



June 24, 2025

California Law Revision Commission
 c/o Legislative Counsel Bureau
 925 L Street, Suite 275
 Sacramento, California 95814

Submitted electronically to: Sharon Reilly at sreilly@clrc.ca.gov

SUBJECT: ANTITRUST LAW – STUDY B-750 – PUBLIC COMMENT

Dear Chairperson Carrion and Commissioners:

We write on behalf of California's businesses and employers to comment on the work the California Law Revision Commission (the "CLRC") is doing regarding California's antitrust laws, Study B-750. As the backbone of California's economy, we believe that the robust enforcement of California's antitrust laws benefits all who live and work in the State. Indeed, California's economy has thrived under the existing antitrust laws, spurring growth and innovation all while protecting businesses and consumers from anticompetitive conduct. But we have serious concerns about the CLRC Staff's March 24, 2025, Memorandum 2025-21 ("Staff Memo") containing options for a single-firm conduct provision to be added to California law. It is our view that the CLRC should refrain from proposing amendments to California's antitrust laws based on the Staff Memo's proposals for several reasons.

- The key shortcoming we see with the proposals contained in the Staff Memo, and the idea of revising California law generally, is that we have not seen any evidence that California's antitrust laws are failing to protect businesses and consumers. While we understand that the CLRC has heard voices seeking revisions, none of them have made the case, based on evidence, that Californians are suffering from higher prices or lessened innovation and competition because of deficiencies in California law.
- Another major shortcoming we see with the proposals in the Staff Memo is that no one has measured the costs associated with revisions to California's antitrust laws and whether those costs will be offset by benefits to California businesses and consumers. We know that new regulations, particularly new regulations that depart from existing law, like those proposed in the Staff Memo, come with costs due to uncertainty and increased litigation. Uncertainty and litigation risks associated with a new antitrust law regime in California will chill pro-competitive practices and stifle innovation. The trade-offs associated with amending California's antitrust laws must be measured and considered by the CLRC before proposing any revisions.
- Our concerns about a lack of need and the absence of an analysis of policy trade-offs are made worse by the fact that the Staff Memo proposes major changes in both substantive antitrust law and its enforcement. As we understand the proposals, they could be interpreted to outlaw common business practices that are viewed as being good for competition and consumers, including standard licensing agreements, exclusive dealing arrangements and even discounts aimed at beating competition. This is particularly the case if the CLRC adopts the recommendation in the Staff Memo to disregard the decades of federal precedents that have guided courts and businesses in determining what is lawful and what is not.

Attached to this letter is the California Chamber of Commerce's May 23, 2025, public comment to the CLRC. We fully endorse the points expressed in CalChamber's public comment and ask that the CLRC consider it seriously before taking any further action.

Sincerely,



Ben Golombek
Executive Vice President and Chief of Staff for Policy
California Chamber of Commerce

CalBroadband
California Association of REALTORS®
California Life Sciences
Carlsbad Chamber of Commerce
Chino Valley Chamber of Commerce
Civil Justice Association of California

Computer and Communications Industry Association
Garden Grove Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
International Franchise Association
La Cañada Flintridge Chamber of Commerce
Livermore Valley Chamber of Commerce
Los Angeles Area Chamber of Commerce
Los Angeles County Business Federation
Mission Viejo Chamber of Commerce
Motion Picture Association
Murrieta/Wildomar Chamber of Commerce
National Retail Federation
Orange County Business Council
Palm Desert Area Chamber of Commerce
Palos Verdes Peninsula Chamber of Commerce
Paso Robles and Templeton Chamber of Commerce
Rancho Mirage Chamber of Commerce
Redondo Beach Chamber of Commerce
San Juan Capistrano Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Silicon Valley Leadership Group
Software Information Industry Association
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
U.S. Chamber of Commerce
Wilmington Chamber of Commerce

cc: Governor Gavin Newsom
Members, California State Senate
Members, California State Assembly

BG:am

Eric P. Enson
EEnson@crowell.com
213.310.7977 direct
310.503.1774 mobile

Crowell & Moring LLP
515 South Flower Street,
40th Floor
Los Angeles, CA 90071
+1.213.622.4750 main
+1.213.622.2690 fax

May 23, 2025

Xochitl Carrion, 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 Carrion and Commissioners:

Under California’s existing antitrust laws, the California economy has grown to the fourth-largest in the world and has given rise to the most innovative technology sector on Earth, all while protecting businesses and consumers from unlawful, anticompetitive conduct. Yet the sweeping revisions being considered by the California Law Revision Commission (“CLRC” or the “Commission”) threaten California’s progress and economic success. As such, the California Chamber of Commerce (“CalChamber”), and its more than 14,000 members, have serious concerns about the proposals being considered and recommend caution.

CalChamber¹ 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 looks forward to continuing to work with the CLRC in attempting to develop policies that ensure a strong and dynamic business environment that benefits all Californians. We write regarding the CLRC Staff’s March 24, 2025 Memorandum 2025-21 (“Staff Memo”)² containing options for a single-firm conduct (“SFC”) provision that may be added to California law. In short, these proposals all greatly risk stifling competition in California and making illegal common business practices that have long been considered pro-competitive and good for consumers. Moreover, the proposed options remain unsupported by an independent analysis suggesting that they are necessary to protect Californians, and there has been no economic study measuring the costs these proposals will inflict on Californians, all of which can be, and should be, studied empirically before proceeding.

In this comment, we first respond to questions posed by the Commission during the April 3, 2025 hearing regarding the feasibility of conducting economic studies of competition in California as and the costs, benefits and fiscal impact of the proposed revisions. We then detail the massive impact the Staff Memo proposals will have on competition, innovation and businesses, large and small, in California.

