# Antitrust

## Robust Market Competition Under Fire

Is the California free market sufficiently competitive, or should the Legislature and courts make new rules governing the state's $4 trillion economy? This complex question is under investigation by a state commission and may be the subject of legislation in 2025.

National advocacy organizations have mobilized to change federal and state antitrust laws to increase government oversight and regulation of markets and competition. California has initiated a commission-based policy development process, stacked with anti-market and pro-regulation activists, that will issue legislative proposals in the near future.

Congress has so far resisted calls to upend existing competition laws, and the Federal Trade Commission and U.S. Department of Justice have failed to consistently advance new antitrust theories. Advocates like the American Economic Liberties Project and its supporters, including labor unions and trial lawyers, have thus turned their attention to statehouses to get a foothold to adopt these new theories, including importing European theories of market competition. Most notably — and expansively — have been efforts in New York state, Minnesota, Pennsylvania and Maine, which are pending before their legislatures.

The posture of the Trump administration on antitrust litigation remains to be seen. During his first administration, federal agencies continued to pursue some high-profile holdover cases, and initiated new actions, but certainly nowhere near the scale of the Biden administration. No doubt there are antitrust hawks among Republicans, including Vice President JD Vance when he was a senator.

### CALIFORNIA LAW REVISION COMMISSION

In August 2022, the California Legislature enacted ACR 95, a resolution directing the California Law Revision Commission (CLRC) to study "new prescribed topics relating to antitrust law and its enforcement." The CLRC is organized to study selected laws to discover defects and anachronisms and recommend legislation to make needed adjustments and revisions. Seven of the Commission's 10 members are appointed by the Governor, two are members of the Legislature, and one is the Legislative Counsel. This study is among the most far-reaching projects the Commission has undertaken, as measured by its potential effects on the California economy.

Jointly authored by Buffy Wicks (D-Oakland), current chair of the Assembly Appropriations Committee, Lorena Gonzalez, now head of the California Labor Federation, and former Republican Assemblymember Jordan Cunningham (San Luis Obispo), ACR 95 directed the CLRC to examine whether California should, among other things:

- Outlaw "single company monopolies."
- Expand definition of monopolistic behavior regarding tech companies.
- Evaluate industry "concentration" in the marketplace for the purpose of supporting new antitrust rules.
- Revise law regarding mergers and acquisitions, exemptions.

The California Chamber of Commerce has been closely monitoring and providing comments on this policy development effort and has urged the Commission to refrain from recommending any new legislation without first establishing a unique need for a separate state legal framework and conducting a cost-benefit analysis of the economic effects of such far-reaching proposals.

The Commission assembled and directed eight working groups to provide insight on subjects identified by ACR 95, and several others. Most controversial were reports by the working groups on Single Firm Conduct and Concentration in California.

The CalChamber strongly urged the Commission to reject separate regulation of single firms, since its proposal fails to distinguish between what is and what is not anticompetitive and rejects more than a century of federal and state precedent designed to identify truly anticompetitive conduct.

The Single Firm Conduct Working Group legislative proposal is based on anecdotal and unsupported beliefs that competition in California could be more robust, and it does not provide any economic analysis of the likely impact of the reforms. The proposal's imprecision and lax standards will chill competition and will lead to increased litigation that will result in inconsistent rulings among courts, together with rulings restricting pro-competitive conduct, making doing business in California more expensive, riskier, and less desirable — all of which is bad for California consumers and workers.

Every corner of the California economy would be affected by changes in antitrust and competition law. After all, that's the intent of the advocates for change. The headline targets will be technology, finance, health care, media and entertainment, energy, pharmaceuticals, and biotechnology; however, based on proposals in New York and what we have seen from the CLRC so far, we expect legislation to be so far-reaching that it could have an impact on every industry here in California.

The intended and unintended consequences of these profound changes in the legal framework will capture small and legacy businesses and long-established industries. For example, establishing an aggressive definition of industry concentration could destabilize historic relationships within supply chains. Prior approval of mergers and acquisitions by the Attorney General could fundamentally transform the investment and growth climate in California.

### ECONOMIC IMPACTS

Other industry groups have been intensely interested in debate over the regulation of competition as framed by the CLRC.

The Motion Picture Association released an economic report that repudiated the Concentration Working Group's conclusion that the audiovisual sector is implicitly uncompetitive because it is "overly concentrated." In fact, the report found, "The audiovisual industry is a dynamic and highly competitive industry with numerous participants providing an increasingly diverse array of content across new and innovative delivery platforms, benefitting consumers."

California's technology industry has been a particular target of the Legislature for regulation on many fronts. The tech sector was called out uniquely in ACR 95 for examination by the Law Revision Commission.

Representatives of the tech industry have provided testimony to the Commission demonstrating the devastating effects that, say, a California version of the European Digital Markets Act, would have on the industry. Hamstringing the technology sector would have serious implications for the California economy and investment climate.

According to a study published by the California Foundation for Commerce and Education, on its own, the tech sector accounts for 19% of California's gross regional product (GRP), contributing $623.4 billion to the state's economy in 2022. The full breadth of its impact is even larger when considering the activity it drives in other industries via business-to-business interactions and through personal consumption spending among tech sector workers. Factoring in these ripple effects, the tech sector contributed nearly $1 trillion to California's GRP, accounting for 30% of the state's economy. In terms of employment, the tech sector supported 4.2 million jobs, or 20% of all jobs statewide.

Another report by NERA, a national economics firm, undermines a key argument by the Concentration Working Group that attempted to define the "monopoly problem" in California. The report cites a "deeply flawed" principal talking point used by those who advocate for new, sweeping regulation of business organization. According to experts with NERA, the mistaken premise of "industrial concentration" is a misleading and an unworkable benchmark of monopoly power. These experts assert that trends in industrial concentration "should play no role in guiding antitrust policy in California, any other state, or the United States" because concentration is neither a growing phenomenon, nor has been demonstrated to itself reduce competition in markets or harm consumers.

The NERA report dug deeply into the trend by advocates to point to industrial "concentration" as evidence that markets are not competitive. Far from it, concludes NERA. The experts found that:

- No evidence exists suggesting that concentration in the United States has risen to "excessive" or "harmful" levels.
- Industrial concentration is not a useful benchmark of monopoly power.
- No empirical evidence exists demonstrating industrial concentration trends in California.

The authors conclude that trends in industrial concentration should play no role in guiding antitrust policy in California,

any other state, or the United States. The CalChamber also cautions that anecdotal or ad hoc claims regarding concentration are not a substitute for rigorous empirical analysis and should be rejected. Basing policy decisions on unfounded claims of increasing and excessive concentration has the potential to do serious harm to the California and U.S. economies.

In 2024, no anti-competition bills survived the legislative process. A proposal (AB 2230) to subject large residential housing purchases to scrutiny under the Cartwright Act failed in the Assembly. A proposal to subject purchases of health care businesses by private investors (AB 3129) to burdensome antitrust regulation was vetoed by the Governor.

### CALCHAMBER ACTION

To address this looming issue, the CalChamber has organized a coalition of industry associations and individual businesses, Californians for Fair Competition, which could have far-reaching implications for the competitive marketplace in the state.

The coalition will enlist a full suite of services to improve the California business community's capacity to engage on this issue before the Commission, and ultimately before the Legislature.

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