Crowell

Eric P. Enson
EEnson@crowell.com
213. 310.7977 direct

Crowell & Moring LLP
515 South Flower Street
41st Floor
Los Angeles, CA 90071
+1.213.622.4750 main
+1.213.622.2690 fax

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The Honorable Ambassador David Huebner, Chairperson
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law – Study B-750 – Additional Comment On Behalf Of The California Chamber Of Commerce

Dear Chairperson Huebner and Commissioners:

We write as counsel for the California Chamber of Commerce ("CalChamber").[1] CalChamber is a non-profit business association with more than 14,000 members, both individual and corporate, representing twenty-five percent of the State's private-sector workforce and virtually every economic interest in California. While CalChamber represents several of the largest corporations in California, seventy percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

CalChamber thanks the California Law Revision Commission (the "CLRC") 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 on developing policies that ensure a strong and dynamic business environment that benefits all Californians. We submit these comments in advance of the CLRC's June 20, 2024 hearing on the topics of Mergers and Acquisitions and Technology Platforms, and its August 15, 2024 hearing on the topics of Concerted Action; the Consumer Welfare Standard; and Enforcement and Exemptions. As you know, Working Groups have submitted reports to the CLRC on each of these topics (together, the "Working Group Reports" and individually the "Mergers and Acquisitions Report," the "Technology Platforms Report," the "Concerted Action Report," the "Consumer Welfare Standard Report," and the "Enforcement and Exemptions Report"). This comment is in addition to our submission on April 25, 2024, which was primarily focused on the Single-Firm Conduct Working Group Report and my testimony at the CLRC's May 2, 2024 hearing.

CalChamber also thanks the members of the Working Groups for their efforts in drafting the Working Group Reports. For the most part, the Working Group Reports contain accurate statements of the law and present the CLRC with options it could take in recommending revisions to California's antitrust laws, including the option of recommending no changes. The Working Group Reports,

[1] CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with Berkeley Research Group.

however, do not justify the CLRC in making any particular legislative proposal to the California Legislature, for several reasons.

One, as we noted in our April response to the Single-Firm Conduct Working Group Report, the Working Group Reports do not demonstrate a need for revising California's antitrust laws. There has been no showing that Californians are suffering from higher prices, inferior products or services, or less competition under the current California antitrust regime. Passing statutory revisions without a demonstrated need for those revisions is bad policy. Two, as we also noted in our response to the Single-Firm Conduct Working Group Report, none of the Working Group Reports provide any cost-benefit analysis of the quantitative and qualitative effects – both economically beneficial and economically harmful – that are likely to result from statutory revisions. Antitrust policy making should utilize a cost-benefit methodology in order to craft policies that improve economic performance and efficiency, ultimately benefiting consumers and workers in California. Three, these two shortcomings are compounded by the fact that many of the options identified in the Working Group Reports are not minor tweaks, but are instead major shifts in California antitrust law and enforcement that, in some cases, are not necessary given federal antitrust law and, in all cases, may impact every level of the economy. Four, because the Working Group Reports do not offer specific legislative proposals,[2] they are too general and imprecise for stakeholders to analyze and comment on, and they cannot be used by the CLRC as guides for crafting a specific legislative proposal to the Legislature. CalChamber recommends that the CLRC not propose any revisions to California's antitrust laws unless and until (1) There is a demonstrated need for such revisions; (2) An independent cost-benefit analysis has been performed suggesting the revisions are, on balance, good for California; and (3) Specific statutory language has been crafted and released for stakeholder analysis and comment.

Below, we provide a brief summary of the Working Group Reports and an overarching commentary that relates to the recommendations and proposals in the Working Group Reports.