¹ CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffske, economists with BRG.

² Memorandum 2025-21 “Draft Language for Single Firm Conduct Provision,” March 24, 2025.

***The Proposals Remain Unsupported by an Economic Analysis of
Competition in California or the Costs of Implementing the Proposals,
Which are Studies That Can and Should be Performed***

Since our first submission to the Commission in April 2024, CalChamber has repeatedly raised two key concerns. One, there has been no study showing that California’s antitrust laws are failing. Put another way, there has been no empirical or analytical analysis showing that California consumers or businesses are suffering from reduced competition, higher prices or lessened innovation because of gaps in California law. Two, there has been no cost-benefit study performed to determine whether the proposed revisions to California’s antitrust laws – on balance – are likely to improve economic performance and efficiency at a cost the State is willing to bear.

At the Commission’s April 2025 meeting, several Commissioners asked whether these types of economic analyses are even feasible. The short answer is, absolutely!

As an initial matter, there are scores of economic consulting firms and PhD economists who perform studies of economies, industries, and markets all the time to answer difficult questions about levels of competition and the costs of regulation. They include BRG, which is advising CalChamber in this matter, Compass Lexecon, NERA Economic Consulting, The Brattle Group, Charles River Associates, Cornerstone Research, Bates White Economic Consulting and Econic Partners, to name just a few. Major consulting firms like McKinsey & Company, Boston Consulting Group, and Bain & Company also have strong economic consulting divisions. Moreover, California’s Legislative Analyst’s Office is a resource available to all California legislators and could be asked to prepare a report assessing the benefits, costs, and fiscal impact of the legislative proposals in the Staff Memo in a non-partisan manner.

In fact, several economic consulting firms have already provided the Commission with economic analyses of some of these issues. For example, the Data Catalyst Institute authored a January 2024 economic analysis measuring potential costs associated with new antitrust laws and found that “based on a bespoke economic model . . . if European-style competition concepts, also called ‘abuse of dominance’ (AOD), become law in the U.S., it could cost small and medium-sized businesses (SMBs) more than \$600 billion in lost sales revenue annually.”³ Likewise, the Computer & Communications Industry Association Research Center issued a March 2024 economic study, entitled *Assessment of Economic Costs of Imposing Abuse of Dominance Standards at the State Level*, finding that an AOD-style law in California “could reduce GDP by 1.1 percent and create 116,000 fewer jobs in the first year” and that “[b]y 2032, California could experience a whopping GDP loss of \$554 billion, a 10.2 percent decrease in GDP, resulting in 1.2 million fewer jobs created.”⁴ In October 2024, the economic consulting firm, NERA, provided the Commission with an economic study of concentration in the United States and found that “the empirical evidence based on official data from the U.S. Census Bureau demonstrates that there is no general trend towards increasing and excessive concentration. Indeed, overall concentration levels are on par with those that prevailed before the allegedly lax antitrust policy of the Bush and Obama Administrations and the advent of ‘Big Tech.’”⁵ And Compass Lexecon performed an economic analysis of the levels of competition in the audiovisual industry, concluding, despite claims to

³ Second Supplement to Memorandum 2024-13, p. EX 34.

⁴ First Supplement to Memorandum 2024-13, p. EX 47.

⁵ First Supplement to Memorandum 2025-11, p. EX 35.

the contrary, “that the empirical evidence supports that the audiovisual industry exhibits signs of a dynamic and highly competitive industry, benefiting both consumers and workers in the industry.”⁶

While there are a number of different ways that these types of studies can be designed and performed, the economics of them can be quite basic. For example, to explore whether competition in California is less robust than it otherwise would be if California had an SFC provision, economists can compare prices in California with prices in states that have an SFC provision, such as Arizona, Colorado, Florida, and Maryland. That is, economists could compare pricing or margins for specific goods and services in states that have SFC provisions to those that do not, to test whether there are statistically significant price or margin differences between these two groups of states, while controlling for local and regional pricing effects and other variables, like the cost of living.

Likewise, the economic effects of the addition of an SFC provision to California law can be estimated using standard economic impact tools, such as input-output (“IO”) analysis or computable general equilibrium (“CGE”) models. These economic effects could include losses associated with businesses relocating to other states, the loss of taxes from relocating businesses and employees, and the loss of spending by relocating businesses and employees, among other impacts. IO and CGE models are designed to track direct and indirect effects from economic changes and are commonly used to study the economic effects of changes in government policies. Firms like Regional Economic Models, Inc. specialize in conducting these types of studies.

Yes, studies like these can take time and can be expensive. But the time and costs of such studies pale in comparison to the potential costs of California adopting new legal standards that may stifle competition and innovation and drive business and jobs from the State. As we have repeatedly noted, the Commission should at least study whether new laws are necessary and, if so, how much they will cost before taking further action.

The Breadth of the Potential SFC Provisions

The Staff Memo proposes three options for a Cartwright Act SFC prohibition: (i) The “Basic SFC Provision;” (ii) the “Enhanced SFC Provision;” and (iii) the “Exclusionary Conduct Provision.” These are:

Option One: Basic SFC Provision

It is unlawful for a person to monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize, in any part of trade or commerce.⁷

Option Two: Enhanced SFC Provision

- (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

⁶ Second Supplement to Memorandum 2024-46, p. EX 19.

⁷ Staff Memo, p. 2 (footnotes omitted).

