THIRD SUPPLEMENT TO MEMORANDUM 2026-29

Antitrust Law: Status Update (Mergers Public Comment)

This supplement presents a public comment received by the Commission related to Memorandum 2026-29.[1] The public comment is attached as an Exhibit to this supplement.

Exhibit ***Exhibit page***
California Chamber of Commerce (8/14/26)..1

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

California Chamber of Commerce

This comment was submitted by Eric P. Enson of Crowell & Moring LLP on behalf of the California Chamber of Commerce. According to its website:

> The California Chamber of Commerce (CalChamber) is dedicated to supporting businesses across the state with tools, resources, and advocacy to thrive in California's dynamic economy. From navigating California labor laws to ensuring HR compliance, CalChamber HR services provide everything employers need to succeed.[2]

PUBLIC COMMENT

CalChamber continues to oppose a California merger statute:

> The revised options presented in Memorandum 2026-29 share the same fundamental problems that plagued the options presented in the June 2025 memorandum on which CalChamber previously commented: They are premised on an unsubstantiated concern that federal merger enforcement has failed, they rely on lax presumptions untethered to a rigorous analysis of competitive effects and they will impose extraordinary costs on California businesses, workers and consumers.[3]

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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] CalChamber.

[3] Letter from CalChamber, August 14, 2026, EX 2.

Does the Commission have any questions about this public comment?

Respectfully submitted,

Sarah Huchel
Chief Deputy Director

Sharon Reilly
Executive Director

Crowell

August 14, 2026

Richard Simpson, Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law – Study B-750 – Comment on Behalf of the California Chamber of Commerce

Dear Chairperson Simpson and Commissioners:

The California Chamber of Commerce ("CalChamber"), and its more than 14,000 members, thanks the Commission for the opportunity to comment further on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber submits these comments in response to Staff Memorandum 2026-29, which presents revised options for a California mergers and acquisitions statute. We continue to urge the Commission to decline to recommend any of the options presented in Memorandum 2026-29, as set forth below.

Mergers and acquisitions are critical aspects — indeed, indicators — of a healthy economy. Mergers enable companies to access new markets, expand their customer base and diversify their offerings. Mergers also allow companies to acquire and invest in new technologies, products or services that may not thrive without sufficient funding. Frequently, mergers allow for increased production volumes and economies of scale that reduce costs and inefficiencies, all of which can benefit consumers and workers as better, but cheaper, products and services are developed and employment opportunities expand.

California has the most innovative technology sector on the planet, a critical innovation ecosystem in life sciences, the largest manufacturing base in the country and numerous vibrant industries that have thrived due, in larger part, to mergers and acquisitions evaluated under existing federal law. And, of course, California's venture capital sector is the largest and most influential in the world, anchored by hubs in Silicon Valley, San Francisco, Los Angeles and San Diego. While CalChamber and its members favor rigorous merger enforcement, we are deeply concerned that the proposals set forth in Memorandum 2026-29 threaten to upend this carefully balanced ecosystem with no demonstrated need and at enormous cost to the California economy.

The revised options presented in Memorandum 2026-29 share the same fundamental problems that plagued the options presented in the June 2025 memorandum on which CalChamber previously commented: They are premised on an unsubstantiated concern that federal merger enforcement has failed, they rely on lax presumptions untethered to a rigorous analysis of competitive effects and they will impose extraordinary costs on California businesses, workers and consumers.

I. California Already Has Robust Merger Enforcement Tools — No New Framework Is Needed.

California's Attorney General enforces both California and federal antitrust law through merger reviews, investigations and litigation. In February 2026, California enacted SB 25, the California Uniform Antitrust Premerger Notification Act. Under that Act, beginning January 1, 2027, merging parties must give the Attorney General a complete copy of their federal Hart-Scott-Rodino filing within one business day; California-headquartered filers must also provide the federal government additional documentary material, while other covered filers must provide it within seven business days of request. Thus, under existing law, California will receive the same core information used by the DOJ and the FTC to assess mergers and acquisitions, at essentially the same time.

California is also actively using its existing authority. In July, Attorney General Bonta led twelve states in suing under federal law to block the proposed Warner Brothers / Paramount merger and recently obtained a temporary restraining order. California likewise joined the federal and multistate Live Nation/Ticketmaster case, rejected DOJ's proposed settlement and won a jury verdict in April 2026. And California has recently sued to block Nexstar Media Group's purchase of Tegna. These actions, and many, many others, demonstrate that California neither lacks meaningful legal tools nor the practical ability to act independently when it believes competition is at risk.