The Working Group Reports Provide General Options The CLRC Could Pursue

Mergers and Acquisitions:

The Mergers and Acquisitions Report indicates that there are several options to consider with respect to mergers and acquisitions, one of which is to maintain the status quo.[3] Another is to add language to California law related to mergers:

> As noted, one option is to amend California antitrust law to specifically address mergers and acquisitions. It is arguable whether such amendment is necessary given that California antitrust authorities can challenge mergers under the Clayton Act. On the other hand, such an amendment would allow antitrust cases to proceed in state courts and

[2] To be clear, this is not a critique of the Working Groups. It is CalChamber's understanding that the CLRC did not request specific legislative proposals from the Working Groups, and most abided by that request.

[3] Mergers and Acquisitions Report, p. 17.

allow California judges to develop legal standards that differ from the federal standards.[4,5]

The Mergers and Acquisitions Report also mentions possibly coordinating with other states on reporting requirements for mergers. Specifically, it notes that state-level pre-merger notification is under discussion at the Uniform Law Commission, which has a committee drafting proposed language.[6] The goal of this effort is to standardize state notification requirements,[7] which at present can have different timelines and filing thresholds,[8] and the Mergers and Acquisitions Report also states that one option would be to apply the obligation to report transactions only to those that primarily affect commerce in California (e.g., mergers of physician practices).[9]

Mergers are an important part of a healthy economy, as assets are re-combined over time to promote efficiencies and enhance the development of new products and services. Thus, amending California antitrust law to address mergers may have an immense and potentially unpredictable impact on California businesses and the California economy overall, depending on the specifics of the legislative language adopted. For instance, if the substantive test for merger illegality under California law does not closely conform to federal standards on issues such as the definition of markets, structural presumptions of illegality, the evaluation of effects on competition, and analysis of efficiencies, there will be great uncertainty in the marketplace. Likewise, the adoption of new substantive tests and analytical approaches to mergers and acquisitions may chill competitively neutral or beneficial

[4] The Mergers and Acquisitions Report notes benefits from having alternative venues to federal court for merger cases, stating at p. 18, that "Given the importance of the courts, much of merger policy takes place through appointments to the federal judiciary. The composition of the California state court is different than the federal judiciary and California courts would produce different merger decisions, even with an identically-worded statute. California could even consider constituting a specialized court that would hear merger or other antitrust cases or a specialized administrative agency that would enact rules governing merger policy. There would be costs and benefits to the divergence from federal law that this would create. Businesses would bear the costs of another set of merger laws."

[5] Mergers and Acquisitions Report, p. 17. The Mergers and Acquisitions Report addresses additional potential gains and downsides from this option, stating, "A state court might bring superior information and perspective to some matters, and this venue might give the state added credibility. On the other hand, state-based merger challenges might raise issues of costs as well as consistency with federal standards." Mergers and Acquisitions Report, p. 16 (citation omitted).

[6] Mergers and Acquisitions Report, p. 16. To the extent it is determined that there is a need for a pre-merger notification protocol in California, which remains an open question, CalChamber is of the view that such a protocol should be developed jointly with other states so as to minimize the burdens imposed by needing to file in multiple states with inconsistent standards. Ideally this protocol would be directed at transactions that affect local markets (*e.g.*, in certain healthcare markets) not regional or national markets which would be covered by HSR filing requirements and review by the Department of Justice and Federal trade Commission.

[7] The Mergers and Acquisitions Report, at p. 19, describes the Uniform Law Commission as suggesting "a joint filing for federal and state antitrust enforcers (subject to confidentiality protection) that balances the need for state level information for potential enforcement actions with the potential burdens of to the merging parties. Specifically, the drafting committee will address issues such as substantial nexus to the transaction; the scope of the information required to be provided to the state, timing, confidentiality, and fees that would make state antitrust enforcement unreasonable."

[8] Mergers and Acquisitions Report, p. 16.

[9] Mergers and Acquisitions Report, p. 17.

transactions. Uncertainty regarding legality under new standards increases business costs and stifles innovative businesses. Finally, if national or international mergers will be evaluated both by the California Attorney General and the federal government – even if using the same legal tests and analytical techniques – enforcement decisions could differ, creating even more uncertainty and increasing costs. Given all of this, in addition to the fact that a California merger review process is not necessary in light of the federal regime already in place, CalChamber cautions the CLRC in attempting to adopt a California merger regime.