- (1) In restraint of trade, or to attempt to restrain the free exercise of competition or the freedom of trade or production; or,
 - (2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.
- (b) As used in this section, “restraint of trade” shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.⁸

Option Three: The Exclusionary Conduct Provision

- (a) It shall be unlawful for one or more persons to engage in anticompetitive exclusionary conduct that affects any part of the trade or commerce within the State.
- (b) Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to:
- (1) Diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant’s rivals and thereby increase or create a meaningful risk of increasing the defendant’s market power, and
 - (2) Does not provide sufficient benefits to prevent the defendant’s trading partners from being harmed by that increased market power.
- (c) “Trading partners” are parties with which the defendant deals, either as a customer or as a supplier.⁹

Option One is designed to track the language of Section 2 of the federal Sherman Act, which prohibits monopolization, attempted monopolization and conspiracy to monopolize.¹⁰ Option Two extends Option One by adding restrictions against restraints of trade. Restraints of trade are currently covered by the Cartwright Act and Section 1 of the Sherman Act, but in the context of joint conduct by two or more firms and not unilateral, single-firm conduct. Nevertheless, Option Two has at least some roots in current antitrust law. Option Three is altogether different, however, and the Staff Memo refers to it as a “clean break from existing federal SFC law.”¹¹

⁸ Staff Memo, p. 4.

⁹ Staff Memo, pp. 5 – 6.

¹⁰ Option One’s references to monopsonization can be thought of a being akin to monopolization by a buyer instead of by a seller.

¹¹ Staff Memo, p. 5.

*Option One Is Problematic Given the Recommendation that
Relevant Federal Standards be Rejected*

Although Option One is supposed to track Section 2 of the federal Sherman Act, it comes with a recommendation that, if adopted, the Commission should also adopt language that “explicitly untethers California’s law from federal law and certain narrow precedents that might limit California’s ability to effectively control competition” (the “Untethering Text”).¹² Put simply, adoption of the Untethering Text would remove the traditional guardrails that have been developed over decades to assist courts in distinguishing between truly anticompetitive conduct and aggressive competition on the merits that, while perhaps weakening rivals, is the essence of competition. For example, by rejecting federal precedent there would be no requirement that a defendant be a certain size or have a certain market share (*i.e.*, be a monopolist) before the proposed SFC law would apply, no explanation of how much of an increase in market power is problematic, and no carve-out for temporary increases in market power (regardless if achieved through competition on the merits or otherwise).¹³ Indeed, there would be no requirement to define a proper relevant antitrust market, which is designed by federal law to evaluate any increase in market power. Moreover, the Untethering Text states that plaintiffs need not show that “[t]he rivals whose ability to compete has been reduced are as efficient, or nearly as efficient, as the defendant,” thereby protecting less efficient competitors.

If adopted, the Untethering Text will not only stifle competition and increase litigation and business costs in California, but may also outlaw business conduct that is commonly viewed as good for competition, consumers, and workers. The Untethering Text would convert Option One’s language that hews closely to the Sherman Act into something very different and outlaw common business practices. We discuss several examples in the next section. Here, we simply note that the Untethering Text is designed to remove defenses to liability in antitrust litigation, even though those defenses are aimed at preserving or protecting pro-competitive or competitively neutral conduct from a finding of liability. Slashing prices to lure away competitors’ customers; introducing innovative products and services aimed at pressuring outdated and inefficient competitors to either improve or exit the marketplace; giving rebates to loyal customers choosing to forego purchases from competing businesses; offering discounts to resellers seeking to invest in and promote a manufacturer’s product to the exclusion of its competitors; and small or temporary gains in market power regardless of the size of the business or others in the market, would all be subject to government and private lawsuits under Option One and the Untethering Text.

While the aim of the Untethering Text may be to protect against predatory practices of dominant entities, as worded and in practice, even small companies employing common business strategies – such as price cutting – will be exposed to significant uncertainty and potential liability if Option One and the Untethering Text are adopted.

¹² Staff Memo, p. 3.

¹³ The lack of a market share or market power threshold is included in the Untethering Text even though when discussing predatory pricing, the CLRC’s antitrust advisor for this study, Cheryl Johnson, stated, “Now predatory pricing may not be unlawful. In fact, it may be procompetitive if somebody is pricing their goods very low but they are a small player and are not putting people out of business. ... So size and market power does matter in terms of the effect of the conduct.” California Law Revision Commission meeting, January 23, 2025, meeting video, question and answer starting at 2h 46m 7s and ending at 2h 47m 39s.

Option Two Is Extremely Broad and Captures Many Types of Common Business Conduct

A “restraint of trade” is an action that inhibits parties from entering into transactions. The federal Sherman Act has been interpreted as enjoining only “unreasonable” restraints of trade – restraints whose competitive harms outweigh any competitive benefits. As written, however, Option Two condemns as unlawful any “restraint of trade” and is not limited only to unreasonable restraints of trade. Given the Staff Memo’s focus on distinguishing any new California SFC law from its federal counterpart, the failure to limit Option Two’s applicability to unreasonable restraints of trade could be interpreted as an intention for the provision to apply to all restraints. Furthermore, adding a prohibition against any “attempt to restrain the free exercise of competition or the freedom of trade or production” to Section (a)(1) also demonstrates an intention that Option Two be interpreted broadly.¹⁴

Common business contracts such as exclusive dealing contracts, tie-ins, requirements contracts, and most-favored nation agreements could be illegal under Option Two even though these types of contracts can have strong, pro-competitive effects or be competitively neutral. Exclusive dealing contracts are an example. An exclusive dealing contract between a manufacturer and a wholesaler prevents the wholesaler from selling the products of a different manufacturer. This necessarily inhibits the wholesaler’s freedom of trade with other manufacturers and other manufacturers’ freedom of trade with the wholesaler. Similarly, a requirements contract between a manufacturer and an input supplier prevents the manufacturer from buying the input from a different supplier, which necessarily inhibits the freedom of the manufacturer to trade with other suppliers of the input and the freedom of other input suppliers to trade with the manufacturer. Additional examples can be found with respect to intellectual property. Under Option Two, would a business in California with rights to certain patented technology be required to license that technology to all other businesses in California so as not to restrain those businesses’ freedom of production? Would a manufacturer licensing a technology be able to enforce exclusive territories in California or other use restrictions in its licenses, which is a common practice today? Would movie studios be required to give all cinemas in the State the right to show all movies, or could the studios license their movies to the cinemas of their choosing, as they do today? These types of common contracts likely would run afoul of Option Two’s prohibition of attempts to restrain the freedom of trade or production.