Legislation designed to supersede federal law and establish a divergent antitrust standard in California is not necessary to enable state officials to continue to review and challenge mergers and acquisitions that impact state businesses and residents. Instead, a California-specific M&A regime would only frustrate legitimate transactions even if they pass federal scrutiny. That is, transactions could complete federal review and still face a California challenge applying different thresholds, burdens and definitions of actionable risk. Adopting an entirely new State merger regime under these circumstances is unnecessary, unjustified and harmful.

II. The Basic Merger Framework and Its Variations Remain Problematic.

a. The Basic Merger Framework Creates Significant Confusion and Uncertainty.

The "Basic Merger Framework" presented in Memorandum 2026-29 is anything but basic. While it uses established antitrust language, it will still cause confusion and inconsistent results. The chief reason is that the Basic Merger Framework presents three separate tests for the legality of a merger or acquisition: (i) one similar to the Clayton act; (ii) one prohibiting a merger that "tend[s] to create a monopoly or monopsony;" and (iii) one that uses the *Philadelphia National Bank* standard. The framework also endorses the 2023 Merger Guidelines as persuasive authority that courts should consider in evaluating a merger.

This means that opponents of a merger will have the ability to pick and choose the test, or tests, they will use to challenge a merger, and merging parties will have to defend their transaction under multiple legal standards and authority in California. This kind of "cafeteria-style" statute is not only a foot on the scale designed to aid plaintiffs, but it is also inefficient merger policy that will inhibit mergers and acquisitions due primarily to the uncertainty it creates.

Another cause of uncertainty is the fact that merger challenges under this framework may be heard in California state courts, which have little, or no, M&A antitrust experience. Coupling this lack of experience with a novel, multi-pronged legal test ensures that state courts will interpret and apply merger standards differently among themselves and differently from federal courts. Indeed, Memorandum 2026-29 notes that "[m]erely adding language that provides the ability to challenge mergers in state courts is a significant change to California's antitrust law."

b. The HHI Presumptions Will Not Improve Merger Enforcement or Reduce Its Costs.

The option to codify Federal Merger Guideline 1 by incorporating Herfindahl-Hirschman Index ("HHI") presumptions into the Basic Merger Framework is also troubling. The 2023 Merger Guidelines expressly describe themselves as a "non-binding statement" of agency practice. Nevertheless, the proposed language would convert lower concentration screens into statutory presumptions: A transaction with a post-merger HHI above 1,800 with an increase above 100, or a share above 30 percent with an HHI increase above 100 will be presumed unlawful.

Antitrust enforcement decision-making based on market share and market concentration presumptions is a blunt instrument. While the HHI is a straightforward calculation, it cannot capture the richness of the data and the information in documents available to an agency involved in a merger investigation. Merger analysis is a fact-intensive exercise, and no simple market structure presumption can adequately evaluate the nuances present in specific markets across the economy. Indeed, reducing important antitrust decisions to simple mathematical calculations risks chilling the vibrancy of the California economy because it would treat industries as diverse as tech, entertainment, healthcare, agriculture, biotech, manufacturing and tourism, among others, in a one-size-fits-all manner.

Moreover, the empirical record confirms that HHI thresholds are an unreliable guide to competitive harm. As set forth in our August 14, 2025 public comment, many transactions that have been investigated by the DOJ and FTC, under both Democratic and Republican administrations, were not challenged even though their market structure characteristics exceeded the 2023 Merger Guidelines' presumptions. A study of FTC horizontal merger investigations between 1996 and 2011 indicates that the FTC has often not taken enforcement actions involving mergers that produce HHIs above the thresholds set forth in the proposed options. The data shows that out of 1,204 FTC investigations in which HHI values were above 1,800 with increases above 100, the FTC did not challenge transactions in 209 of these markets. Codifying these presumptions into California law would therefore result in false positives — the blocking or deterrence of mergers that, after thorough investigation, would have been recognized as procompetitive.