Technology Platforms:

The Technology Platforms Report indicates that there are three options to consider related to technology platforms: "(1) enact no new legislation and maintain the status quo; (2) amend California's antitrust laws generally, without specifically focusing on [technology] platforms; and (3) enact specific legislation addressing [technology] platforms."[10] Instead of proposing specific legislation as to the third option, the Technology Platforms Report sets forth a basic framework for technology platform-specific legislation, such as size of business thresholds and ties to California necessary for the legislation to apply; the types of conduct that could be deemed presumptively unlawful ("(a) self-preferencing; (b) discrimination that harms competition;[11] (c) restrictions on interoperability; (d) tying; or (e) using data from the covered platform to support another business line."[12]); and that "[a]ny acquisition by a covered platform of another technology-based company would be subject to automatic merger review by the California Attorney General, regardless of market size or the value of the acquisition."[13]

To be certain, development of an *ex ante* regulatory framework for technology platforms is a sea change in the current approach taken in the U.S. Such a dramatic departure from current practice can have substantial effects on technology companies, investments in the development of new platform services, and the products and services made available to consumers. Technology platforms have revolutionized numerous industries in the U.S. and globally. They are a source of economic vibrancy and innovation, and due to that innovation, technology platforms have driven growth in the U.S. and especially in the California economy. This economic dynamism has generated enormous value for businesses, consumers, and workers. Indeed, economists generally recognize the importance of innovation in driving improvements in the standard of living and the overall performance of the economy.[14] Changes in the regulatory framework applied to technology platforms need to be carefully evaluated to be sure they will improve economic performance. The potential for the adoption of an *ex ante* regulatory framework to have significant and adverse unintended consequences is, in our view, significant. Finally, we note that any amendments to California antitrust law intended to address

[10] Technology Platforms Report, p. 3.

[11] Even though it is described as "presumptively unlawful" in this legislative framework, discrimination would need to harm competition to be unlawful, which would appear to require an effects analysis. Given the need for an effects analysis, discrimination would appear to be evaluated using a rule of reason analysis in this proposed legislative framework.

[12] Technology Platforms Report, p. 12.

[13] Technology Platforms Report, p. 12.

[14] See, for example, Nordhaus, William D., "Schumpeterian Profits in the American Economy: Theory and Measurement," National Bureau of Economic Research Working Paper 10433, April 2004, Abstract.

perceived concerns about technology platforms, but applied across the economy may have even wider adverse consequences, harming California businesses, consumers, and workers.

Concerted Action:

The Concerted Action Report addresses several potential areas for legislative action. These are:

- The legislature could clarify that the Cartwright Act is broader than federal antitrust law and has its own common law.[15]
- The legislature could "eliminate the distinction between commodities and services in §16720 (b) to (e) and §16727."[16]
- The legislature could clarify California law on tying. Though available under federal law, the Concerted Action Report notes that it is unclear whether California law allows a legitimate business justification defense to a tying claim.[17]
- The legislature could revise or delete subsections §16720 (b) to (e). The Concerted Action Report states that "[i]t is arguable that these subsections … do not add significantly to the general condemnation provided in §16720(a)," with two exceptions:
    - First, "§16720(e)(3) provides an express condemnation of resale price maintenance (RPM), and the California Supreme Court has held that such restraints are 'per se' illegal." The Concerted Action Report states that "[r]etaining §16720(e)(3) would… ensure that any effort to impose RPM in California would be subject at least to strict scrutiny."

[15] Concerted Action Report, p. 8 ("To the extent that federal courts continue to assert that the Cartwright Act mirrors federal antitrust law, the California legislature could eliminate this confusion by clarifying that the Cartwright Act is broader than federal antitrust law and has its own common law.").

