# SECOND SUPPLEMENT TO MEMORANDUM 2026-29

## Antitrust Law: Status Update (Mergers Public Comment)

This supplement presents public comment received by the Commission related to Memorandum 2026-29.[1] The public comments are attached as Exhibits to this supplement.



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

*Computer & Communications Industry Association*

This comment was submitted by Aodhan Downey, State Policy Manager, West Region for the Computer & Communications Industry Association (CCIA). According to its website:

> CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.[2]

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[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise. 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 presented without staff analysis.

[2] CCIA, "About CCIA."

*EXIT Alliance*

This comment was submitted by Novel Strategies[3] on behalf of The EXIT Alliance. According to its letter:

> The EXIT Alliance is a non-partisan coalition of founders, investors, business owners, and the professionals who advise them. Our focus spans the full spectrum of deals through which owners exit a business and companies change hands, including strategic sales, public offerings, sales to employees, and secondary transactions.[4]

*California Life Sciences*

This comment was submitted by Sam Chung, Senior Vice President of Governmental & External Affairs for California Life Sciences. According to its website:

> California Life Sciences is the state's leading advocate for the life sciences. We represent the entire innovation ecosystem, from startups and global companies to research institutions and service providers. We champion smart policy, foster strategic connections, and deliver resources that help life sciences companies grow and thrive. Based in the global epicenter of life sciences innovation, we work to ensure that the discoveries made here translate into healthier lives everywhere.[5]

*John Kwoka*

This comment was submitted by John Kwoka, the Neal F. Finnegan Distinguished Professor of Economics at Northeastern University. Professor Kwoka previously served as Chief Economic Advisor to the prior Chair of the Federal Trade Commission, Lina Khan, and was a member of the Commission's Mergers and Acquisition expert working group.[6]

*TechNet*

This comment was submitted by Robert Boykin, Executive Director for California and the Southwest of TechNet. According to its website:

> TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of American innovation.
>
> TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 5 million employees and countless customers in the fields of information technology,

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[3] According to its website, Novel Strategies is a Washington, DC-based public relations firm who "helps organizations shape perception, influence policy, and move ideas forward. We translate policy into communication that resonates and drives influence."

[4] Letter from The EXIT Alliance, August 12, 2026, EX 6.

[5] California Life Sciences, "About Us."

[6] Memorandum 2024-25; here is an extended biography of Professor Kwoka.

> artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.[7]

*American Economic Liberties Project*; *California Nurses Association*; *Consumer Federation of California*; *Economic Security California Action*; *Institute for Local Self-Reliance*; *Rise Economy*; *United Domestic Workers, AFSCME Local 3930*; *United Food & Commercial Workers, Western States Council*; *TechEquity Action*

This comment was submitted by Ron Knox, Senior Researcher and Policy Advocate from the Institute for Local Self-Reliance (ILSR) on behalf of ILSR and the entities above (ILSR Coalition). According to its website, "The Institute for Local Self-Reliance has a vision of thriving, diverse, equitable communities. To reach this vision, we build local power and fight corporate control."[8]

## PUBLIC COMMENT

CCIA does not believe the Commission's memoranda demonstrate that California's existing legal framework is inadequate. For this and several other reasons explained in their letter:

> …CCIA respectfully urges the Commission to preserve a merger framework that remains substantially consistent with federal law, and to decline to adopt the proposed changes to the liability standard or to incorporate the 2023 Merger Guidelines and their concentration thresholds into California statute. Departure from the federal Clayton Act and the introduction of new, untested legal standards would increase legal unpredictability and discourage otherwise procompetitive and beneficial business transactions.[9]

The EXIT Alliance urges the Commission to not adopt any of the proposed merger options and instead consider a "size-based safe harbor or exemption keyed to the same federal reporting threshold that SB 25 already uses, so that California's substantive standard and its notification statute operate consistently with one another."[10] They write further:

> Competition policy should protect competition. It should not make it harder for a founder to sell, an owner to retire, or employees to buy the company they work for. None of the three options on the table draws that line today, and the two built to sharpen enforcement against the mergers that matter most end up reaching

[7] TechNet, "About."
[8] Institute for Local Self-Reliance, "About ILSR."
[9] Letter from CCIA, August 11, 2026, EX 5.
[10] Letter from The EXIT Alliance, August 12, 2026, EX 9.

further into the small, thin markets where ordinary business transitions happen.[11]

California Life Sciences continues to express concern about the Commission adopting one of the proposed merger options. Among other issues in their letter, they discuss the importance of mergers and acquisitions to life sciences, their concern with codifying both the *Philadelphia National Bank* presumption and the 2023 Federal Merger Guidelines' HHI-based thresholds, and that stating federal case law is "not binding on California courts" will cause great uncertainty.

> California's global leadership in life sciences depends on a regulatory environment that is stable, predictable, and calibrated to the realities of research-driven, capital-intensive markets. The draft options presented in Memorandum 2026-29 continue to raise serious concerns in each of these dimensions.[12]

John Kwoka wrote in support of bifurcating "substantially lessen competition" and "tend to create a monopoly," codifying the presumption from *Philadelphia National Bank*, relying on the 2023 Federal Merger Guidelines as persuasive authority, and the "appreciable risk" or "appreciable danger" standard.[13]

Professor Kwoka also responded to other commenters. In response to concerns about false positives (concern about over-enforcement) from merger enforcement, Professor Kwoka cites his own empirical work that shows that "…it is not false positives but false negatives that have compromised current merger enforcement."[14] In response to concerns that a new merger law would prohibit growth through acquisition, Professor Kwoka notes that current law does not prohibit this, the 2023 Federal Merger Guidelines expressly allow for necessary and procompetitive acquisitions, and the antitrust concern lies in "killer acquisitions."[15] Finally, Professor Kwoka rebuts the assertions that "the relatively constant number of merger investigations by the federal agencies over many years implies that there is no dearth of enforcement."[16] Kwoka shows that the constant number of enforcement cases should have proportionately risen with the number of mergers, but agency constraints limited enforcement.

TechNet "respectfully urge[s] the Commission to keep California's merger framework substantially consistent with federal law and to decline the proposed changes absent a demonstrated gap in existing authority."[17] Specifically, TechNet recommends that the

[11] Letter from The EXIT Alliance, August 12, 2026, EX 10.
[12] Letter from California Life Sciences, August 13, 2026, EX 16.
[13] Letter from John Kwoka, August 13, 2026, EX 17-18.
[14] *Id*, EX 18.
[15] *Id.*
[16] Letter from John Kwoka, August 13, 2026, EX 19.
[17] Letter from TechNet, August 13, 2026, EX 22.

Commission:

- Retain the existing prohibition as a unified standard and decline to split "tend to create a monopoly" into a standalone prong.
- Decline both the "appreciable risk" and the "reasonable probability" formulations, preserving substantial consistency with Section 7 of the Clayton Act.
- Decline to codify the 2023 Merger Guidelines or their concentration thresholds. If the Commission wants courts to have the benefit of federal guidance, reference the guidance in effect at the time of the action rather than fixing one version in statute.
- Preserve the federal allocation of proof: a structural showing shifts the burden of production, and the burden of persuasion remains with the plaintiff.
- Before recommending any departure, identify specific California transactions that state enforcers could not reach under existing law, and explain why the proposed change would have reached them.[18]

The ISLR Coalition supports creating a California-specific merger law and reaffirms the recommendations expressed in a prior public comment letter:[19]

> This includes recommending legislation that enshrines in California law the authority and guidance of the 2023 Federal Merger Guidelines, empowering the Attorney General to rely on simple, clear measurements of market structure and concentration when reviewing and challenging potentially anticompetitive mergers. The Commission should also recommend legislation that enshrines in law the United States Supreme Court precedent established in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), which prohibits 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."[20]

**Does the Commission have any questions about these public comments?**

Respectfully submitted,

Sarah Huchel
Chief Deputy Director

Sharon Reilly
Executive Director

[18] Letter from TechNet, August 13, 2026, EX 25.
[19] Fourth Supplement to Memorandum 2025-42, EX 1.
[20] Letter from ISLR Coalition, August 13, 2026, EX 28.

August 11, 2026

California Law Revision Commission
Attn: Sharon Reilly, Executive Director
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

# Re: California Law Revision Commission, Study B-750 (Antitrust Law), Memorandum 2026-29: Draft Language Options for Mergers and Acquisitions

Dear Executive Director Reilly and Members of the California Law Revision Commission:

On behalf of the Computer & Communications Industry Association (CCIA),[1] I write in response to the published Memorandum 2026-29: Draft Language Options for Mergers and Acquisitions,[2] in advance of the Commission's August 17, 2026 meeting. CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms. The proposed merger regulations will likely have a significant impact on CCIA members and on the interstate provision of digital services.

