rebuttal burden. Finally, concern that a presumption rooted in HHI or market share thresholds is too rigid is assuaged by the additive "appreciable risk" standard set forth in Option Four.

Option Four would bolster federal prohibitions against anti-competitive mergers with a prohibition against mergers whose effect "may be to create an ***appreciable risk*** of lessening competition more than a de minimis amount" (emphasis added). In support of this recommendation, Memorandum 25-31 references Senator Klobuchar's Competition and Antitrust Law Enforcement Reform Act ("CALERA"). The extant Clayton Act standard, which prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly," has proven vulnerable to erosion, including recently by a federal court in California, by a misinterpretation of the text that supplants the prohibition against mergers that "***may*** be substantially to lessen competition" with a higher burden of proof that a merger "is ***likely*** to substantially lessen competition" or "would ***probably*** substantially lessen" competition (emphasis added).[8]

An "appreciable risk" standard is not new. Rather, it is based in the text of the Clayton Act itself and in federal interpretations of the law, as noted by CLRC staff in Memorandum 25-

---

(E.D.N.Y. Sept. 20, 2024); *Innovative Health LLC v. Biosense Webster, Inc.*, 2025 WL 1712388, at *6 (C.D. Cal. Apr. 22, 2025); *Ambilu Tech. AS v. U.S. Composite Pipe S.*, 2024 WL 993284, at *7 (M.D. La. Mar. 7, 2024); *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 2024 WL 5174825, at *9 (E.D. Va. Dec. 19, 2024); *In re Essar Steel Minnesota LLC*, 2024 WL 4047451, at *17 (Bankr. D. Del. Sept. 4, 2024).

[6] Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (issued December 18, 2023) ("2023 Merger Guidelines"), accessible online: https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[7] *Phila. Nat'l Bank,* 374 U.S. at 364-65 ("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."); see also Robert H. Lande, Erik Peinert, "Comments of American Economic Liberties Project on 2023 Draft Merger Guidelines," American Economic Liberties Project, accessible online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4597323

[8] 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., et al.*, 681 F.Supp.3d 1069, at 1089, 1090 (N.D.Cal., July 10, 2023.

31.[9] In fact, the Supreme Court has repeatedly interpreted the Clayton Act in a manner consistent with an "appreciable risk" standard, including by focusing on the neglected latter half of the Clayton Act,[10] which bars mergers that "tend to create a monopoly."[11] The Supreme Court has thus condemned mergers that move a market "measurably closer to [monopoly]."[12] The Court has separately observed:

> "[I]t is immaterial that the tendency is a creeping one rather than one that proceeds at full gallup; nor does the law await arrival at the goal before condemning the direction of the movement."[13]

Other scholars have referred to an "appreciable risk"-like standard as the Clayton Act's "incipiency mandate," as stated by the Supreme Court in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). In *Brown Shoe*, the Court explained Congress' intent to prohibit mergers before markets already succumb to concentration, "at a time when the trend to a lessening of competition in a line of commerce was still in its *incipiency*" (emphasis added),[14] explaining further that the intent of the Clayton Act is to "brake this force at its outset and before it gathered momentum."[15] An "appreciable risk" standard thus reflects long-standing interpretations of federal merger law.

In response to concerns that an "appreciable risk" standard "comes with significant risks," by which CLRC staff anticipates arguments made by the opponents of *any* reform effort, we again submit that the standard is firmly rooted in federal merger law, the Clayton Act. Any argument to the contrary is a distraction designed to confuse this Commission and lawmakers, with the implicit intent of eroding the law even further.

California can – and should – seize the opportunity to codify longstanding, well-understood, and highly administrable principles of anti-merger law, which – not incidentally – find their roots in an era characterized by more robust competition and lesser inequality.

II. Additional Presumptions of Merger Illegality – Serial Acquisitions ("Roll Ups") and Mega-Firm Acquisitions

---

[9] Memorandum 25-31, at 11, citing *St. Alphonsus Medical Center-Nampa v. St. Luke's Health System, Ltd.* (9th Cir. 2015), 778 F. 3d 775, 778 ("all that is required is a merger create an appreciable danger of such consequences").

[10] The CLRC's Expert Report on Mergers and Acquisitions similarly neglects the latter half of the Clayton Act's prohibition, focusing instead on the Clayton Act's "key phrase." Memorandum 2024-25, accessible online: https://clrc.ca.gov/pub/2024/MM24-25.pdf

[11] Robert H. Lande, John M. Newman, Rebecca Kelly Slaughter "The Forgotten Anti-monopoly Law: The Second Half of Clayton Act §7," 103 Texas L.R. 103 (2024).

[12] *Id.*, at 26, citing *U.S. v. E.D. du Pont de Nemours & Co.*, 353 U.S. 586, at 592-93 (1957).

[13] *Int'l Salt Co. v. United States,* 332 U.S. 392, 396 (1947).

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

[15] *Id.*, at 318; *see also* Peter C. Carstensen, Robert H. Lande, "The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors," 2018 Wisc. L.R. 783 (2018), accessible online: https://scholarworks.law.ubalt.edu/all_fac/1086/.

