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COMMENTS OF ITIF

Before the

California Law Revision Commission

California, United States

In the Matter of: Tentative Recommendation December 12, 2025 Antitrust Law: Single Firm Conduct	))))))))	Public Comment

January 12, 2026

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INTRODUCTION

On December 12, 2025, the California Law Revision Commission (the Commission) released its much anticipated Tentative Recommendation on Single Firm Conduct to the California Legislature (the Recommendation).[1] The Recommendation offers proposed amendments to the Cartwright Act, California's antitrust law, to include new liability for single firm conduct offenses. The Recommendation follows a multiyear review by the Commission, which included eight working groups that studied various aspects of antitrust law, including single firm conduct, with reports presented to the Commission in 2024.[2] In connection with this process, the Commission received numerous detailed comments from stakeholders, many of which raised concerns about the potential effects of the proposed changes to California's antitrust regime.[3] In January of last year, the Commission began drafting proposed language to amend the Cartwright Act to cover single firm conduct, culminating in its Recommendation.

The Information Technology and Innovation Foundation (ITIF) is a nonprofit, nonpartisan research and educational institute that has been repeatedly recognized as the world's leading think tank for science and technology policy.[4] While ITIF commends the Commission for its extensive review of California's antitrust laws, the Recommendation would, in several key respects, harm and upend the *status quo*. In particular, the Recommendation's inclusion of a unilateral restraint of trade offense, treatment of efficiencies, *de facto* abandonment of the consumer welfare standard, and deviation from the federal legal rules for evaluating a variety of single firm practices risk creating an unadministrable enforcement regime that chills consumer welfare and innovation.

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[1] State of California, California Law Revision Commission, Tentative Recommendation, Antitrust Law: Single Firm Conduct (Dec. 2025), https://clrc.ca.gov/pub/Misc-Report/TR-B750.pdf [hereinafter Recommendation].

[2] *See, e.g.*, Single-Firm Conduct Working Group, California Law Review Commission Study of Antitrust Law, Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton and Carl Shapiro (Jan. 25, 2024), https://www.clrc.ca.gov/pub/2024/MM24-15.pdf.

[3] *See, e.g.*, Joseph V. Coniglio, Comments for the California Law Revision Commission Study of Antitrust Law Regarding Consumer Welfare Standard, Concerted Action, and Other Issues, ITIF (Aug. 26, 2024); https://www2.itif.org/2024-california-consumer-welfare-concerted-action.pdf; Joseph V. Coniglio, Comments for the California Law Review Commission Study of Antitrust Law Regarding Innovation and Mergers, ITIF (June 20, 2024), https://www2.itif.org/2024-california-law-review.pdf; Joseph V. Coniglio and Trelysa Long, Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration, ITIF (May 2, 2024), https://www2.itif.org/2024-california-single-firm-conduct.pdf.

[4] James G. McGann, 2020 Global Go To Think Tank Index Report, Univ. of Pa. (2021), https://repository.upenn.edu/think_tanks/18/.

PROPOSED SECTION 16729

ITIF offers no objection to the Recommendation's proposal in Section 16729(a)(2) for the inclusion of single firm conduct offenses that prohibit the undue acquisition and maintenance of, or the attempt or conspiracy to obtain, monopoly or monopsony power in a market, which are already prohibited under Section 2 of the Sherman Act. Indeed, while the Sherman Act does not expressly prohibit monopsony behavior by its terms, the Supreme Court has been clear that "the theoretical connection between monopoly and monopsony suggests that similar legal standards should apply to both sorts of claims."[5] The economics supports this "mirror-image" treatment between monopoly and monopsony: Like monopoly, exclusionary practices that maintain monopsony power will harm consumers, such as through reduced output.