CCIA appreciates the Commission's careful consideration of California's merger laws and the opportunity to comment on Memorandum 2026-29. While the Commission seeks to strengthen merger enforcement, the memorandum does not demonstrate that California's existing legal framework is inadequate. California already possesses robust authority to challenge anticompetitive mergers, including transactions that federal enforcers have declined to pursue.

The proposed recommendations would introduce significant departures from longstanding federal merger law. They would replace well-established liability standards with novel statutory language, incorporate agency guidance into statute, and adopt structural presumptions and burden-shifting provisions that would increase legal uncertainty and risk deterring procompetitive transactions. These changes would have practical consequences extending well beyond the state, while diminishing the predictability that decades of jurisprudence under Section 7 of the Clayton Act provides to courts, businesses, and enforcers.

Accordingly, CCIA respectfully urges the Commission to preserve substantial consistency with the federal merger framework and to decline the proposed amendments absent a demonstrated need to depart from existing law.

[1] For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.
[2] California Law Revision Commission, *Memorandum 2026-29: Draft Language Options for Mergers and Acquisitions* (Jul. 24, 2026), https://clrc.ca.gov/pub/2026/MM26-29.pdf.

EX 1

## I. The memorandum does not demonstrate that California enforcers lack the authority to challenge potentially anticompetitive mergers.

Memorandum 2026-29 principally argues that California requires new merger enforcement tools because federal antitrust agencies may decline to challenge transactions that California would prefer to investigate.[3] But differences in enforcement priorities do not demonstrate a deficiency in California law. Ongoing enforcement actions by the California Attorney General suggest that the existing antitrust laws provide state enforcers with the necessary toolkit to challenge mergers that may risk harming competition in California, including where federal enforcers have declined to act.[4] Further, the proposed amendments are not appropriately tailored to address a demonstrated market failure or a lack of effective enforcement tools. The memorandum does not identify a business transaction affecting California that state enforcers were unable to reach, nor does it demonstrate that more antitrust enforcement,[5] founded on departures from federal law and judicial precedent, produces better outcomes overall. Absent such a showing, the proposals risk increasing regulatory costs and discouraging otherwise procompetitive transactions.

Before accepting proposals that would substantively diverge California law from established federal jurisprudence, the Commission should identify cases in which California courts were unable to prevent anticompetitive mergers because existing legal authority proved insufficient.

## II. Departures from federal jurisprudence impose real costs on all business transactions regardless of size.

A state injunction or divestiture order can determine whether a nationwide transaction is abandoned or cleared; as a practical matter, the most restrictive applicable standard can therefore set the limit for the entire transaction. Because the draft language reaches acquisitions affecting commerce in any section of the state, a California-specific standard would function in practice as a national standard for any firm doing business in California, regardless of transaction size or jurisdictional nexus. This would likely result in higher compliance costs, greater difficulty pricing and timing transactions, and incentives to litigate in the forum offering the most favorable framework. Decades of jurisprudence developed from enforcement under Section 7 of the Clayton Act provide businesses, enforcers, and courts with a reliable and tested legal framework. An overly burdensome framework risks increasing legal uncertainty and unpredictability, and missing the procompetitive benefits of mergers that help

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[3] *Supra* n. 2, at 9, Fn. 48 ("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.").

[4] California possess independent authority to enforce its own antitrust laws and seek injunctive relief where competition is threatened. *See, e.g.*, Press Release, Cal. Att'y Gen., *Attorney General Bonta Files Lawsuit Seeking to Block $6.2 Billion Nexstar/Tegna Broadcasting Merger* (Mar. 18, 2026), https://www.oag.ca.gov/news/press-releases/attorney-general-bonta-files-lawsuit-seeking-block-62-billion-nexstartegna (coalition of eight state attorneys general, led by California, filed suit to block the transaction); Press Release, Cal. Att'y Gen., *Attorney General Bonta Secures Critical Win in Nexstar/Tegna Merger Challenge, Court Orders Titans to Halt Merging* (Apr. 18, 2026), https://oag.ca.gov/news/press-releases/attorney-general-bonta-secures-critical-win-nexstartegna-merger-challenge-court (preliminary injunction issued by the U.S. District Court for the Eastern District of California after the transaction received approval from the Federal Communications Commission and the U.S. Department of Justice); *see also supra* n. 2, at 9 n.48 (collecting recent state challenges to transactions cleared by federal enforcers).

[5] *Supra* n. 2, at 18 ("[S]ubstituting a lesser standard could also make it easier to prove cases, freeing resources toward pursuing additional cases.").

EX 2

foster innovation and competition in relevant and adjacent markets.[6] Any new proposal should be justified by a concrete benefit sufficient to outweigh the loss of that legal certainty.

CCIA also urges the Commission to avoid separating the existing Clayton Section 7 "tend to create a monopoly" language into a standalone prong.[7] Retaining language closely aligned with Section 7 allows California courts to continue drawing on well-developed federal jurisprudence, whereas separating the prohibitions invites an independent state construction of the incipiency standard untethered from that body of decisions.

## III. Both proposed formulations of the liability standard would replace a familiar standard with one whose contours must be established through litigation.

CCIA opposes adopting either the "appreciable risk" standard or the "reasonable probability" standard.[8] Enacting either formulation as California statutory text would displace the standard businesses and courts have applied for decades. The reasonable probability option is drafted as an instruction to courts about the degree of certainty they may require rather than as a restatement of the prohibition, so its practical effect on merger litigation would have to be worked out case by case. The appreciable risk option goes further, revising both the likelihood and the degree of competitive harm the statute reaches.

Technology companies seek to operate in clear, fair, and principle-based regulatory environments.[9] Adopting a new, untested standard diverging from federal jurisprudence would significantly increase legal uncertainty for California businesses and risk discouraging procompetitive acquisitions and reducing investment incentives, heavily impacting dynamic, high-technology industries.[10] In highly dynamic digital markets, acquisitions are an important mechanism for scaling new technologies, acquiring complementary capabilities, and commercializing innovation.[11] Empirical research finds that political and regulatory uncertainty attributed to heightened levels of enforcement negatively impacts merger and acquisition

[6] Mert Demirer & Omer Karaduman, *Do Mergers and Acquisitions Improve Efficiency: Evidence from Power Plants* (2022), at 2, https://www.ftc.gov/system/files/ftc_gov/pdf/demirerkaraduman.pdf ("A major challenge in analyzing the efficiency effects of mergers is distinguishing true efficiency gains from other factors, such as changes in market power, buyer power, and product quality.").
[7] *Supra* n. 2, at 11.
[8] *Supra* n. 2, at 16.
[9] See, e.g., Christian M. Dippon & Matthew D. Hoell, A Quantitative Evaluation: The Economic Costs of Structural Separation, Line of Business Restrictions, and Common Carrier Regulation of Online Platforms and Marketplaces, CCIA Research Center (Mar. 18, 2022), https://research.ccianet.org/reports/economic-costs-regulation-online-platforms-marketplaces/#main-content; Engine & the CCIA Research Center, Tools to Compete Lower Costs, More Resources, and the Symbiosis of the Tech Ecosystem (Jan. 25, 2023), https://research.ccianet.org/reports/tools-to-compete/#main-content.
[10] OECD, *Merger Control in Dynamic Markets*, OECD Competition Committee Roundtable (2020), at 7, https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/03/merger-control-in-dynamic-markets_a8bf4a0a/d3752037-en.pdf; *see also* Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, Chicago Journal of Int'l Law, (Jun. 1, 2009), at 206, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1305&context=cjil.
[11] Berger et al., *Acquisitions and Their Effect on Start-Up Innovation: Stifling or Scaling?*, OECD Science, Technology and Industry Working Paper No. 2025/10 (2025), at 29 https://www.oecd.org/en/publications/acquisitions-and-their-effect-on-start-up-innovation_b4efd3ab-en.html (evidence indicating that startup acquisitions are often driven by innovation motives).

EX 3

activity at both the macroeconomic and firm levels.[12] In uncertain regulatory environments, firms tend to delay or avoid largely irreversible transactions.[13]

## IV. Merger guidelines are enforcement guidance, and statutory incorporation would give them a role they were not designed to serve.