[16] Concerted Action Report, p. 62 ("Although §16720 (a) applies generally to any restraint, the following subsections (b) to (e) apply only to 'commodities.' In addition, §16727 that condemns tying applies only to commodities. Hence, tying contracts that involve services or real property are not subject to this stricter standard although they can still be condemned under §16720(a). From an economic and market perspective there is no rational basis for distinguishing between commodities and other goods or services in the market. As a result, it would make sense to revise these provisions to include all goods, services, and real property.").

[17] Concerted Action Report, pp. 62-63 ("With respect to tying, federal case law refers to such contracts as 'per se' illegal but applies only when a number of pre-conditions are satisfied including significant market power. California law distinguishes between ties that violate §16720(a) which require proof of market power and an effect on a significant amount of commerce and those that violate §16727 which require only an effect on a substantial amount of commerce.… If … the statutes make clear that §16725 provides a route for the justification of an otherwise objectionable tying contract that would resolve concern that the stricter standard of §17627 would cause any adverse effect" (footnotes omitted)).

- Second, §16720(c) explicitly condemns restraints affecting the buying side of the market, and the Concerted Action Report recommends that this provision be retained.[18]

- The legislature could declare that §16725 provides the standard for upholding restraints. The Concerted Action Report states that California courts have placed "little or no reliance on §16725 or explain[ed] when and how it applies to restraints of trade." It explains that "California's statutory scheme provides … a general condemnation of all restraints in §16720, §16722, and §16726, but §16725 provides an affirmative defense if the [defendants] demonstrate[] that [the restraint] functions ' … to promote, encourage or increase competition in any trade or industry, or … [is] in furtherance of trade.'" The "focus of analysis [of a restraint] would be on the function of the restraint in the market context in which it operates. To implement this, the legislature could update the wording of §16725 to be explicit that any non-exempt restraint must satisfy this section."[19]

- The Concerted Action Report argues that there is little empirical support that RPM results in economically desirable outcomes and that other less anticompetitive restraints can achieve almost all the benefits claimed for RPM. The Concerted Action Report argues that, together, these considerations suggest "the legislature could decide that the potential benefits of RPM, even if subject to a strict §16725 review, are not worth the potential costs and so it should be categorically condemned" and that "the condemnation in §16720(b)(3) could be revised either explicitly to condemn RPM as illegal or to exclude it from inclusion in those restraints that are reviewable under §16725."[20]

Outside of "hardcore offenses" like price fixing and bid rigging, which are *per se* unlawful, restraints of trade are generally evaluated under both federal and California law using a rule-of-reason standard.[21] The rule-of-reason considers the facts of the industry and business to which the restraint is applied, the nature and effects of the restraint, as well as the history of the restraint and reasons for its adoption. This is to assess whether the restraint is more likely to promote or hinder competition. Outside of the *per se* realm, various types of restraints are recognized as having the potential to be either pro- or anti-competitive, and therefore a factual rule of reason assessment is necessary to prohibit harmful restraints while leaving intact beneficial restraints. This balancing of potentially harmful and beneficial effects is economically appropriate when certain types of conduct have the potential to be either harmful or beneficial. Revising the analytical approach used to assess RPM, for example, to *per se* illegality is only appropriate economically if RPM is always anticompetitive. If there are specific instances wherein RPM is viewed as being procompetitive, even if it is adverse in many other instances, adopting a *per se* standard of illegality would prohibit beneficial conduct – which is precisely why RPM is evaluated under the rule of reason under federal law. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that vertical price restraints, like RPM, are to be judged under the rule

[18] Concerted Action Report, pp. 63-64. The Concerted Action Report notes that the California Supreme Court holding that RPM is *per se* illegal in California preceded the United States Supreme Court's decision in *Leegin* that treats RPM as presumptively lawful unless the party imposing the RPM has substantial market power.

[19] Concerted Action Report, pp. 64-66. The Concerted Action Report states that "[t]his would require California courts to focus their analysis on the function of the restraint at issue and determine whether it 'promote[s], encourage[s], or increase[s] competition.'"