Yet it is well recognized that these types of vertical restraints – several of which are addressed in more detail below – can be pro-competitive. This is why they are analyzed using the rule-of-reason framework under federal antitrust law. Treating these types of commercial practices as *per se* illegal because they limit or restrain someone’s free exercise of competition, freedom of trade or freedom of

¹⁴ The CLRC’s antitrust advisor for this study, Cheryl Johnson, described Option Two as, “But you’re also not going to let unilateral actors restrain trade, unreasonably restrain trade. I know we say, “restrain trade,” but in antitrust talk, that means unreasonable restraints of trade.” California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 13m 16s and ending at 1h 14m 38s. Once untethered from federal law, the interpretation of California law cannot rely on “antitrust talk” developed around federal law. We note that state antitrust laws at times are explicit about restraint of trade language. For example, as detailed in the state law summary provided as Exhibit A to the Staff Memo, statutory language in Massachusetts includes, “It is the purpose of this chapter to encourage free and open competition in the interests of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth.” Similarly, that in Rhode Island includes, “The purposes of this chapter are ... (2) To promote the unhampered growth of commerce and industry throughout the state by prohibiting unreasonable restraints of trade and monopolistic practices, inasmuch as these have the effect of hampering, preventing, or decreasing competition.” Staff Memo Exhibit A, pp. 16 and 26.

production would necessarily inhibit pro-competitive and competitively neutral conduct, which would increase costs for businesses in California and harm both California consumers and workers.

Staff indicated that it is “very important” to adopt the Untethering Text with Option Two for the same reasons as with Option One.¹⁵ But as with Option One, the result would be to expose even small companies employing common business strategies to significant uncertainty and potential liability.

Option Three Is Expansive and May Outlaw Standard, Pro-competitive Conduct

Option Three is similarly broad and covers common business conduct that is considered pro-competitive. The Staff Memo notes that Option Three uses new terminology and a new analytical framework.¹⁶ It is, therefore, subject to uncertainty regarding how it will be interpreted by courts. Uncertainty itself increases costs for business and is, therefore, harmful to California businesses, consumers, and workers.

The first part of the test for illegality set out in Option Three is whether the conduct diminishes or creates a meaningful risk of diminishing the competitive constraints imposed by the defendant’s rivals, thereby increasing or creating a meaningful risk of increasing the defendant’s market power. Many types of business conduct diminish the competitive constraints of rivals. For example, improving a firm’s product quality is a type of business conduct that would diminish the competitive constraints imposed by the firm’s rivals and may temporarily increase the firm’s market power.

Market power is the ability to price above a competitive level for a significant period, and Option Three is based on a trade-off between market power (Section (b)(1)) and trading partner benefits (Section (b)(2)). As explained by the Staff Memo, even if conduct results in increased market power or presents a risk of increased market power, Section (b)(2) “is intended to exempt conduct that benefits trading partners, such as producing a superior product.”¹⁷ The standard for exemption would be challenging to meet in practice, however.

The market power/trading partner benefit trade-off condemns conduct that “[d]oes not provide sufficient benefits to prevent the defendant’s trading partners from being harmed by that increased market power.” Different customers value different competitive changes differently. Take a product improvement, for example. Some customers may place a high value on specific product improvements. Even if these customers purchase the improved product at a higher price because of the quality improvement, they are better off. Other customers may place less value on the product improvement and receive less value from the purchase of the improved product or opt to forgo making purchases at the higher price. Thus, these customers are worse off even with the quality improvement. Trading partners in this latter group are arguably “harmed,” which means the conduct could be prohibited under Option Three. As this example illustrates, some type of (undefined) analysis may be required to weigh benefits accruing to some trading partners with harm to other trading partners arising from any increase in market power. Without such a trade-off, “producing a superior product” would not be exempted under Section (b)(2). In short, while the proposed Option Three may seem simple in theory, it is likely to be highly complex in application, especially without any federal precedent as guidance.

¹⁵ California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 2m 14s and ending at 1h 2m 53s.

¹⁶ Staff Memo, p. 5.

¹⁷ Staff Memo, p. 6.

In addition to chilling product improvements, consider again the example of an exclusive dealing contract between a manufacturer and a wholesaler. Such a contract would prevent the wholesaler from selling the products of the manufacturer’s rivals. This necessarily imposes an additional constraint on the operations of each of these rivals, which is either competitively neutral (*e.g.*, the rivals have other, equally good wholesale options available to them) or is competitively detrimental (*e.g.*, the rivals have only less attractive wholesale options available). If only less attractive options were available, an exclusive dealing contract would reduce the constraint posed by each of the manufacturer’s competitors, resulting in potential illegality under the first prong of the Option Three test. There may also be competitive harm suffered by customers of the diminished rivals, resulting in illegality under the second prong of that test. Other common vertical restraints may similarly be barred by Option Three, even though it is well recognized that vertical restraints can be pro-competitive or competitively neutral.

As with Options One and Two, the Staff Memo recommends the adoption of the Untethering Text with Option Three,¹⁸ which will similarly expose even small companies employing common business strategies to significant uncertainty and potential liability.