The 2023 Merger Guidelines describe the federal agencies' analytical framework and enforcement priorities, and they work as a "non-binding statement" that provides transparency into agency deliberations exercising discretion over which transactions to pursue.[14] As the memorandum notes, federal merger guidelines are periodically updated by the federal agencies.[15] Revisability is a feature of the Merger Guidelines, allowing agencies to respond to developments in economics, judicial decisions, and enforcement experience. A statute that designates one dated guidance document as persuasive authority, or that transposes Herfindahl-Hirschman Index (HHI) thresholds into statutory presumptions, fixes a single iteration in place and cannot follow subsequent revisions or interpretations.[16]

Federal antitrust law has long established that the burden of proving the alleged anticompetitive effects of the merger rests upon the plaintiff.[17] The structural presumption under *Philadelphia National Bank* shifts the burden of proof to the defendant that meets the threshold, who would then need to rebut this presumption before the plaintiffs provide additional evidence of anticompetitive effect.[18] However, the proposal would require the defendant not only to prove it does not meet PNB's thresholds, but also to show that the transaction is not likely to substantially lessen competition and that the market concentration is not anticompetitive. Instead of simply having to rebut a presumption, the full burden of proof to show the future competitive effects of the proposed merger would fall on the defendant, going against decades of federal antitrust jurisprudence.

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[12] Susan E. Woodward, CCIA Research Center, *Antitrust Enforcement Over-deters Acquisitions, Squeezing Smaller Startups and Venture Capital Investors* (Jan. 24, 2025), https://ccianet.org/research/reports/antitrust-enforcement-over-deters-acquisitions-squeezing-smaller-startups-and-venture-capital-investors/.

[13] Alice Bonaime, Huseyin Gulen & Mihai Ion, *Does Policy Uncertainty Affect Mergers and Acquisitions?*, 129 J. Fin. Econ. 531 (2018), https://doi.org/10.1016/j.jfineco.2018.05.007 ("[W]e identify a significant negative relation between policy uncertainty and acquisition likelihood, which implies that the effect of policy uncertainty on M&A activity is distinct from the effect of more general economic conditions.").

[14] U.S. Dep't of Just., *2023 Merger Guidelines* (Dec. 18, 2023), https://www.justice.gov/atr/2023-merger-guidelines (describing the Guidelines as a non-binding statement).

[15] *Supra* n. 2, at 13.

[16] Supra n. 2, at 14. (presenting the provisions as subdivisions (X) and (XX)); id. at EX 3 (same provisions designated (d) and (e)). The concentration triggers mirror the guidance in Guideline 1 of the 2023 Merger Guidelines, under which a presumption applies where a transaction results in a post-merger HHI above 1,800 together with an increase exceeding 100 points, or a share above thirty percent together with an increase exceeding 100 points. See U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2.1, at 5-6 (Dec. 18, 2023); supra n. 2, at 14 n.76. CCIA has previously expressed concern about reliance on structural presumptions and concentration thresholds with limited attention to efficiencies. See CCIA, CCIA Offers Comments on FTC and DOJ's Draft Merger Guidelines (Sept. 2023), https://ccianet.org/news/2023/09/ccia-offers-comments-on-ftc-and-dojs-draft-merger-guidelines/.

[17] Federal courts applying Section 7 after *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), have described the rebuttal burden as a "showing" rather than a "clear showing." Under Section 7, a plaintiff's showing of undue concentration shifts to the defendant only the burden of producing rebuttal evidence; the ultimate burden of persuasion remains with the plaintiff throughout. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990) (citing *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974), and *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120 (1975)).

[18] *Compare supra* n. 2, at 10 (subdivision (c), deeming a qualifying transaction to lessen competition substantially "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects," language drawn from *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963)), *with id.* at 14-15 (requiring a defendant to demonstrate by a preponderance of the evidence the absence of likely anticompetitive effects, or that such effects are de minimis and clearly outweighed by cognizable procompetitive benefits in the same relevant market).

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For these reasons, CCIA respectfully urges the Commission to preserve a merger framework that remains substantially consistent with federal law, and to decline to adopt the proposed changes to the liability standard or to incorporate the 2023 Merger Guidelines and their concentration thresholds into California statute. Departure from the federal Clayton Act and the introduction of new, untested legal standards would increase legal unpredictability and discourage otherwise procompetitive and beneficial business transactions.

We appreciate the opportunity to provide input, and we acknowledge the Commission's continued effort to analyze the state's best approach to antitrust regulation.

Sincerely,

Aodhan Downey
State Policy Manager, West Region
Computer & Communications Industry Association

# EXIT ALLIANCE.

*Comment on Memorandum 2026-29, Draft Language Options for Mergers and Acquisitions (Study B-750, MEMORANDUM 2026-29)*

Submitted to the California Law Revision Commission | August 7, 2026

MEMORANDUM 2026-29

**Draft Language Options for Mergers and Acquisitions**

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

*Submitted by email to Sharon Reilly, Executive Director (sreilly@clrc.ca.gov)*

**Re: Memorandum 2026-29, Draft Language Options for Mergers and Acquisitions (Study B-750)**

Dear Chair Simpson and Honorable Commissioners:

The EXIT Alliance is a non-partisan coalition of founders, investors, business owners, and the professionals who advise them. Our focus spans the full spectrum of deals through which owners exit a business and companies change hands, including strategic sales, public offerings, sales to employees, and secondary transactions. We formed around the conviction that business transitions are engines of growth rather than threats to it, and we appreciate the opportunity to share our perspective on Memorandum 2026-29.

## I. Who We Are

The EXIT Alliance is a non-partisan coalition of entrepreneurs, founders, investors, and M&A advisors who share an interest in commonsense merger policy. We are not an industry trade group representing a single sector. Our members span the full lifecycle of a business, from founders building companies to investors backing them to the brokers, bankers, and attorneys who carry deals to close. The Alliance is managed through Novel Strategies and is guided by a cross-sector advisory council of business and policy leaders. Our policy work centers on the sales, successions, and employee buyouts that make up the large majority of California merger and acquisition activity, transactions that often look quite different from the deals merger law was originally written to address.

## II. M&A Exits and Transitions Are Vital to California's Small Businesses

Roughly six million small and midsize American businesses will go through an ownership transition by 2035 as baby boomers retire, and more than a million are viable candidates for sale, worth as much as $5 trillion[1]. In 2025, California had 4.3 million small businesses, which employ nearly half of everyone working in the state's private sector[2]. A large share of the national transition wave will land here.

M&A is more nuanced than these proposals assume. Sometimes an owner is retiring. Sometimes a founder has run out of runway. Sometimes the employees want to assume ownership. When those sales close, retirements get funded, capital moves into new companies, and people keep their jobs under a new owner. When they fall apart, businesses shut down.

The pattern holds at the other end of the market as well. Venture-backed companies in the United States completed nearly 1,000 acquisition exits in 2025, compared with roughly 60 public offerings[3]. For many companies that receive venture funding, acquisition is a realistic path to liquidity, and the expectation of that path is part of why investors fund young companies in the first place.

Behind all of these numbers are retirements, employee buyouts, and founder exits that make up the full ecosystem of business transitions, and how wealth is generated from them.

## III. The CLRC Should Not Impose Uncertainty and New Burdens on California's Businesses

We respectfully urge the Commission, as it weighs the remaining open questions at its August 17 meeting, not to finalize any of the merger options as currently drafted, for the reasons set out below.

Merger policy works best when it concentrates attention on bad actors, the transactions that pose a genuine risk to competition, and allows the liquid capital flows that drive economic growth and entrepreneurship to continue unimpeded. We have reviewed the Basic Merger Framework and its two variations as presented in Memorandum 2026-29. Each shares a feature relevant to Main Street transactions. None includes a size threshold, a dollar value floor, or another form of proportionality screen. All would reach any purchase of stock or assets, in any industry, at any size, once a concentration test is satisfied, and in a market with few participants that test is often satisfied without regard to the transaction's scale. Each of the options would impose an unprecedented regime of uncertainty and burdens for entrepreneurs and small businesses seeking to scale innovations in California and beyond. This translates into a framework that disincentivizes exits of all types.

### A. The Basic Framework's Presumption

The Basic Merger Framework codifies the structural presumption from United States v. Philadelphia National Bank, under which a merger producing an undue percentage share of the relevant market and a significant increase in concentration is presumed unlawful, with the

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[1]McKinsey & Company, The Great Ownership Transfer: A New Era of Business Stewardship, Institute for Economic Mobility

[2]U.S. Small Business Administration, Office of Advocacy, California 2025 Small Business State Profile, available at advocacy.sba.gov.

[3]PitchBook, Venture Monitor, Q4 2025.

burden shifting to the parties to disprove harm[4]. That case concerned two banks combining to hold thirty percent of a metropolitan banking market, institutions with the resources to litigate a rebuttal. The draft language applies the same presumption, with the same shifted burden, to a hardware store buying its only local competitor. Subdivision (c) does not distinguish between the two. Rather than protecting competition, treating a hardware store's sale to its only local competitor the same as a merger between two regional banks merely adds cost and delay to the kind of ownership transition that lets a Main Street business survive to its next owner.