The Commission should provide further clarity to the state's merger law by codifying simple, easy to interpret presumptions. Discussed below in turn, merging parties would be allowed to rebut a presumption of illegality in either of two scenarios:

1) First, where allegations include evidence of a series of acquisitions by the same firm within the same or adjacent markets; and
2) Second, where the acquiring firm is of an extremely large size (e.g., with a market cap exceeding $600 billion), such that dominance can be safely presumed.

In either scenario, the implicit presumption is that the acquiring firm is seeking to neutralize real or perceived nascent competitors, or to "corner" a market through serial acquisitions.

A. Acquisitions should be presumptively illegal where the evidence reveals serial acquisitions of firms within the same or complementary markets.

Both the CLRC Expert Report on Mergers and Acquisitions[16] and the 2023 Merger Guidelines[17] address the phenomenon whereby a series of mergers, including smaller mergers that may not trigger federal antitrust scrutiny, affect an entire industry and enhance a trend toward concentration. Even if the Commission recommends the 2023 Merger Guidelines be designated as persuasive authority (Option 2, above), doing so would not create the same clarity and ease of administrability accompanying a presumption of illegality where a plaintiff provides evidence of serial acquisitions.

Firms pursue serial acquisitions for several reasons. For instance, several studies have found a strong, positive correlation between serial acquisitions and shareholder value growth.[18] Firms that adopt a highly acquisitive strategy tend to end up doing business on a larger scale and with increased market power, allowing them to raise prices or extract concessions from workers or suppliers.[19] The choice to grow through acquisition can be a less risky proposition than building from scratch, and smaller firms with less cash reserves may be more willing to sell at a lower value. In short, any presumed efficiencies of roll-up strategies tend to produce greater harms for workers, increased pricing power for the acquiring firm (or higher prices for consumers), and stronger buyer power that can be used as leverage against suppliers.

Roll-up strategies are often associated with the rise of private equity. In the decade prior to 2022, more than 4,000 private equity firms in the United States raised over $2 trillion for

---

[16] Expert Report: Mergers and Acquisitions, Memorandum 2024-25, CLRC, May 28, 2024, at 5, https://clrc.ca.gov/pub/2024/MM24-25.pdf

[17] *Supra*, fn. 6 (*see* Guideline 2.8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.)

[18] Gerry Hansell, Decker Walker, and Jens Kengelbach, "Lessons from Successful Serial Acquirers: Unlocking Acquisitive Groth," Boston Consulting Group, October 1, 2014; Gregory Schooley, "How mergers and acquisitions can create value, defying M&A skeptics," Ernst & Young, March 3, 2021

[19] Denise Hearn, Krista Brown, Taylor Sekhon, and Erik Peinert, "The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions," American Economic Liberties Project, December 2022, https://www.economicliberties.us/wp-content/uploads/2022/12/Serial-Acquisitions-Working-Paper-R4-2.pdf

buyout strategies alone.[20] There are now more than twice the number of private equity-owned companies as there are public companies.[21] And there is hardly an industry private equity has not tried to roll up: comedy clubs, ad agencies, water bottles, local newspapers, healthcare providers (including hospitals and physician practices), and nursing homes.[22]

Even worse, according to a public inquiry initiated by the Federal Trade Commission and Department of Justice, businesses can be exempt from reporting roll-up acquisitions to federal antitrust agencies if they fall below reporting thresholds.[23] This means that individual acquisitions may fly under the radar, even if the aggregate harms to consumers, workers, and small businesses are the same. The FTC/DOJ study on serial acquisitions and a parallel inquiry including the Department of Health and Human Services into the impact of private equity roll-ups of physician practices appear to have since been terminated by the Trump Administration.

California can continue to be the standard bearer despite federal inaction on firm roll-ups. The Commission should recommend that merger reform include a rebuttable presumption of illegality where a plaintiff alleges evidence of multiple or serial acquisitions in the same or adjacent markets. To avoid any erosion of the right of defense, any such presumption should be subject to the same affirmative defenses and opportunity for rebuttal available under the general merger prohibition.

B. Acquisition of nascent competitors by firms with a market cap exceeding $600 billion should be presumptively illegal.

California's new merger law would benefit further from a structural presumption of illegality for acquisitions by firms that are so large that their dominance in a relevant market can be presumed. The 2023 Merger Guidelines provide that mergers may violate the law when they entrench or extend an already dominant position.[24] The CLRC can provide greater clarity to the law by codifying a rebuttable presumption of anticompetitive merger effects for acquisitions by presumptively dominant firms of firms in the same or complementary markets.

There are currently just 15 firms in the United States with a market cap greater than $600 billion, and 16 firms with a market cap greater $500 billion.[25] The vast majority of these firms have demonstrated durable market power for well over a decade, further supporting an inference of dominance. The top 10 most dominant firms include all four digital platforms that were the subject of a 2022 investigation by the House Subcommittee on Antitrust of competition

---

[20] Hugh MacArthur, Josh Lerner and State Street Global Markets & State Street Private Equity Index, "Public vs. Private Equity Returns: Is PE Losing Its Advantage?" Bain and Company, February 24, 2020.