The Untethering Text Will Suppress Competition and Innovation and is Likely to Make Common Business Practices Unlawful in California

The proposed Untethering Text urges a rejection of federal precedents. It also includes a list of elements that are common or required when proving liability in monopolization and attempted monopolization litigation under the Sherman Act, but that would not be required when proving liability under a Cartwright Act SFC provision:

The Legislature hereby finds and declares that although the following may constitute evidence of a violation of this section, liability shall not require a finding that:

- (a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct;
- (b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons;
- (c) Any price of the defendant for a product or service was below any measure of the costs to the defendant for providing the product or service;
- (d) The conduct of the defendant makes no economic sense apart from its tendency to harm competition;

¹⁸ California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 9m 39s and ending at 1h 10m 4s.

- (e) The risk of harming competition presented by the conduct or any resulting actual harm must be quantified or proven with quantitative evidence;
- (f) In cases where a defendant’s business is a multi-sided platform, that the defendant’s conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform;
- (g) In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue;
- (h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendant’s; or,
- (i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.¹⁹

If adopted, the Untethering Text is likely to outlaw common pricing and distribution practices that are generally viewed as good for competition, consumers, and workers.

Common Pricing Practices Could Become Unlawful

Cutting Prices and Predatory Pricing Claims:

One of the most frequently used competitive strategies is a simple drop in prices to attract competitors’ customers. But due to efforts to “untether” from federal law on predatory pricing, standard price cutting could be challenged and deemed unlawful.

In its simplest form, predatory pricing involves an incumbent firm setting a price below its cost to drive rivals out of the market. Once the rivals have been driven from the market, the incumbent firm can raise its price because it faces no (or reduced) competition.²⁰ By pricing below its cost, the incumbent takes an economic loss in the short term. For this to be a rational pricing strategy, the incumbent must expect to earn more in the eventual “recoupment phase” when its price is elevated than it loses from pricing at the below-cost, predatory level.

¹⁹ Staff Memo, pp. 13-14.

²⁰ Carlton, Dennis W. and Jeffrey M. Perloff, *Modern Industrial Organization*, 3rd Ed., 2000, pp. 338-339. Along these lines, the CLRC’s antitrust advisor for this study, Cheryl Johnson, described predatory pricing as: “When a dominant party misuses their market power, for instance, to engage in predatory pricing to put out all their competitors and then to take over the market afterwards.” California Law Revision Commission meeting, January 23, 2025, meeting video, question and answer starting at 2h 46m 7s and ending at 2h 47m 39s.

Thus, what distinguishes predatory pricing from aggressive price cutting is (i) pricing below some measure of cost and (ii) a likelihood that losses can be recouped once competitors are driven from the market. The Untethering Text, however, specifically abandons these standards. It states that the key economic elements of a predatory pricing claim – the below-cost pricing and recoupment period touchstones – would not be required if challenged under the proposed Cartwright Act SFC provision.²¹ This significantly blurs the line between lawful price cutting and anticompetitive predatory pricing.

Without requiring a showing that pricing is below some measure of cost or that the defendant can recoup its losses, a predatory pricing claim loses its economic foundations.²² Without these foundations, **all price cutting**, especially to relatively low prices, would be at risk under a new SFC provision. Low and highly-competitive (but above cost) prices could be judged to be predatory under all three options presented in the Staff Memo. Price cutting could be challenged under Option One as an act of monopolization, Option Two because it restrains the freedom to trade by rival sellers priced out of the market, and Option Three because the competitive constraint from rivals diminishes as rivals exit the market. Without the need to assess whether actual prices are below cost, above cost pricing can be deemed to be predatory, and without the need to assess whether recoupment is likely, pricing can be deemed to be predatory even if exit by rivals is unlikely to result in increased prices.²³

Loyalty Programs:

Like price cutting, loyalty programs are ubiquitous in the economy and coveted by consumers. Starbucks has a loyalty program that provides free coffee to repeat customers, as does Peet’s Coffee, Dunkin’, Panera Bread and Caribou Coffee. United, Delta, American, Southwest, Allegiant, JetBlue and virtually every other airline offers frequent flyer rewards programs. Gasoline retailers like Exxon Mobil, Chevron, Shell, 7-Eleven, Circle K and Speedway offer loyalty rewards programs to frequent fuel

²¹ Untethering Text at (c) and (g). See also SFC Working Group Report, p. 17 (“liability ... does not require finding ... (iii) that any price of the defendant for a product or service was below any measure of the costs to the defendant for providing the product or service”) and SFC Working Group Report, p. 15 (“the ‘recoupment’ requirement for a predatory pricing claim under federal antitrust law is not a requirement under California law.”). In addition, see SFC Working Group Report, p. 17 (“liability ... does not require finding ... that in a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue.”). We note also that there are no market share or market power threshold requirements under the Untethering Text part (i). See also SFC Working Group Report, p. 18 (“A single firm may violate section (a) regardless of whether it has or may achieve a market share above a threshold recognized under Section 2 of the Sherman Act. Furthermore, this statute is [sic] does not require the plaintiff to establish any threshold of market power.”).

²² Note also that the Untethering Text also includes that the Plaintiff need not show that the conduct of the Defendant makes no economic sense apart from its tendency to harm competition (item (d)). Below-cost pricing is only economically rational if losses can be made up later, and this, therefore, reinforces the Untethering Text related to recoupment periods.