### B. HHI Thresholds in Thin Markets

The second option incorporates the Herfindahl-Hirschman Index thresholds from the 2023 Federal Merger Guidelines directly into statute, creating a rebuttable presumption of illegality where a transaction produces a post-merger HHI above 1,800 with an increase of more than 100 points, or a resulting market share above thirty percent with the same increase[5]. HHI is a useful tool for evaluating national or regional markets with many competitors. It performs differently in the thin, local markets where most small business sales occur. A county with three feed suppliers, two HVAC contractors, or a single veterinary practice seeking a buyer is a concentrated market by definition. The HHI in a three firm market typically exceeds 1,800 before any transaction takes place, and a sale between any two of the three participants will often cross the 100 point threshold on its own. The presumption can be triggered by the structure of a small market rather than by evidence that a particular transaction is likely to cause harm.

The rebuttal standard adds a further burden. A defendant must show, by a preponderance of the evidence, that the transaction has no likely anticompetitive effects, or that any effects are de minimis and clearly outweighed by cognizable procompetitive benefits in the same relevant market.[6]. This is a substantial evidentiary showing, suited to a merger review with economists and antitrust counsel on both sides. A retiring owner selling to the only other operator in town typically has a broker and one attorney, and the closing conditions in a small business purchase agreement are not well suited to a multi-month burden-shifting inquiry. This would land the full weight of the California antitrust regulatory apparatus on the backs of small and medium sized business owners simply seeking to convert a lifetime of hard work into prosperity for their families and communities.

### C. The Appreciable Risk Standard

The third option retains the HHI presumption and also replaces the phrase may be substantially to lessen competition with an appreciable risk of lessening competition by more than a de minimis amount[7]. We take no position on the broader debate over whether federal courts have set an unduly high bar for proving competitive harm in large, concentrated markets. Whatever the merits of that debate, pairing a lower evidentiary trigger with an unmodified small market concentration screen has a specific effect on transactions like the small business sales and closely held company transitions described in Sections A and B above. It becomes easier, not harder, to challenge a routine local business sale, even though the standard was developed with larger and more consequential transactions in mind. This would chill the kind of ordinary, pro-competitive, pro-innovation business activity that antitrust law isn’t meant to discourage.

### D. The Investment-Only Exemption

Each version of the draft statute exempts persons purchasing stock solely for investment and not using it to bring about a lessening of competition[8]. This exemption is meaningful for passive

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[4]United States v. Philadelphia National Bank (1963) 374 U.S. 321; Memorandum 2026-21, pp. 10-13.

[5]Memorandum 2026-21, pp. 14-16, citing 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, pp. 5-6.

[6]Memorandum 2026-21, p. 14, subdivision (e).

[7]Memorandum 2026-21, pp. 16-18.

[8]Memorandum 2026-21, p. 11, subdivision (e).

minority investors. It does not describe a competitor buying the business next door, a management team buying out a founder, or an employee ownership trust acquiring the company its members work for. These are strategic, voting acquisitions that fall outside the exemption as written.

## IV. California's Existing Approach

The federal Hart-Scott-Rodino threshold, which serves as the federal trigger for premerger notification, currently sits at $133.9 million[9]. California's recently enacted SB 25 adopts this same federal figure as the trigger for sharing premerger filings with the Attorney General beginning January 1, 2027[10]. The options in Memorandum 2026-29 would apply comparable scrutiny starting at zero.

We raise this only to note that federal and state regulators have both settled on a size-based screen for premerger review. We ask the Commission to consider how a merger standard reaching every transaction in the state, regardless of size, relates to that existing approach, and how this could disincentivize regular, pro-competitive and pro-innovation activity across the state before businesses are able to scale. A size-based screen already works for federal and state regulators; there's no reason California's small business sellers should face a standard that deters competitive and/or innovative transactions; the federal approach was designed to avoid such discouragement.

## V. The Cascading Costs of Regulatory Uncertainty for California’s entrepreneurs and small businesses

A business sale is typically a one-time event for the seller, and it is financed, insured, and documented against a known set of rules. Each option in Memorandum 2026-29 would create a body of California-specific merger law without a developed body of state case law to interpret it, layered onto federal precedent that has itself shifted over the past six decades, as the memorandum's own background section documents.

Large acquirers are generally able to absorb this kind of uncertainty. They retain antitrust counsel and can commission economic analysis to support a rebuttal. A retiring owner typically has a broker and one attorney, and transaction costs come directly out of the sale price. Extending an untested, concentration-triggered presumption to every transaction in the state is more likely to produce lower offers, longer holdback periods, new financing contingencies, and buyers who decline to proceed than it is to produce additional litigation.

## VI. What We Ask

We would ask the Commission to weigh several considerations as it finalizes its recommendation. Merger review works best when it is proportionate, and a rule reaching every business sale in California, regardless of which of the three options is adopted, does not achieve that goal. The Commission may wish to consider a size-based safe harbor or exemption keyed to the same federal reporting threshold that SB 25 already uses, so that

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9 https://www.ftc.gov/enforcement/competition-matters/2026/01/new-hsr-thresholds-filing-fees-2026

10 California SB 25 (2025–26 Reg. Sess.)

California's substantive standard and its notification statute operate consistently with one another.

If the Commission proceeds with an HHI-based presumption, accounting for market size and not only market share, through a transaction value exception or a floor on the number of competitors, would reduce the likelihood that the presumption is triggered by the structure of a small market rather than by evidence of likely harm.

Finally, the Attorney General's office will receive its first meaningful premerger filing data under SB 25 beginning in January 2027, and the Commission may find it useful to have that data available before finalizing a recommendation.

## VII. Conclusion

Competition policy should protect competition. It should not make it harder for a founder to sell, an owner to retire, or employees to buy the company they work for. None of the three options on the table draws that line today, and the two built to sharpen enforcement against the mergers that matter most end up reaching further into the small, thin markets where ordinary business transitions happen.

California sees more of these transitions than any other state and has generally been well served by them. We appreciate the opportunity to comment on Memorandum 2026-29 and would welcome further conversation with staff on any of the points raised above.

Respectfully submitted,

**The EXIT Alliance**
*Managed by Novel Strategies*

*Comments submitted in response to the California Law Revision Commission's Memorandum 2026-29, Draft Language Options for Mergers and Acquisitions (Study B-750), regarding the Commission's ongoing Antitrust Law study.*

CALIFORNIA LIFE SCIENCES

August 13, 2026

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: Memorandum 2026-29: Draft Language Options for Mergers and Acquisitions**

Dear Chairperson Simpson and Honorable Commissioners,

On behalf of California Life Sciences (CLS), which represents over 1,300 pharmaceutical, biotechnology, medical technology, and academic research institutions statewide, we write in response to Staff Memorandum 2026-29. As its draft options to amend California's Mergers and Acquisitions (M&A) law are nearly identical to those in Memorandum 2026-21, the concerns we raised previously remain largely applicable, and we reiterate and update them here as the Commission approaches a decision. Despite the Commission's continued efforts to refine these options, they remain seriously flawed and pose real risks to the life sciences industry and the patients who depend on it.

Our comments below address Memorandum 2026-29's options in turn as well as providing a more fulsome understanding on the importance of M&A in our sector and some unique considerations therein.

**The Fundamental Role of M&A in the Life Sciences Ecosystem**

Before addressing the specific options, it is essential to underscore why M&A is uniquely indispensable to life sciences, and why a one-size-fits-all merger enforcement framework is particularly ill-suited to this sector.

The economics of drug development are unlike those of any other industry. According to Deloitte's 16th Edition of its *Measuring the Return from Pharmaceutical Innovation* report — one of the most objective and widely-cited longitudinal analyses of biopharma R&D productivity — the average cost to bring a single medicine from discovery to launch reached $2.67 billion in 2025[1]. This figure reflects not only the direct cost of successful programs, but the full financial burden of failure. Because the vast majority of drug candidates never reach patients, the few that do must carry the cost of every program that did not.