The Recommendation's creation in Section 16729(a)(1) of a separate "restraint of trade" offense is a different story. As the Recommendation explains, while there is no prohibition under the Sherman Act of single firm conduct untethered to monopoly power or the attempt to acquire it, this new offense is "intended to capture the full range of anticompetitive conduct by a single firm."[6] To be sure, firms with market power that lack monopoly power, or the specific intent and dangerous probability of achieving it, can engage in unilateral behavior that harms competition, including invitations to collude and other unilateral facilitating practices.[7] However, as ITIF has previously explained, there are reasons why a broad ban on unilateral conduct that merely creates or maintains market power is undesirable.[8] First, administrative costs will substantially increase given that in many modern markets "almost every business enjoys some degree of market power," such that a broad swath of firms could be subject to the single firm conduct regime.[9] Moreover, whereas monopoly power is consistent with true market failure, market power may spur dynamic competition and innovation.[10]

Finally, the proposed language in §16729(c) similarly deviates from Section 2 of the Sherman Act by expressly and categorically precluding consideration of out-of-market efficiencies. Specifically, whereas federal law discounts these efficiencies under Section 7 of the Clayton Act, the Supreme Court has not clarified whether a similar rule applies to Section 2 of the Sherman Act, and has even arguably considered the merits of out-of-market efficiencies in the Section 1 context.[11] Moreover, the ban of out-of-market efficiencies in §16729(c) is particularly problematic in light of the accompanying language in Section 16731(f) that rebukes the Supreme Court's rule in *Ohio v. Am. Express* that courts should take into account anticompetitive effects on the platform as a whole, rather than focusing on just one side of the market, in order to avoid chilling behavior that is, on balance, procompetitive simply because it may harm one side of the market.[12]

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[5] Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., 549 U.S. 312 (2007); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945) (allegations of a dominant firm engaged in predatory overbuying).

[6] Recommendation at 11.

[7] E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128 (2d Cir. 1984).

[8] Joseph V. Coniglio and Trelysa Long, Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration, ITIF (May 2, 2024), https://www2.itif.org/2024-california-single-firm-conduct.pdf.

[9] FTC v. Meta Platforms, Inc., __ F.Supp.3d __, 2025 WL 3458822 (D.D.C. Nov. 18, 2025).

[10] This follows from the "inverted-U" relationship that often obtains between market structure and innovation. See, e.g., Philippe Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701 (2005).

[11] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).

[12] Ohio v. American Express Co., 138 S. Ct. 2274 (2018).

PROPOSED SECTION 16730

The draft language in Section 16730 appears to present a purposive framework that troublingly departs from the consumer welfare orientation that has long animated the Sherman Act.[13] In particular, the purpose of the Cartwright Act is articulated in Sections 16730(a) and (c) as the promotion and protection of "free and fair competition," which not only reflects a more European approach to antitrust enforcement, but also imports its significant ambiguity with respect to the meaning of "fairness."[14] Indeed, this more European and structural understanding of competition is both inapposite to the dynamic, Schumpeterian competition that typifies so many contemporary markets, but has also likely contributed to the technology-driven productivity gap between the United States and Europe that has emerged over the past several decades.[15] Moreover, the proposed language would fundamentally politicize the purpose of unilateral conduct enforcement by sanctioning the pursuit of political ends, such as the "preservation of our democratic, political, and social institutions"—a troubling ghost of antitrust's past.[16] Doing so would further open the door to an unadministrable enforcement regime whereby courts consider political concerns when evaluating the legality of single firm conduct, and ultimately stifle procompetitive behavior on the grounds that it results in some purported offsetting adverse political consequences.

The express inclusion of worker welfare in Section 16730 raises similar concerns about administrability and the risk of false positives. Whereas the Sherman Act is designed to protect consumer welfare in a product market, worker interests reflect producer welfare in a labor market, and there are various practices that may harm the former while benefiting the latter. That is, although single firm conduct that maintains monopsony power in a labor market is rightly seen as anticompetitive, there are many cases in which single firm conduct that increases buyer power in a labor market could have proconsumer effects, such as reduced prices and increased output. As such, Section 16730's statement that these amendments are designed to promote worker and consumer welfare is a recipe to force courts to make difficult tradeoffs between worker and consumer welfare that will come at the expense of administrability and conduct that benefits consumers.

Moreover, while deterrence is an important goal of antitrust policy, a single firm conduct regime geared toward "maximizing" effective deterrence can result in harmful unintended consequences when implemented without consideration of other legitimate objectives. Excessive remedies can result in overdeterrence, harming consumers through false positives, and anticompetitive single firm conduct is almost exclusively a civil offense, in which context the Supreme Court has made clear that "[c]ourts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."[17] For this reason, while it is legitimate for remedies to serve a deterrent—and in some cases punitive—purpose, such as through treble damages, this must not be the singular or even preferred approach to remedy anticompetitive single firm conduct.