Another problem with combining the Basic Merger Framework and Federal Merger Guidelines is that it does not properly account for merger efficiencies. Mergers are generally recognized as having the potential to promote economic efficiency to the benefit of consumers, workers, businesses and the overall economy. But the proposed rebuttal standard limits the evaluation of efficiencies to mergers where anticompetitive effects are absent or *de minimis*, providing that a defendant may rebut the presumption only by demonstrating "that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis and that any potential anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market." Such a standard would block a merger that raises small (but not *de minimis*) competitive harms in one market even if there were large and certain efficiencies or benefits created in other markets that could not otherwise be achieved — a result that is not in the best interest of California consumers, workers or the overall economy.

c. The "Appreciable Risk" and "Reasonable Probability" Standards Are Equally Problematic.

Option Four — now relabeled the "Appreciable Risk" option — is a completely new standard intended to reduce the burden of proof necessary to challenge and halt a merger. This is explicit in Memorandum 2026-29, which states that with this option the "volume and strength of evidence required to prove possible anticompetitive harms would be lower, which would make it easier for the state to address anticompetitive mergers." This is undoubtedly true, but the use of a less rigorous standard also makes it more likely that enforcement errors are made and that economically beneficial transactions are blocked or not pursued.

The proposed "appreciable risk" formulation is particularly problematic because it simultaneously reduces both the probability and the magnitude of harm that must be demonstrated to obtain relief. Under this standard, a plaintiff would not need to show that a merger is likely to substantially lessen competition — the well-settled federal benchmark — but only that there exists some appreciable probability of a harm exceeding a *de minimis* level. California courts would be left to define those boundaries through case-by-case adjudication, with no established body of precedent to guide them and no limiting principle to prevent the standard from being applied to transactions that are plainly innocuous.

The “reasonable probability” option, while superficially less radical, presents similar difficulties. Changing a familiar legal standard comes with significant risks and will cause disruption to businesses, creating uncertainty until a solid base of jurisprudence is built.

III. The AB 1776 Experience Demonstrates the Risks of Antitrust Legislation That Departs From Federal Law.

The Commission need look no further than its own single-firm conduct recommendations — which resulted in AB 1776 — to understand why adopting a merger statute that diverges from federal standards is inadvisable. As Memorandum 2026-29 notes, AB 1776 has been amended several times and is likely to be amended again as it moves through the Legislative process, if it proceeds. The primary driver of these amendments has been the Legislature’s recognition that provisions of AB 1776 that departed significantly from federal law raised serious concerns. The Senate Judiciary Committee’s analysis, and required amendments, reflected deep unease about the practical consequences of this kind of divergence, including the uncertainty that flows from a rejection of federal antitrust precedent.

The story of AB 1776 serves as an important and cautionary lesson that the Legislature itself has recognized: California antitrust legislation that departs too far from federal law invites the kind of legislative instability, uncertainty and substantive revision that frustrates the very purposes the Commission seeks to advance. And because mergers and acquisitions arguably carry even higher economic and cross-border stakes than single-firm conduct, these dynamics are even more acute in the merger context.

IV. The Economic Costs Are Severe, Real and Quantifiable.

The Commission should not underestimate the economic consequences of adopting any of the options in Memorandum 2026-29. As we noted in our August 14, 2025 public comment, substantial State resources will be required to enforce a California merger provision. Another real cost the State will suffer is the mergers and acquisitions that are never consummated due to a fear of enforcement actions and uncertainty around the standards that may apply. As the Software & Information Industry Association recently noted for the Commission, a July 2026 Oxford Economics report evaluating the impact of state-level antitrust fragmentation finds a direct link between proposals like those in Memorandum 2026-29 and slower growth, reduced productivity and declining M&A and investment activity. The Oxford Economics report quantifies what this uncertainty would mean in practice: Over one-third of surveyed businesses expect merger approval to be slower under state-specific antitrust provisions, and more than half say that they expect laws like those proposed in Memorandum 2026-29 would influence their decision about whether to pursue a deal at all. These are real costs that the Commission should not ignore.

V. Conclusion.

As many have noted, including the Commission's Mergers and Acquisitions Working Group, the vast majority of mergers raise no competitive concerns. Indeed, economists have repeatedly concluded that most mergers drive innovation and competition. Merger law enforcement is critical to ensuring that the right balance is struck — aimed at halting problematic mergers, but allowing procompetitive mergers. The existing federal framework, bolstered by California's robust enforcement tools including the Attorney General's independent enforcement authority and the newly enacted mini-HSR law, already strikes that balance. The proposals in Memorandum 2026-29 do not. CalChamber looks forward to continuing to work with the Commission and to maintaining a business environment that benefits all Californians.

Sincerely,

Eric P. Enson

Eric P. Enson