1. Measuring the Return from Pharmaceutical Innovation, Deloitte
2. Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs, Journal of Health Economics
3. Life Sciences M&A: A Vital Catalyst for Investment and Innovation, Partnership for the US Life Sciences Ecosystem (PULSE)
4. The Pharmaceutical Industry in 2025: An Analysis of FDA Drug Approvals from the Perspective of Molecules, Molecules
5. Summary of NDA Approvals & Receipts, 1938 to the Present, U.S. Food and Drug Administration
6. M&A isn't just for big pharma. A diverse group of mid-size companies are stepping up dealmaking, EndPoints News
7. Trends in Competition in the United States: What does the Evidence Show?, National Bureau of Economic Research

Against this backdrop, M&A is not merely a business strategy, it is a structural necessity. More than 80% of California's life sciences companies operate without profit and depend on external investment, including venture capital and strategic partnerships, to sustain their research[2]. On average, it takes ten years and a nearly 90% failure rate to bring a therapy to market[2]. Against this backdrop, M&A is not merely a business strategy, it is a structural necessity. M&A allows early-stage companies to access the resources, infrastructure, and expertise needed to complete development and reach patients — bridging a gap that most companies cannot cross on their own. As the Partnership for the U.S. Life Science Ecosystem (PULSE) has noted, without confidence in a stable and predictable merger framework, investment in early-stage innovation will decline, ultimately slowing the development of therapies for patients[3].

Critically, this M&A-dependent innovation pipeline is producing results. A 2025 analysis of new drugs approved by the U.S. Food and Drug Administration (FDA) during this century shows that, during the first decade (2000-2010), an average of 25 drugs were approved per year. This number increased to 34 per year during the period 2011-2017 and further rose to approximately 50 per year between 2018-2024[4]. Additionally, the number of approved New Drug Applications (NDA) by the FDA has continued to rise over the past two decades, increasing from an average of 87 per year from 2000-2009 to 116 per year from 2010-2019[5]. As of 2022, the last data year available, 118 NDAs were approved. Underscoring that the pipeline of innovation continues to be robust. A regulatory framework that introduces material uncertainty into the M&A transactions that capitalize this pipeline puts these gains at direct risk.

This dynamic is playing out for companies of all sizes across the life sciences sector. A May 2026 report on biopharma M&A trends documents how mid-cap drugmakers, family-owned pharmaceutical groups, and non-traditional acquirers are increasingly stepping into roles that large pharma once dominated[6]. These actors are not consolidating markets for anticompetitive purposes. They are responding to the same structural imperative that drives all life sciences M&A; the extraordinary cost, time horizon, and capital intensity of bringing a therapy to patients. That this imperative is now drawing in a broader and more diverse set of acquirers only reinforces how fundamental M&A is to the sector's functioning — and how poorly served it would be by a one-size-fits-all enforcement standard. Markets for rare diseases, orphan drugs, and emerging cell and gene therapies often have only one or two approved treatments — a direct consequence of the targeted nature of the science and the rigor of the regulatory pathway. A framework that applies uniform concentration thresholds to these markets will systematically misidentify procompetitive transactions as presumptively illegal.

**A More Aggressive Enforcement Framework Already Exists**

Memorandum 2026-29 observes that while the 2023 Federal Merger 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." We respectfully submit that this observation provides far less reassurance than it may appear to. The 2023

Guidelines are not merely an aspirational policy document awaiting implementation, they represent the operative legal framework under which the U.S. Department of Justice and the Federal Trade Commission are already empowered to review and challenge mergers. The fact that federal enforcement activity may not yet fully reflect the Guidelines' more aggressive posture does not mean that it cannot or will not.

This reality is critical. Regulatory risk is not assessed based on what enforcement activity looks like today, it is assessed based on what legal exposure exists over the entire time horizon of a transaction, including future enforcement environments. Companies and their counsel must advise on what the law permits, not merely on what agencies have chosen to pursue recently.

**Option Two: Basic Merger Framework (Philadelphia National Bank Standard)**

Our core concerns with Option Two remain substantially unchanged from our prior submissions. The decision to separate the "tend to create a monopoly or monopsony" prong of the Clayton Act into its own operative subdivision (subsection (b)) continues to concern us. While this structural choice may appear to be a matter of drafting style, its practical effect could be to enable challenges to mergers under subsection (b) without any showing that competition would be "substantially" lessened — a departure from the longstanding federal standard. In life sciences markets, which are frequently narrow and concentrated by scientific and regulatory necessity, particularly in rare disease and orphan drug indications, this separation substantially increases the risk that procompetitive combinations will fall within the statute's reach.

The codification of Philadelphia National Bank's structural presumption in subsection (c) also warrants continued caution. While we understand the Commission's intent to lighten the evidentiary burden on plaintiffs in cases involving highly concentrated markets, the presumption does not account for markets that are concentrated by design. A company developing the only two approved treatments for a rare pediatric neurological disorder will necessarily produce market concentration figures that look alarming under a structural presumption — even when the transaction is unambiguously procompetitive. Given the Deloitte data showing that only 9% of pipeline assets generate ~70% of projected revenue, the life sciences industry already operates under extreme concentration pressures that have nothing to do with anticompetitive conduct.

Because relevant markets in life sciences are often defined narrowly around a single indication or mechanism of action, routine and clearly procompetitive transactions can easily trigger the Philadelphia National Bank presumption. Would a company holding a 30% share in an approved injectable treatment be presumed to violate the statute simply for acquiring an early-stage oral therapy for the same condition, even where multiple competing therapies remain in development? Would a company marketing an approved therapy targeting one genetic mutation be presumed to violate the statute for acquiring a clinical-stage asset targeting an adjacent mutation for the same indication, where the acquirer's stated purpose is to develop a combination therapy that offers patients a meaningfully better outcome? As drafted, subsection (c) could require the parties to both transactions to affirmatively disprove anticompetitive effects, even though each represents exactly the kind of scientific combination and portfolio-building the industry relies on to bring new treatments to patients.

We understand referencing the 2023 Federal Merger Guidelines in subsection (d), but only as persuasive authority, not as binding law. This distinction matters. For life sciences companies and their investors, regulatory risk is not assessed based on what enforcement looks like today; it is assessed across the entire time horizon of a transaction, including future enforcement environments. Companies and their counsel must advise on what the law permits, not merely on what agencies have chosen to pursue in a given moment. The 2023 Guidelines are already an operative federal enforcement framework. Codifying their specific standards into binding California state law, would permanently lock in those metrics, regardless of how federal or state enforcement priorities evolve, and without any demonstrated need to apply them to this sector.

**Option Three: Basic Merger Framework and Federal Merger Guidelines**

This option compounds our concerns with Option Two by layering the 2023 Federal Merger Guidelines' HHI-based thresholds onto the Basic Framework's interpretation of Philadelphia National Bank. At its May 22, 2026, meeting, Commissioners shared mixed opinions regarding whether to include HHI-based thresholds. We respectfully submit that this division is itself instructive. Codifying specific HHI thresholds drawn from the 2023 Federal Merger Guidelines into California law will create a structural presumption of illegality that is poorly calibrated to life sciences market realities. As noted above, markets for rare diseases, orphan drugs, and emerging therapies are small by nature. Acquisitions in such markets, which often serve to consolidate scientific expertise, eliminate redundant development costs, and accelerate commercialization, will routinely exceed these thresholds even when they are unambiguously beneficial to competition and to patients. HHIs [the summation of the squares of each firm's market share // $HHI=\sum (\text{market share } \%)^2$] tend to overstate potential anticompetitive harm in markets with differentiated products or rapid innovation, both characteristics of the life sciences industry.

Even economists who study market power closely acknowledge that HHI calculations rest on analytical choices about market definition, geographic scope, and cost allocation, meaning reasonable analysts applying different assumptions can reach very different conclusions about the same transaction[7]. Hard-coding a specific numerical threshold into statute treats this assumption-dependent metric as an objective bright line, which it clearly is not. This problem is even more serious in a sector where, as discussed above, HHI already doesn't work well. HHI is a static snapshot, it measures concentration at a single point in time and assumes market shares are a reasonably stable proxy for competitive power. But in a fast-moving, dynamic sector, that snapshot can be misleading and risks capturing or dissuading procompetitive conduct along with it.

We also renew our objection to the rebuttal standard in subsection (e), which requires defendants to demonstrate that “any potential anticompetitive effects are clearly outweighed by the cognizable procompetitive benefits of the transaction in the same relevant market.” The “same relevant market” limitation is particularly problematic for life sciences. Many mergers produce benefits — including accelerated pipeline development, shared manufacturing infrastructure, and cross-indication platform synergies — that materialize across multiple markets over extended time horizons. For instance, the Deloitte report documents a rising share of novel mechanism-of-action drug development programs whose benefits often cannot be fully assessed at the time of transaction. By demanding immediate, market-specific proof, regulators effectively foreclose the dynamic efficiency justifications that are central to how M&A creates value in our industry.