²³ Single-Firm Conduct Working Group proponents have indicated that, with Option Three, beneficial, pro-competitive conduct would be protected by requiring challenged conduct to be that which “does not provide sufficient benefits to prevent the defendant’s trading partners from being harmed by that increased market power.” See SFC Working Group Report, p. 16; California Law Revision Commission Transcript of May 2, 2024, meeting, Working Group 1: Single Firm Conduct, pp. 9-14, available at Public Database linked at <https://clrc.ca.gov/B750.html>. Single-Firm Conduct Working Group, Presentation to the California Law Reform Commission, Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton, and Carl Shapiro, May 2, 2024, available at Public Database linked at <https://clrc.ca.gov/B750.html>. Though customers in the near term may gain from low prices, customers in the future would be harmed by elevated prices. Without a requirement for the analysis of a recoupment period, which is when future customers would be harmed, beneficial, pro-competitive conduct cannot be distinguished from harmful anticompetitive conduct.

purchasers. Grocery stores and hotel chains offer loyalty programs, as do sporting apparel stores like The North Face, REI and Dick's. Rewards programs have the effect of reducing the prices paid by consumers who participate in the rewards program as compared to those who do not.

Loyalty programs, however, can be seen as penalizing customers who conduct more business with a firm's rivals²⁴ and often diminish customer switching among rivals. Any program or policy that encourages buyers to purchase products from one provider over a rival (e.g., retail coupons) discourages purchases from rivals, reduces the demand for rivals' offerings and may diminish the profitability and unit sales of rivals. Such conduct necessarily reduces the competitive constraint rivals impose on other market participants in even a modestly concentrated market while also restricting the rivals' free exercise of competition and may be viewed as running afoul of both Option Two and Option Three. It also presents a risk of monopolization or attempted monopolization under Option One, especially when evaluated without a market share standard per the Untethering Text. Even so, the ubiquitous nature of these programs makes clear that competition and loyalty programs can go hand-in-hand, and indeed loyalty rewards can be an element of competition between rivals, for example, when firms compete for frequent coffee or gas purchasers or frequent travelers by improving their rewards programs.²⁵ The economics and antitrust literature generally views loyalty programs as being pro-competitive.²⁶ And consumers often belong to multiple, competing rewards programs. Yet loyalty programs have not prevented industries like airlines and gasoline retailing from having numerous rivals active in the marketplace.

Nevertheless, the SFC Working Group Report states that loyalty rewards that "penalize a customer that conducts more business with the defendant's rivals" could be anticompetitive "depending on the circumstances."²⁷ The Staff Memo, however, provides no guidance on how loyalty rewards should be evaluated under the various SFC provisions being considered. Because loyalty programs encourage consumers to purchase products from one provider over that provider's rival(s), they can reduce the demand for a rival's offerings, and can diminish a rival's profitability, they could give rise to

²⁴ SFC Working Group Report, p. 15.

²⁵ Maze, Jonathan, "Dutch Bros Sales Improve Despite 'Headwinds,' Thanks to Loyalty," *Restaurant Business*, November 11, 2021, available at <https://www.restaurantbusinessonline.com/financing/dutch-bros-sales-improve-despite-headwinds-thanks-loyalty>; Kelso, Alicia, "Dutch Bros Rewards Will Play a Big Part in the Company's 'Long Game,'" *Nation's Restaurant News*, February 23, 2023, available at <https://www.nrn.com/restaurant-finance/dutch-bros-rewards-will-play-a-big-part-in-the-company-s-long-game->; Koprowski, Amanda, "Shell's Fuel Rewards Marks One Year Anniversary of Platinum Status," *Convenience Store News*, July 14, 2024, available at <https://csnews.com/shells-fuel-rewards-marks-one-year-anniversary-platinum-status>; Griff, Zach, "American Airlines Unveils 10 Changes to the AAdvantage Program," *The Points Guy*, January 9, 2024, available at <https://thepointsguy.com/news/american-aadvantage-changes-2024/>.

²⁶ See, for example, Zenger, Hans, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics*, Vol. 8, No. 4, 2012, pp. 717-768; Ware, Roger, "The Economics of Multiproduct Loyalty Programs," *Canadian Competition Law Review*, Vol. 30, No. 1, 2012, pp. 112-132; Campbell, Neil and Florence (Sze Pui) Chan, "Loyalty Is Usually Good – The Treatment of Loyalty Programs Under the Competition Act," *Canadian Competition Law Review*, Vol. 30, No. 1, 2012, pp. 51-92; Caminal, Ramón and Adina Claiici, "Are Loyalty-Rewarding Pricing Schemes Anti-Competitive?" *International Journal of Industrial Organization*, Vol. 25, 2007; Spector, David, "Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Rule of Reason," *Competition Policy International*, Vol. 1, No. 2, Autumn 2005, pp. 89-114. While the effects of loyalty programs are generally viewed as being pro-competitive, we note that their effects can be ambiguous in certain cases. Therefore, the merits should be analyzed on a case-by-case basis to avoid chilling procompetitive conduct which would occur if an overall ban on loyalty programs were enacted.

²⁷ SFC Working Group Report, p. 15.

lawsuits and adverse rulings under the proposed SFC provisions. One consequence would be the chilling of incentives to offer such programs even though they are popular with consumers, lower their prices, and are generally pro-competitive.

Common Distribution Practices Could Become Unlawful

SFC cases often involve product or service distribution practices, such as exclusive dealing and the use of most-favored nations clauses. As with commonly used pricing practices, these commonly used distribution practices may run afoul of the proposed SFC provisions even though these distribution practices are not likely to have anticompetitive effects.