[20] Concerted Action Report, p. 66 (footnote omitted).

[21] See, for example, Concerted Action Report at p. 9.

of reason, rather than being treated as *per se* unlawful). Changing the standard for assessment of RPM, and other business conduct, will create uncertainty in the marketplace and risks chilling conduct that is, on balance, procompetitive.

Consumer Welfare Standard:

The Consumer Welfare Standard Report does not include any proposed legislation, but does suggest that the legislature adopt a core principle around which to shape any legislation:

> In the view of the committee, the label is less important than the substantive principle on which antitrust law is based. The principle is this: conduct that maintains, increases, or enhances market power to the detriment of trading partners, whether customers or suppliers, is unlawful, unless that conduct can be justified as reasonably necessary to provide welfare-enhancing benefits for those trading partners…. If the legislature were to embrace this principle, … it could then focus on the important question of shaping an antitrust law that would effectively promote welfare ….”[22]

The consumer welfare standard has guided courts for decades, but the Consumer Welfare Standard Working Group Report notes that the courts have not clearly defined what the consumer welfare standard means. Even so, given the consumer welfare standard has been used for decades and is currently familiar to courts and businesses, adopting a new core principle defining this standard is unlikely to improve antitrust enforcement. Instead, it is more likely to confuse courts and businesses as they evaluate antitrust issues. That confusion is more likely than not to result in unintended, adverse consequences, as well as differing opinions by the courts.

Enforcement and Exemptions:

The Enforcement and Exemptions Report provides this summary of potential actions to be taken by the legislature:

> “• Amend [the] Cartwright [Act] to be applicable to single firm conduct.
>
> • Create an option for the courts to utilize a ’structured rule of reason’ standard or burden-shifting process where warranted in Cartwright [Act] cases.[23]

[22] Consumer Welfare Standard Report, p. 8.

[23] A structured rule of reason analysis is simpler than a full rule of reason analysis. The proposal is not specific, but the Enforcement and Exemptions Report notes several characteristics of a structured rule of reason approach, including that (1) it would apply when a plaintiff shows “such clear and harmful real-world effects on competition that consumer harm is obvious,” (2) there would be no need for a plaintiff to define and prove a relevant product market and a relevant geographic market, (3) it is the defendant’s burden to prove any pro-competitive effects, (4) the court has discretion to disallow certain defenses, and (5) the court’s balancing of pro-competitive and anti-competitive effects to determine whether the conduct is in fact procompetitive is vigorous.” Enforcement and Exemptions Report, pp. 6-7. The Enforcement and Exemptions Report notes, for example, that the Working Group has not specified whether there would be a presumption of illegality after the first step, what defenses would be disallowed, and what, if any, defenses would be available to defendants.

• Clarify that antitrust standing requirement under [the] Cartwright [Act] is based on general proximate cause rules, *i.e.* the target area test.[24]

• Clarify that [RPM] remains *per se* unlawful under the Cartwright Act notwithstanding the US Supreme Court's ruling in the *Leegin* case.

• Adopt a Pre-Merger Notification law only in conjunction with additional measures relating to payment of fees, expanded staffing of the Antitrust Law Section, penalties for violations.

• Add [a] Cartwright [Act] amendment declaring that contractual waivers (in boilerplate arbitration clauses) of treble damages, attorneys' fees, and statute of limitations are unenforceable as against public policy.