**Option Four: Appreciable Risk Standard**

We continue to have significant concerns regarding the “appreciable risk” standard proposed in Option Four. The revised text would replace the Clayton Act’s “may be substantially to lessen competition” standard with a prohibition on mergers whose effect “may be to create an appreciable risk of lessening competition more than a de minimis amount.” As previous staff memos have acknowledged, critics of this approach view it as introducing “a new and untested legal standard” for which there is “no caselaw history for courts to draw upon.” We believe this acknowledgment compels substantial caution. Additionally, a majority of the members who served on the Commission’s Expert Working Group on the topic of M&A have since written to the Commission articulating that “consistency with federal merger law is of primary importance. Neither consumers nor businesses benefit from a fragmented collection of statutes regarding acceptable mergers and acquisitions.” We again feel this warning is worth consideration, creating an appreciable risk standard not found in the Clayton Act seems to be antithetical to the recommendations of the Commission’s own experts.

Venture capital and strategic investors evaluate regulatory risks closely when allocating capital to early-stage life sciences companies. If merger review standards become subjective or indeterminate because of terms like “appreciable risk” and “more than a de minimis amount” that have no settled judicial interpretation in the state, capital will migrate to jurisdictions with more predictable frameworks.

**Purpose Statement**

We maintain our concern that subsection (d) of the proposed purpose statement — which states that federal case law is “not binding on California courts” — will function in practice as an invitation to courts to depart from the substantial body of federal merger jurisprudence that currently provides predictability to life sciences companies and their investors. The ability to plan transactions around established precedents is the practical foundation of any workable regulatory system.

California already possesses robust tools for merger oversight without these novel departures from federal standards. The California Attorney General may enforce Section 7 of the Clayton Act directly in federal court, and large transactions are subject to mandatory review under the Hart-Scott-Rodino Act (HRSA). Beginning January 1, 2027, under SB 25 (Umberg, 2025), the Attorney General will gain contemporaneous access to all HSRA federal filings for covered California transactions, enabling coordinated and timely state-level review without displacing the federal framework. These existing and forthcoming tools provide meaningful oversight without the risks introduced by novel state-level standards.

**Conclusion**

California's global leadership in life sciences depends on a regulatory environment that is stable, predictable, and calibrated to the realities of research-driven, capital-intensive markets. The draft options presented in Memorandum 2026-29 continue to raise serious concerns in each of these dimensions.

Industry data makes the stakes concrete, at $2.67 billion per approved drug, with 90% of programs failing and pipeline value concentrated in a handful of assets, the life sciences industry operates on economics that demand predictable legal frameworks for M&A. Every source of additional regulatory uncertainty — whether from an untested appreciable risk standard, rigid HHI thresholds ill-calibrated to specialty markets, or a purpose statement inviting departure from federal precedent — directly raises the cost of capital for California's early-stage life sciences companies and ultimately delays the development of therapies for patients.

California's life sciences industry has flourished precisely because the state has historically balanced vigorous competition policy with meaningful recognition of the unique economics of scientific innovation. We urge the Commission to preserve that balance in any final recommendation. We appreciate the opportunity to provide these comments, and please do not hesitate to contact me at schung@califesciences.org with any questions.

Sincerely,

Sam Chung
Senior Vice President, Government Relations & External Affairs
California Life Sciences

MEMO TO: California Law Review Commission

FROM: John Kwoka, Finnegan Distinguished Professor of Economics
Northeastern University

DATE: August 13, 2026

RE: Mergers and Acquisitions

This inquiry into a California merger statute has arrived at an advanced stage, with draft language options outlined in Staff Memorandum 2026-29. It has been my distinct pleasure to engage in this process twice before. I served on the Merger Study Group in the initial stages of this proceeding and testified to this Commission in person on behalf of the Group in 2024. I subsequently provided my own recommendations in 2025 on the draft language in Staff Memorandum 2025-31. In this memo, I provide further comments, this time addressing Staff Memorandum 2026-29 amd also responding to some questions and concerns that the memorandum has elicited.

Comments on Staff Memorandum 2026-29

I begin by endorsing the approach set out in the Staff Memorandum. That Memorandum offers a "Basic Merger Framework" (pp. 10-11) as a useful template within which various possible issues are described. Among those issues, I strongly endorse the following provisions:

(1) The bifurcation of "substantially lessen competition" and "tend to create a monopoly," as proposed by Antitrust Authors. The joining of these two phrases in the Clayton Act has in practice resulted in diminished attention by the agencies and courts to the "tendency to monopoly" prong. For the reasons described in the Staff Memo, this bifurcation would highlight the two prongs and restore the intent of the statute.

(2) The codification of the presumption of harm from large mergers in concentrated markets that was articulated by the Supreme Court in its *Philadelphia National Bank* opinion. This presumption was designed to simplify merger control where little or no further analysis is required. Despite that, and despite supporting economic evidence, this standard has not been adhered to by lower courts. The explicit inclusion of this presumption in a new statute would address the weakening of enforcement practice.

(3) The reliance on the 2023 Merger Guidelines of the Federal Trade Commission and the Antitrust Division of the Justice Department as persuasive authority. These new Guidelines were intended to represent the best current legal analysis and economic implementation of the Clayton Act. Reliance on them by California will strength enforcement and help ensure harmonization of state and federal practices.

In addition, I strongly endorse the effect standard of an "appreciable risk" or "appreciable danger" in place of the Clayton Act provision of "substantially lessening of competition." As the staff memo correctly notes, the latter language has undergone a de facto re-interpretation by lower courts that has deviated from the intended meaning in the Clayton Act and weakened enforcement. This alternative language will restore the intent of that statute.

Responses to Interveners' Comments.

My survey of interveners' comments has revealed wide agreement with many of these proposed changes. That said, there are several common criticisms that I would like to address.

First, some commenters have expressed concern that any strengthening the merger statute will result in numerous false positives–that is, incorrect assessments of mergers as anticompetitive. There is, of course, no policy that avoids all errors, so identifying a possible case or two by itself does not prove much. The correct standard would compare the frequency and harm from false *positives* to the frequency and harm from false *negatives*, that is, incorrectly approved mergers that result in competitive harm. On this question, there is considerable evidence. Let me cite one especially relevant study.

My own empirical work (published in the *Antitrust Law Journal*, 2013) compiled all careful, controlled studies of mergers in the economics and finance literature. All the mergers were reviewed by the agencies and allowed to go through. Some were approved outright, others with remedies that were supposed to fix the competitive concern. In either case, if correctly evaluated, there should have been no further competitive harm.

This study found that more than 80 percent of all these mergers reviewed and approved by the agencies ended up in fact being anticompetitive, that is, resulting in higher prices, despite agency analysis that concluded otherwise. This evidence clearly indicates a very high incidence of false *negatives*, that is, anticompetitive mergers that the agencies incorrectly permitted. Examples of approved mergers that ended up anticompetitive from that data base and from current experience include Ticketmaster/Live Nation, Southwest/AirTran, American/US Air, Maytag/Whirlpool, Evanston/Highland Park hospital, ProMedica/St Lukes Hospital, and many other hospital and health sector mergers.

Empirical evidence therefore makes clear that it is not false positives but false negatives that have compromised current merger enforcement.

(2) A issue with special resonance in California is the concern raised by some commentators that small firms may not be able to grow in their own right, but need to sell to larger firms with more resources. But if that is all there is to the story, nothing in antitrust prevents that, and indeed the 2023 Merger Guidelines expressly allow for necessary and procompetitive acquisitions. What concerns antitrust are acquisitions by large companies of smaller firms that otherwise would evolve into direct competitors, so-called "killer acquisitions." The purpose–and effect–of such

acquisitions is to entrench dominance, certainly not to preserve competition or enhance the resources of small firms.

Once again, there is good evidence on this issue. A classic study from the pharmaceutical industry has shown that about 6 percent of all acquisitions in this sector result in the large company, after acquiring the small firm, simply abandoning the small firm's competing R&D program. Acquiring a rival to eliminate its competitive threat is precisely what antitrust is rightfully concerned about.

A second piece of evidence comes from the important tech sector. Over the past 25 years, the five major U.S. tech companies have collectively acquired more than 1000 smaller firms, without a single challenge until very recently. Despite repeated statements of concern, there is simply no evidence that antitrust has handicapped innovation or in any other way, stood in the way of necessary mergers in this sector of special importance to California.

(3) Finally, it has been alleged that the relatively constant number of merger investigations by the federal agencies over many years implies that there is no dearth of enforcement. But that conclusion is easily shown to be incorrect.

The attached table from my 2020 book *Controlling Mergers and Market Power* shows that the number of merger investigations in the 2010 decade was indeed fairly constant, ranging from 42 to 55, without any real trend during that period. But in 2010 the 42 investigations constituted 3.8 percent of all mergers reported under HSR, while the 45 investigations in 2018 were only 2.1 percent of the far, far larger number of filed mergers. That number rose from 716 in 2010, to 2011 in 2018–a near tripling.