Exclusive Dealing:

It is common for manufacturers to enter into exclusive dealing contracts with distributors or retailers. These contracts limit the distributors' or retailers' ability to carry products from rival manufacturers. Exclusive dealing contracts are generally thought of as being pro-competitive and efficiency-enhancing because they allow a manufacturer to locate distributors and retailers who are willing to heavily promote the manufacturer's products and to train staff on the benefits of these products, which usually enhances competition among brands.²⁸ It is well established in the economics and antitrust literature that exclusive dealing is one way to address the free riding of one manufacturer on the efforts of another by essentially giving the other manufacturer a property right in its promotional expenses.²⁹ For example, one manufacturer may spend heavily to promote a product or to train distributor staff in offering services to customers or prospects, while a rival manufacturer may not. When customers seek to make purchases, they may find the product from the rival manufacturer to be more attractive because it has a lower price due to its lower cost structure resulting from its more limited promotional and training expenses. The rival essentially free rides on the other manufacturer's market development and promotional efforts, reducing the manufacturer's incentive to engage in these efforts. That is, exclusive dealing prevents free-riding on a manufacturer's demand-increasing promotions where such promotions would be underprovided in the absence of the exclusive dealing contract. Exclusive dealing in this context is pro-competitive because it addresses this free-riding problem and thereby facilitates the manufacturer's investments in product and market development.³⁰

Even though it is generally pro-competitive, exclusive dealing inhibits a rival manufacturer's freedom to trade with distributors that are "locked up" under an exclusive contract with another manufacturer. It also inhibits the locked-up distributor's freedom to trade with other manufacturers. As a result, exclusive dealing contracts could be challenged as possibly violating Option Two. It could also

²⁸ See, for example, Cooper, James C., Luke M. Froeb, Dan O'Brien, and Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization*, No. 23, 2005, p. 639; Wright, Joshua D., "An Evidence-Based Approach to Exclusive Dealing and Loyalty Discounts," *Global Competition Policy*, July 2009; Heide, Jan B., Shantanu Dutta, and Mark Bergen, "Exclusive Dealing and Business Efficiency: Evidence from Industry Practice," *Journal of Law and Economics*, Vol. XLI, October 1998, p. 387; Abbott, Alden F. and Joshua D. Wright, "Antitrust Analysis of Tying Arrangements and Exclusive Dealing," *Encyclopedia of Law and Economics*, Gerrit De Geest (Ed.), 2008, pp. 200-201.

²⁹ The seminal paper in this area is Marvel, Howard, "Exclusive Dealing," *Journal of Law and Economics*, vol. XXV, April 1982, 1-25. See also Ornstein, S.I., "Exclusive Dealing and Antitrust," *The Antitrust Bulletin*, Spring 1989, 65-98.

³⁰ Heide, Jan B., Shantanu Dutta, and Mark Bergen, "Exclusive Dealing and Business Efficiency: Evidence from Industry Practice," *Journal of Law and Economics*, Vol. XLI, October 1998, p. 387.

be a violation of Option Three if a manufacturer does not have access to its preferred distributor, making it a less-effective a competitor.

Exclusive dealing may also violate Option One if it is adopted with the Untethering Text. Under federal law, exclusive dealing contracts can only harm competition among manufacturers if they “lock up” a significant share of the market, thereby making entry or expansion by rivals more difficult. If a market is local and has several available distributors or retailers, for example, and one only serves 10% of a local market, then a manufacturer that enters into an exclusive dealing contract with that distributor or retailer – and no others in the local area – cannot use that contract to block entry or expansion by rival manufacturers. The distributor’s share of the local market is simply too small for its exclusive dealing contract with a manufacturer to raise concerns regarding the creation of barriers to entry into the market for a new manufacturer. The Untethering Text, however, states that a defendant would not be required to meet or achieve any specific market share or threshold of market power to establish a claim. Without a market share threshold requirement, it does not matter what standard is used to define the relevant market because the market definition itself does not otherwise matter. Furthermore, without defining a market using an accepted standard of analysis and having some guidelines as to what constitutes a “troubling” market share, a court cannot determine the extent to which exclusive dealing contracts “cover” that market. Thus, exclusive dealing may be found to violate even Option One, especially if it is coupled with the Untethering Text’s abandonment of market power or market share thresholds to find liability. That is, there can be a difference in outcomes under Option One and the Sherman Act – even though Option One closely tracks the Sherman Act – because there would be no principled manner to assess the extent of the market limited by exclusive dealing contracts under an untethered Option One.

Most-favored Nation Clauses:

A most-favored nation (“MFN”) clause is a contractual commitment to a buyer that the buyer is paying the lowest price charged by the seller.³¹ The SFC Working Group Report notes that MFN clauses can be concerns “especially if such clauses are widely used by the defendant.”³²

MFN clauses restrict a seller’s freedom to trade with other buyers or to compete for the business of other buyers by lowering prices (possibly violating Option Two) and weaken the competitive constraint provided by rivals to the buyer (possibly violating Option Three). As with exclusive dealing contracts, the Untethering Text inhibits the analysis of whether MFN clauses are widely used by the defendant for the product at issue or a comparison of their pro- versus anti-competitive features, subjecting them to possible liability under Option One.

But MFNs can have pro-competitive effects, such as reducing uncertainty and transactions costs, decreasing search costs, limiting free-riding, and encouraging efficient investment. These clauses are

³¹ A ‘simple’ or ‘traditional’ MFN guarantees the protected buyer that it will be charged the lowest price offered by the seller to its other buyers. A contractual restriction by one platform that restrict sellers from charging lower prices for their products or services on other platforms including the sellers’ own website is known as a “broad” or “wide” platform MFN. For a review of the economics literature pertaining to MFNs, see, for example, Chipty, Tasneem, “Platform MFNs: Can Asking for the Lowest Price Discourage Competition?” *The Price Point*, ABA Antitrust Law Section, January 2024; and, Long, Sarah, “Retail MFNs and Online Platforms Under EU Competition Law: A Practical Primer,” *Antitrust Chronicle*, Competition Policy International, September 2019.