• Consider amending [the] Cartwright [Act] to apply to mergers and acquisitions."[25]

The Enforcement and Exemptions Report also provides other recommendations to the legislature that are not included in this summary. Most significant are the recommendations on the application of the Cartwright Act to "Big Tech." The recommendation includes considering the *ex ante* regulation of the sector.[26] Though no formal regulatory proposal is offered, certain principles for implementation are summarized. These include:

"-Limit application of the law to the very largest tech companies offering digital platforms and/or services dependent on digital technologies…;

-Designate certain special obligations that those companies will have to government…, or competitors…, or consumers…;

-Establish a regulatory agency or specialized group to promulgate rules and administer the law;

-Specify a set of business practices known to have exclusionary effects to be the primary (but not exclusive) focus of regulation. They include: (a) impeding data-portability, (b) self-preferencing on the platform, (c) discriminatory platform access, and (d) undue interference with pricing or payments."[27]

Finally, the Enforcement and Exemptions Report highlights that certain exemptions from antitrust laws are provided by law that "could be brought to the attention of the legislature," such as the

[24] "Traditionally, any party within the 'target area' of the challenged anticompetitive conduct has standing to sue under the Cartwright Act. Under this test, the plaintiff's business or transactions must come within the zone of the market endangered by the antitrust violation, as opposed to being 'incidentally injured.'" Enforcement and Exemptions Report, p. 9.

[25] Enforcement and Exemptions Report, pp. 21-22.

[26] Enforcement and Exemptions Report, pp. 16-17 ("An *ex ante* regulatory approach of the kind being implemented in other jurisdictions may afford more effective as well as more economical enforcement with regard to certain practices and therefore should be explored.").

[27] Enforcement and Exemptions Report, pp. 16-17.

regulation of beer by the Alcoholic Beverage Control Board.[28] Additional areas discussed include occupational licensure *(e.g.*, real estate agents)[29] and agricultural marketing boards.[30] Specific recommended changes in exemptions are not discussed.

As we noted in our April response to the Single-Firm Conduct Working Group Report, amending the Cartwright Act to address unilateral conduct carries with it great risks that are unnecessary, given existing federal antitrust law. Those concerns are equally applicable to the merger portions of the Enforcement and Exemptions Report. Likewise, CalChamber's comments, above, warning against creating a California merger review regime and an *ex ante* regulatory scheme for technology platforms also apply to those same suggestions in the Enforcement and Exemptions Report. In short, taking these drastic actions have the potential of harming important drivers of innovation and dynamism in the U.S. and California economies.

The Working Group Reports Do Not Provide A Basis For Recommending Amendment To California's Antitrust Laws Because The Recommendations Are Not Based On A Need For Amendment, They Have No Supporting Cost-Benefit Analysis, And They Are Too General To Support A Legislative Proposal

It is clear that a significant amount of work went into preparing the Working Group Reports. But they do not support the CLRC in making any particular legislative proposal to the California Legislature regarding revisions to the California antitrust law, for several reasons.

One, as we noted in our April response to the Single-Firm Conduct Working Group Report, the Working Group Reports do not demonstrate a need for revising California's antitrust laws. There has been no showing that Californians are suffering from higher prices, inferior products or services, or less competition due to the current California antitrust regime. Indeed, several of the Working Group Reports note that taking no action and maintaining the status quo is a legitimate option for the CLRC. Legislating for legislation's sake or based on subjective beliefs that competition in California is not as robust as it could be is bad for California businesses and ultimately California consumers and workers. It is CalChamber's view that the CLRC should not consider any revisions to California's antitrust laws unless and until there is a demonstrated need for such revisions through some sort of empirical analysis.

Two, none of the Working Group Reports provide any cost-benefit analysis to understand the quantitative and qualitative effects – both economically beneficial and economically harmful – that are likely to result from the possible statutory changes. A cost-benefit analysis of proposed legislation compares the anticipated benefits to be derived from the proposed legislation to the anticipated costs of that proposed legislation if it were to be enacted. The goal of the analysis is to assess, in an unbiased and thorough manner, the net economic benefits that would flow from the legislation. Good public policy involves making changes that are, on balance, beneficial. For antitrust policy, utilizing a proper

[28] Enforcement and Exemptions Report, p. 21 ("A decades-old three-tier strategy to separate manufacturers from retailers through establishment of an independent wholesale market (with rate regulation and licensing by geographic area) has morphed over the last two decades into a very different economic picture in which a very small number of very large wholesalers may exert wide control over the shelf space of retailers, raising concerns about consolidation in this sector and complaints of market exclusion on the part of craft breweries among others.").