What actually accounts for this near-constancy of the number of investigations despite the huge increase in merger filings is the constraint on agency resources. Indeed, as also shown in this table, total agency antitrust funding in 2018 not only did not triple to keep up with the number of mergers, but in inflation-adjusted terms actually decreased from 2010. This actual decline in real resources in the face of far more mergers is responsible for the rough constancy of the number of investigations. It has also led to the sharply reduced likelihood that a merger will even be investigated.

From my experience in 2021-22 as Chief Economic Advisor to the Chair of the FTC, I can attest to the fact that numerous mergers deserving of investigation had to be cleared due to the lack of agency resources. This problem has only gotten worse in the past couple years as 20-30 percent of agency legal and economic staff have departed, leaving even less capacity to conduct necessary investigations.

Conclusion

It is my considered view–and hope–that this Commission will seize this opportunity not only to recommend a California-specific merger statute, but also to do so in a manner that fully reflects the intent of the federal statute and the guidance from the U.S. Supreme Court over the past century. In a limited number of places, changes in language will help ensure that is the case. Passage of such a statute will ensure benefits to all constituents and citizens of California–consumers, workers, farmers, as well as businesses small and large.

I respectfully recommend the approach I have described herein.

**TABLE 8.1**

**Merger Investigations and Agency Funding**

**FTC and DOJ, 2010-2018**

| YEAR | ANTITRUST FUNDING | | | | MERGERS AND INVESTIGATIONS | | |
|---|---|---|---|---|---|---|---|
| | ANTITRUST DIVISION FUNDING (SM) | FTC COMPETITION FUNDING (SM) | TOTAL FUNDING (SM) | TOTAL FUNDING (SM DEFLATED | MERGERS REPORTED UNDER HSR | NUMBER INVESTIGATED | PERCENT INVESTIGATED |
| 2010 | 163.2 | 125.1 | 288.3 | 288.3 | 716 | 42 | 3.8 |
| 2011 | 162.8 | 125.3 | 288.1 | 282.2 | 1166 | 55 | 3.9 |
| 2012 | 159.6 | 135.8 | 295.4 | 284.0 | 1429 | 49 | 3.5 |
| 2013 | 159.0 | 135.9 | 294.9 | 278.7 | 1326 | 47 | 3.6 |
| 2014 | 160.2 | 129.5 | 289.7 | 271.3 | 1663 | 51 | 3.2 |
| 2015 | 162.2 | 127.1 | 289.3 | 268.4 | 1801 | 47 | 2.6 |
| 2016 | 165.0 | 135.7 | 300.7 | 274.1 | 1832 | 54 | 3.0 |
| 2017 | 165.0 | 134.2 | 299.2 | 266.9 | 2052 | 51 | 2.6 |
| 2018 | 165.0 | 139.7 | 304.7 | 265.2 | 2111 | 45 | 2.1 |

Note: Percent investigated is calculated based on a total adjusted for timing of reports and investigations.

Source: HSR Annual Report, DOJ and FTC, 2018; Federal Trade Commission Fiscal Years 2010-2018 Congressional Budget Justification

TECHNET
THE VOICE OF AMERICAN INNOVATION

TechNet Southwest | Telephone 408.898.7145
915 L Street, Suite 1270, Sacramento, CA 95814
www.technet.org

August 13, 2026

California Law Revision Commission
Attn: Sharon Reilly, Executive Director
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

RE: Study B-750 (Antitrust Law), Memorandum 2026-29 – Draft Language Options for Mergers and Acquisitions – TechNet Comments

Dear Executive Director Reilly and Members of the Commission:

On behalf of TechNet, thank you for the opportunity to comment on Memorandum 2026-29 in advance of the Commission's August 17, 2026 meeting. TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of American innovation by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes more than 100 dynamic American businesses ranging from startups to the most iconic companies on the planet and represents five million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

We appreciate the care the Commission and staff have brought to this study, and we share the Commission's interest in an antitrust regime that protects Californians from anticompetitive conduct. Our concern is with means, not ends. The draft language would replace liability standards that businesses and courts have applied for decades with new formulations whose meaning would have to be settled through years of litigation, and would write one iteration of federal enforcement guidance into permanent statute. We respectfully urge the Commission to keep California's merger framework substantially consistent with federal law and to decline the proposed changes absent a demonstrated gap in existing authority.

<u>California enforcers already have the tools to challenge anticompetitive mergers.</u>

The memorandum's central premise is that California needs new tools because federal agencies sometimes decline transactions the state would pursue.[1] But a difference in enforcement priorities is not a defect in California law. The Attorney General has independent authority to enforce the state's antitrust laws and to seek injunctive relief, and has used it – leading an eight-state coalition to block the $6.2 billion

[1] Memorandum 2026-29, at 9 & n.48 (noting recent federal clearances that prompted independent state challenges).

Nexstar/Tegna transaction and securing a preliminary injunction after federal regulators had cleared the deal.[2] That is the existing toolkit working as designed.

The memorandum does not identify a single California transaction that state enforcers were unable to reach under current law, nor does it show that more enforcement built on departures from settled precedent produces better outcomes. Before recommending changes of this magnitude, we ask the Commission to make that showing. If the record cannot identify cases where existing authority proved insufficient, the case for departure has not been made.

<u>A California-only standard would operate as a national standard.</u>

Merger review is not severable by state. A single injunction or divestiture order can determine whether a nationwide transaction closes or is abandoned, so the most restrictive applicable standard effectively governs the entire deal. Because the draft language covers acquisitions affecting commerce in any part of the state, a California-specific test would function as a national test for any company doing business here – regardless of deal size or how thin the California nexus is.

The practical consequences fall on companies of every size: higher compliance costs, more difficulty pricing and timing transactions, and stronger incentives to forum-shop. For California's startup ecosystem in particular, acquisition is a primary path to scale and to liquidity for early investors. A standard that makes acquisitions harder to predict narrows that path, and the effect is felt most acutely by smaller companies with the least capacity to absorb legal uncertainty.

We also urge the Commission not to split the existing "tend to create a monopoly" language into a standalone prong.[3] Keeping that language paired with the substantial-lessening prohibition, as Section 7 does, lets California courts continue drawing on decades of federal decisions. Separating it invites an independent state construction of the incipiency standard with no body of case law behind it.

<u>Both liability formulations trade a tested rule for one built through litigation.</u>

TechNet opposes adopting either the "appreciable risk" standard or the "reasonable probability" standard.[4] The two options have different problems, but the same consequence. The reasonable probability option is drafted as an instruction to courts about how much certainty they may demand rather than as a statement of what the statute prohibits, so its real effect on merger litigation would be worked out case by

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[2] Press Release, Cal. Att'y Gen., Attorney General Bonta Files Lawsuit Seeking to Block $6.2 Billion Nexstar/Tegna Broadcasting Merger (Mar. 18, 2026); Press Release, Cal. Att'y Gen., Attorney General Bonta Secures Critical Win in Nexstar/Tegna Merger Challenge (Apr. 18, 2026) (preliminary injunction entered after federal clearance).

[3] Memorandum 2026-29, at 11.

[4] Memorandum 2026-29, at 16.

case. The appreciable risk option goes further, changing both how likely the harm must be and how serious it must be. Either way, California businesses would be operating under a standard whose contours no one can describe until courts have filled them in.

That uncertainty has measurable costs. Empirical work finds that policy uncertainty attributable to heightened enforcement depresses merger and acquisition activity at both the firm and macroeconomic levels; faced with an unclear rule, firms delay or abandon transactions they cannot easily unwind.[5] In fast-moving technology markets, where acquisitions are how new capabilities get scaled and commercialized, that chilling effect lands hardest on the transactions with the clearest procompetitive rationale. Any new standard should be justified by a concrete benefit large enough to outweigh the loss of legal certainty. The memorandum does not identify one.

<u>The Merger Guidelines are enforcement guidance and should not be written into statute.</u>

The 2023 Merger Guidelines describe how the federal agencies exercise prosecutorial discretion. They are expressly non-binding statements, and they are revised periodically as economics, case law, and enforcement experience evolve.[6] That revisability is the point. A statute that designates one dated guidance document as persuasive authority – or that transposes its HHI thresholds into statutory presumptions – freezes a single iteration in place and cannot follow later revisions, including revisions California's own enforcers might welcome.

The burden-shifting provisions raise a distinct concern. Under federal law, a plaintiff's structural showing shifts to the defendant the burden of producing rebuttal evidence; the ultimate burden of persuasion stays with the plaintiff throughout. The draft would go considerably further, requiring a defendant not only to rebut the presumption but to affirmatively prove that the transaction is not likely to lessen competition substantially and that the resulting concentration is not anticompetitive.[7] That converts a burden of production into a full burden of proof on future competitive effects – a departure from decades of federal jurisprudence that the memorandum does not defend on its own terms.