[21] Phil Mackintosh, "The Battle for Public vs Private Equities," Nasdaq, February 27, 2020.

[22] *Supra*, fn 18.

[23] Press Release, "FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy," Federal Trade Commission, May 23, 2024, accessible online: https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-doj-seek-info-serial-acquisitions-roll-strategies-across-us-economy

[24] *Supra*, fn. 6 (Guideline 2.6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.)

[25] Largest Companies by Marketcap, https://companiesmarketcap.com/.

in digital markets – Apple, Alphabet, Amazon, and Meta.[26] That investigation concluded that the digital economy is "highly concentrated," and that concentration was attributed in part to hundreds of acquisitions in the preceding decade.[27] As with serial acquisitions, acquisitions by dominant firms may fly under the radar when targeting nascent threats before they have developed into full-blown rivals. Yet again, the aggregate harms to workers, consumers, and trading partners can be severe.

California law should seek to prohibit acquisitions by presumptively dominant, mega-firms that would further entrench their dominance, risk foreclosure, or heighten entry barriers to new business formation. But the law need not deprive defendants of an opportunity to defend themselves against a presumption of illegality. Rather, as with the aforementioned presumptions, antitrust defendants would retain their ability to assert affirmative defenses or present evidence in support of an absence of anticompetitive effects.

Consistent with the materials presented to the California Law Revision Commission, and in the spirit of recommending a law that is easily understood and administrable, the Commission should recommend a presumption of merger illegality applicable only to firms with a market cap greater than $600 billion.

III. State Pre-Merger Notification with Cost Recovery Mechanism

We further recommend that the Commission formally support legislation that would provide the California State Attorney General with contemporaneous pre-merger notification when a business with a sufficient nexus to the State files such notification with the federal antitrust agencies. To alleviate the administrative burden on the Office of the State Attorney General, we further recommend that any such legislation include a fee-based mechanism for the office to recover costs.

The Commission is well-versed on one such proposal emanating from the Uniform Law Commission (ULC). On December 19, 2023, the Commission heard, at its request, a presentation by representatives from the ULC about a draft bill on antitrust pre-merger notification.[28] Subsequently, the Commission heard about a revised version of that model legislation at its June 20, 2024 meeting.[29] Despite its ripeness, the Commission has yet to endorse that proposal, but it is well in the scope of the Commission's upcoming action on merger reform.

The model legislation by the ULC is straightforward and represents a consensus approach by representatives from at least 15 states and the District of Columbia. The context for

---

[26] Investigation of Competition in Digital Markets, Subcommittee on Antitrust, United States House of Representatives, July 2022, accessible online: https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf

[27] *Id.*, at 29.

[28] Memorandum 2023-49, CLRC, Dec. 12, 2023, accessible online: https://www.clrc.ca.gov/pub/2023/MM23-49.pdf

[29] First Supplement to Memorandum 2024-24, CLRC, May 30, 2024 (*see* Antitrust Pre-Merger Notification Act, Uniform Law Commission), accessible online: https://clrc.ca.gov/pub/2024/MM24-24s1.pdf

the legislation can be found in the Prefatory Note to the ULC's Antitrust Pre-Merger Notification Act, as attached to Memorandum 2024-24. Notably, while State Attorneys General already have a legal right to challenge anticompetitive mergers under the federal Clayton Act, they do not have access to – and federal agencies are prohibited from sharing, for confidentiality reasons – pre-merger notification materials. As articulated by the ULC, "This puts the AGs at a significant disadvantage in the process of merger review."[30]

In December 2024, Senator Umberg introduced Senate Bill 25, which reflects the ULC's model legislation. While that bill enjoyed near unanimous support in both legislative chambers – and no official opposition – it was ordered to inactive prior to a final vote in the Assembly. We speculate that this was owed in part to the potential fiscal cost to the Attorney General's Office, which an analysis by the Assembly Appropriations Committee estimated at $516,000 in the first fiscal year, and $921,000 annually thereafter for software licensing and four new staff positions.[31] While the bill was amended to allow the Attorney General to impose flat fees for merger filings, the CLRC should specifically recommend that those fees be determined and rendered adjustable by the Attorney General's Office to reflect actual up-front and ongoing costs.

In sum, we encourage the CLRC to adopt formal support for the Uniform Law Commission's Uniform Antitrust Pre-Merger Notification Act, as amended to allow the Office of the Attorney General to impose and adjust fees that reflect actual up-front and ongoing costs.

IV. Conclusion

We thank the Commission for its ongoing efforts to update the Cartwright Act to meet the present needs of a fair economy in California.

Sincerely,

American Economic Liberties Project

California Nurses Association

Consumer Federation of California

Democracy Policy Network

Economic Security California Action

[Cont. on next page]

[30] *Id.*, at EX 4.

[31] Assembly Committee on Appropriations, SB 25 (Umberg), July 9, 2025, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202520260SB25#

Institute for Local Self-Reliance

TechEquity Collaborative

Writers Guild of America West

UDW AFSCME Local 3930

UFCW Western States Council