[29] Enforcement and Exemptions Report, p. 20.

[30] Enforcement and Exemptions Report, pp. 20-21.

cost-benefit methodology as part of decision-making will lead to policies that improve economic performance and efficiency, ultimately benefiting consumers and workers in California.

Three, demonstrating a need for change and conducting a careful analysis of policy choices is particularly important here because the changes being considered are not small adjustments of existing California policy, but instead represent significant changes in both substantive antitrust analysis and the nature of antitrust enforcement. As detailed in the Technology Platforms Report:

> [T]here is not a consensus among the antitrust advisors of this working group that specific legislation is needed to address Big Tech or that these [three options presented] are the most effective ways to address concerns about Big Tech. Some within the working group have expressed concern that, at a minimum, more study is needed of the potential impact of the the [sic] recommendations below – as they would further expand the scope of California's antitrust laws beyond existing federal law.[31]

CalChamber concurs. The technology sector is an incredibly important driver of the California economy and is a source of dynamism in the overall U.S. economy. Changes in policy that may affect the incentives to innovate or invest in California – such as the development and implementation of *ex ante* regulation – should be considered carefully before any changes in policy are made. This concern is not limited to the application of antitrust standards or regulation to technology companies, but rather applies across the broader California economy. Moreover, some of the suggested options are just not necessary given existing federal law. For example, concerns about concerted action and mergers and acquisitions are already adequately address by existing federal law. Accordingly, CalChamber recommends that no legislation be proposed by the CLRC to the California legislature until a cost-benefit analysis of that legislation is performed and released for public for review and comment.

Finally, many of the recommendations provided in the Working Group Reports are too general and imprecise to analyze or use as guides for drafting legislation. Examples include the recommendation to amend the Cartwright Act to apply to mergers and acquisitions in the Enforcement and Exemptions Report (and a similar recommendation in the Merger and Acquisitions Report)[32] and the option of enacting legislation addressing technology platforms in the Technology Platforms Report (and related recommendations in the Enforcement and Exemptions Report). No specifics are provided regarding what California merger or technology platform legislation should say. For example, what standards would apply to merger reviews, and what defenses, if any, would platforms have available to them to justify their business conduct? Both merger and technology platform legislation have the potential to involve dramatic changes in the legal and economic environments in which California businesses operate. Therefore, CalChamber recommends that no such legislation be proposed by the

[31] Technology Platforms Report, pp. 11-12.

[32] The Merger and Acquisitions Report also states that one option is to amend California law to address mergers and acquisitions. As with the similar recommendation in the Enforcement and Exemptions Report, this option in the Mergers and Acquisitions Report lacks specifics as to the detail of how California law should be amended. For example, the Mergers and Acquisitions Report does not describe to which transactions the new California merger law would apply, nor does it detail what standard for evaluation would be used.

CLRC to the California legislature before proposed legislative text is released to the public for review and comment.

Conclusion

CalChamber has long supported robust antitrust enforcement, sound competition policy and reasonable efforts to simplify, clarify and reform California law when necessary. But the Working Group Reports simply do not provide the CLRC with a basis to recommend revision of California's antitrust laws. The Working Group Reports are not supported by a finding that there is a need to amend California's antitrust laws. The sweeping changes offered in the Working Group Reports are not underpinned by a robust cost-benefit analysis of the effects that are likely to result from statutory revisions. And the Working Group Reports do not contain specific legislative proposals that can be analyzed by stakeholders or used by the CLRC as a guide for recommended revisions. CalChamber recommends that the CLRC not propose any revisions to California's antitrust laws unless there is a demonstrated need for such revisions, an independent cost-benefit analysis has been performed that suggests the revisions are, on balance, good for California, and specific statutory language has been proposed and analyzed by stakeholders.

Sincerely,

Eric P. Enson

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On Behalf Of The
California Chamber Of
Commerce