<u>Recommendations.</u>

We respectfully recommend that the Commission:

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[5] Bonaime, Gulen & Ion, Does Policy Uncertainty Affect Mergers and Acquisitions?, 129 J. Fin. Econ. 531 (2018) (identifying a significant negative relationship between policy uncertainty and acquisition likelihood).

[6] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023) (describing the Guidelines as a non-binding statement); see Memorandum 2026-29, at 13–14.

[7] United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990); compare Memorandum 2026-29, at 10, with id. at 14–15.

- Retain the existing prohibition as a unified standard and decline to split "tend to create a monopoly" into a standalone prong.
- Decline both the "appreciable risk" and the "reasonable probability" formulations, preserving substantial consistency with Section 7 of the Clayton Act.
- Decline to codify the 2023 Merger Guidelines or their concentration thresholds. If the Commission wants courts to have the benefit of federal guidance, reference the guidance in effect at the time of the action rather than fixing one version in statute.
- Preserve the federal allocation of proof: a structural showing shifts the burden of production, and the burden of persuasion remains with the plaintiff.
- Before recommending any departure, identify specific California transactions that state enforcers could not reach under existing law, and explain why the proposed change would have reached them.

Departure from the federal framework and the introduction of untested standards in its place would increase unpredictability and discourage procompetitive transactions without a demonstrated enforcement benefit.

If you have any questions regarding our position, please contact Robert Boykin at rboykin@technet.org or 408.898.7145.

Sincerely,

Robert Boykin
Executive Director for California and the Southwest
TechNet

August 12, 2026

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: Antitrust Law – Study B-750 Support for Staff Recommendations**

Dear Chair Simpson and Commissioners,

Since the passage of the federal Clayton Act in 1914, antimerger policy in the United States has been animated by the need to protect and support healthy, diverse markets that include small and independent businesses. "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business," the U.S. Supreme Court found when examining the legislative history of the Clayton Act and its crucial 1950 amendment.[1]

However, our federal antitrust agencies' unwillingness to enforce our antimerger laws for much of the past 50 years has led to dangerously concentrated industries throughout the American economy. The prevailing Chicago School of antitrust and economics, and the rejection of traditional concerns around industrial concentration, has allowed a small number of corporations to assume an extraordinary degree of economic and political control, often through unchecked corporate mergers.[2] This trend has devastated independent businesses in America. Between 1982 and 2017, the share of U.S. business revenue going to firms with fewer than 100

[1] *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)
[2] See generally, Stacy Mitchell and Ron Knox, "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," ILSR report, June 2022; CLRC Memorandum 2024-24, "Expert Report: Mergers and Acquisitions (finding that, "This narrowing of enforcement has coincided with substantial increases in market concentration, the rise of dominant firms, and unusually high profit rates in the economy.")

employees plunged, falling from 40 percent to 23 percent.[3] As experts advising the CLRC have explained in detail, many California industries reflect the national trend toward corporate concentration.[4]

The Institute for Local Self Reliance (ILSR) applauds the passage of SB 25, which created a requirement that certain mergers are reported to the Attorney General for review. Pre-merger notification is an important step toward allowing California enforcers to police potentially dangerous corporate concentration within the state, but pre-merger notification remains insufficient without a strong, state-based antimerger law that would give enforcers the correct tools to prevent corporate dealmaking that threatens workers, small businesses, consumers and business competition.

While federal enforcement of the Clayton Act has fluctuated in recent years, the second Trump administration makes the need for a California-specific merger control regime clear. Corporate consolidation has rapidly accelerated under the second Trump administration. Almost 30 deals worth more than $10 billion were announced in 2025, around twice as many as the previous year, and consolidation by value increased around 40 percent overall in the administration's first year.[5] Settlements of potentially anticompetitive mergers are also up significantly, as corporate, Trump-affiliated lobbyists have gained unprecedented influence over decisionmaking at the federal antitrust agencies.[6]

California Attorney General Rob Bonta has been active in opposing deals when the federal antitrust agencies allowed a potentially anticompetitive merger, or appear likely to do so.[7] Attorney General Bonta's recent lawsuit to block the $110 billion Warner Bros./Paramount merger clearly demonstrates the state's willingness to challenge dangerous and anticompetitive dealmaking.[8] However, because California has no existing state-specific merger statute, the state is forced to challenge deals in federal court, where conflicting and sometimes difficult federal precedent constrains otherwise appropriate antimerger enforcement. By recommending a strong merger law, the Commission can take significant steps towards giving the state the power to use its own courts and law to prevent harmful mergers that impact California small businesses, workers, and communities.

Leaving merger enforcement in the hands of conflicting and sometimes difficult-to-apply federal law puts California communities and jobs at risk. Corporate dealmaking often leads to significant job loss; On average, around 30 percent of employees are deemed redundant after a merger of two companies operating in the same industry.[9] For example, after federal courts relied on

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[3] U.S. Census Bureau, "1982 Economic Census" and "2017 Economic Census."
[4] CLRC Memorandum 2024-14, "Expert Report: Concentration in California," March 28, 2024
[5] Dave Michaels and Ben Glickman, "Corporate Dealmaking Is Getting Bigger and Bolder Under Trump," Wall Street Journal, Nov 26, 2025
[6] David Dayen,"Real Talk About Lobbyists Buying the Justice Department," The American Prospect, Feb 16, 2026
[7] See, for example, "Attorney General Bonta Secures Court Decision Allowing States to Participate in Evaluation of Allegedly Corrupt HPE/Juniper Merger," California Attorney General press release, Nov 18, 2025
[8] "Attorney General Bonta Files Lawsuit to Block $110 Billion Warner Bros./Paramount Merger," press release, State of California Department of Justice, Jul 13, 2026
[9] Mitchell Lee Marks, Philip Mirvis and Ron Ashkenas, "Surviving M&A," Harvard Business Review, Apr 2017

flawed federal merger law to allow Microsoft to buy video game maker Activision Blizzard, Microsoft laid off nearly 2,000 workers in its video game divisions, including hundreds of workers in San Francisco, Irvine, and Santa Monica.[10]

The undersigned organizations continue to fully support the coalition recommendations included in the AELP Coalition letter to the Commission published as public comment on December 1, 2025.[11] We support adopting elements of Option Four with Revisions, which combines the key elements of Options Two and Three with the crucial "appreciable risk" standard.[12] This includes recommending legislation that enshrines in California law the authority and guidance of the 2023 Federal Merger Guidelines, empowering the Attorney General to rely on simple, clear measurements of market structure and concentration when reviewing and challenging potentially anticompetitive mergers.[13] The Commission should also recommend legislation that enshrines in law the United States Supreme Court precedent established in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), which prohibits 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." As the most recent staff memorandum confirms, Philadelphia National Bank remains good case law and the gold standard for interpreting which mergers may impact competition in an industry.

Crucially, the undersigned organizations support a prohibition on mergers where the effect may be to create an "*appreciable risk*" of violating the law, as described in Option 4 with Revisions and detailed in Memorandum 2026-29. The appreciable risk standard is neither new nor novel. As CLRC staff and the Anti-Monopoly Coalition[14] have detailed, enforcers and courts have long used an appreciable risk standard when considering whether to prohibit a merger. Although this standard has been called different names at different times, the idea is simple, clear, and reflects the reality of corporate concentration: Any merger that gives rise to corporate concentration and may risk harming competition should be banned. ILSR also supports the inclusion of a purpose statement as staff described in Memorandum 2026-29.

Adding these elements to the CLRC's recommendations will strengthen the enforceability and predictability of the law, and will give California needed tools to prevent anticompetitive serial acquisitions and private equity roll-ups within the state.

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

Sincerely,

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[10] Samantha Masunaga, "Activision Blizzard to lay off hundreds in Irvine and Santa Monica starting next month," Los Angeles Times, Sep 27, 2024
[11] Fourth Supplement to Memorandum 2025-42
[12] Memorandum 2026-14, "Option Four with Revisions: Philadelphia National Bank, Federal Merger Guidelines, and Appreciable Risk"
[13] 2023 Merger Guidelines ("the Agencies may use evidence about market shares and market concentration as part of their analysis. These structural measures can provide insight into the market power of firms as well as into the extent to which they compete.")
[14] See Fourth Supplement to Memorandum 2025-42, Cal. Law Revision Comm. (Dec. 1, 2025), accessible online: https://clrc.ca.gov/pub/2025/MM25-42s4.pdf

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

American Economic Liberties Project
California Nurses Association
Consumer Federation of California
Economic Security California Action
Rise Economy
United Domestic Workers, AFSCME Local 3930
United Food & Commercial Workers, Western States Council
TechEquity Action