³² SFC Working Group Report, p. 15.

commonly used in hotel booking and in on-line retail marketplaces.³³ A platform that promotes hotel room bookings may not be sustainable, for example, if after finding a hotel room on the website an individual can book the room for less at the hotel operator's own website or some other third-party website. The same concerns may arise for any on-line retail sales. A firm is less likely to invest in developing a business around a product or service if others can free ride on that investment and acquire or offer the product or service at a lower price through other means.³⁴ MFNs, therefore, encourage the development of on-line hotel booking services and other on-line offerings, which benefits competition and consumers. Eliminating MFNs throughout the California economy without allowing a weighing of any pro- versus anti-competitive effects for specific MFNs, or considering whether an MFN is "wide" or "narrow,"³⁵ would harm competition in parts of that economy.

Loyalty Rebates:

A loyalty rebate provided by a manufacturer to a wholesaler is a discount on the price charged for a product based on the volume of that product purchased. If a certain volume target is met, for example, the buyer's unit price may fall, possibly for all units purchased. A buyer may have multiple volume targets or thresholds in its pricing schedule. Targets may be buyer-specific and can be based on metrics such as market share instead of purchase volumes. Based on the magnitude of the discounts provided, loyalty rebates can provide distributors or retailers with very strong incentives to sell the products of a specific manufacturer, and a sufficiently large discount can provide incentives for the wholesaler not to carry products from competing manufacturers. If the discount provided to the customer is significant enough to discourage the customer from purchasing from rival suppliers, the discount may be thought of as payment for exclusivity or near exclusivity on the part of the buyer. Rebates of this magnitude can have effects similar to those from exclusive dealing, and therefore can violate Options One, Two, and Three. Even so, loyalty rebates can also promote increased sales with the proper choice of volume thresholds while allowing for efficient production planning and reduced uncertainty.³⁶

Courts have analyzed whether loyalty rebates are anticompetitive via an analysis that includes elements of predatory pricing (pricing below cost, recoupment periods) and exclusive dealing (the fraction of the market covered). The questions considered include whether the discounts lead to below-

³³ See, for example, Sean Ennis, Marc Ivaldi and Vicente Lagos, "Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change," Toulouse School of Economics Working Paper No. 1106, November 11, 2022.

³⁴ See, for example, Vandenborre, Ingrid and Michal J. Frese, "Most Favoured Nation Clauses Revisited," *European Competition Law Review*, No. 12, 2014, pp. 588-593 (citing Salop, Steven C. and Fiona Scott Morton, "Developing an Administrable MFN Enforcement Policy" *Antitrust*, Vol. 27, No. 2, 2012, pp. 15-19); Wang, Chengsi and Julian Wright, "Search Platforms: Showrooming and Price Parity Clauses," *The RAND Journal of Economics*, 51(1), 2020, pp. 32-58. Wu, Jason J. and John P. Bigelow, "Competition and the Most Favoured Nation Clause," *CPI Antitrust Chronicle*, July 2013, No. 2, p. 5; and Van der Veer, Jan Peter, "Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis," *Journal of European Competition Law & Practice*, Vol. 4, No. 6, 2013, p. 502.

³⁵ A contractual restriction by one platform that restrict sellers from charging lower prices for their products or services on other platforms including the sellers' own website is known as a "broad" or "wide" platform MFN. In contrast, platform MFNs are considered "narrow" if they only prevent a third-party seller from setting a lower price on its own website (or other direct sales channel) than that quoted on the platform imposing the MFN.

³⁶ For a discussion of how loyalty rebates allow manufacturers to increase output and sales, see Zenger, Hans, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics*, Vol. 8, No. 4, 2012, pp. 717-768 ("[A loyalty rebate] allows firms to increase output, as incremental quantities are sold at a lower (discounted) price.").

cost pricing; if so, is there a reasonable prospect for recoupment of any losses; and if the contracts are exclusive or near exclusive, to what extent do they cover the market? For the reasons addressed in our discussions of predatory pricing and exclusive dealing, loyalty rebates may be ensnared by all three Options in the Staff Memo, and the analysis of whether specific loyalty rebates would harm competition would be significantly handicapped by the Untethering Text, even though they are commonly-used business strategies that can be efficiency-enhancing and need not harm competition.

Conclusion

Distinguishing legitimate forms of competition from conduct that harms competition and significantly enhances market power is challenging. This is acknowledged by the SFC Working Group Report, which states, “We know from more than a century of experience under the Sherman Act that courts find it very difficult to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits.”³⁷ This difficulty arises because the questions themselves are complex, not because the language in the Sherman Act is too brief or simplistic. If there were simple solutions that enabled analysts and courts to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits, courts would have found them during previous decades.

The Options provided in the Staff Memo do not provide an easy means to make this distinction accurately. Rather, the Options, along with the proposed Untethering Text, would inhibit courts from making informed decisions on how to target enforcement at competitively harmful conduct while permitting competitively beneficial conduct. Given this, the Options in the Staff Memo are likely to have substantial adverse effects on California residents, workers and businesses, including by making it more expensive, riskier and less desirable to conduct business in the State and ultimately chilling pro-competitive and pro-consumer conduct.

Worse, the Options provided in the Staff Memo are not based on a demonstrated need, but rather on anecdotal and personal beliefs that competition in California could be more robust. Furthermore, the proposals being considered are not supported by a detailed and thorough cost-benefit study that carefully considers the implications – both positive and negative – of the proposed legislative text. Analyzing the costs and benefits of proposals like those in the Staff Memo is particularly important because the proposed SFC Options and the Untethering Text are not likely to assist courts in distinguishing legitimate forms of competition from conduct that harms competition and significantly enhances market power.

Sincerely,

Eric P. Enson

Eric P. Enson

³⁷ SFC Working Group Report, p. 1.