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[13] Reiter v. Sonotone Corp. et al., 442 U.S. 330, 343 (1979).

[14] *See, e.g.*, EU, Summaries of EU legislation, Competition ("European competition policy is intended to ensure free and fair competition in the European Union."), https://eur-lex.europa.eu/EN/legal-content/glossary/competition.html.

[15] Joseph V. Coniglio and Lilla Nóra Kiss, The Draghi Report: Right Problem, Half-Right Solutions for Competition Policy, ITIF (Oct. 2024), https://itif.org/publications/2024/10/02/draghi-report-right-problem-half-right-solutionscompetition-policy/.

[16] Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958).

[17] United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

PROPOSED SECTION 16731

In view of the nature of U.S. antitrust law as a "common law statute," ITIF has concerns with Section 16731's statutory exclusion of certain tests as necessary conditions for liability under any circumstances, rather than allowing courts to make these determinations over time through a common law process.[18] To be sure, this concern applies less to the evidentiary provisions that are stipulated, specifically 16731(e)'s statement that quantitative evidence of harm should not be required, as well as 16731(j)'s proposal that a plaintiff need not make out an indirect case of monopoly power when sufficient direct evidence exists—both of which are sensible and consistent with federal practice. Moreover, the ability of plaintiffs to prove monopoly power through direct evidence itself implies the condition in Section 16731(i) that plaintiffs are not required to show that a defendant has a sufficiently high market share. However, for purposes of indirect proof, a market share threshold should not be statutorily barred so as to allow courts to utilize structural presumptions surrounding when a firm does and does not possess monopoly power that facilitate great administrability.

Notwithstanding the foregoing, Section 16731 would problematically require courts to apply fundamentally different standards for evaluating unilateral conduct under the Cartwright Act and the Sherman Act. For example, Section 16731(d) effectively forecloses courts from applying a "no economic sense" test to evaluate single firm behavior, which, as Herbert Hovenkamp has explained, is a sound approach for assessing conduct like predatory innovation.[19] As the Ninth Circuit has explained, "[t]o weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable."[20] A similar approach is reflected in the Recommendation's categorical rejection of an equally efficient competitor standard in 16731(h), which ignores that the Ninth Circuit has reasonably found such analysis appropriate in analyzing bundled discounts by asking whether they were priced below the seller's marginal cost.[21]

These concerns are further exacerbated by Section 16731's disavowal of several key rules that are critical to assessing the competitive merits of important types of single firm conduct. To be sure, while there is no single test used for evaluating all exclusionary practices, the core questions are always whether the conduct harms the competitive process and consumers. With respect to predatory pricing and volume discounts, the price-cost and recoupment prongs that the Recommendation respectively discards in 16731(c) and (g) are critical to these assessments, as "the below-cost pricing requirement ensures that the pricing harms competitors, the recoupment requirement ensures that the low prices also harm competition—that is, consumers—and prevents antitrust law from condemning the very conduct it is supposed to encourage."[22] Without these respective requirements, courts risk condemning pricing that is both competition on the merits by virtue of not excluding equally efficient competitors, as well as benefits—not harms—consumers with lower prices.

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[18] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007).

[19] *See* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 332 (2001).

[20] Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991, 1000 (9th Cir. 2010).

[21] Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).

[22] Timothy J. Muris and Joseph V. Coniglio, *What* Brooke Group *Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 35 (2020).

A similar logic applies to the standards for evaluating refusals to deal: For a refusal to deal to be anticompetitive, it must not reflect competition on the merits and must be likely to result in consumer harm.[23] To that end, as is the case under the Sherman Act, given that "[i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," some criterion is required for determining whether a refusal to deal reflects competition on the merits.[24] As the Supreme Court explained, for refusals to deal to be unlawful, there must be some showing of profit sacrifice or a "willingness to forsake short-term profits," or else courts risk the perverse result of requiring firms to deal with counterparties even if doing so is unprofitable.[25] This is the function served by both the prior course of dealing test in Section 16731(a) and the discrimination analysis in Section 16731(b), each of which provides a generally administrable framework to conduct this analysis. Without these, or some other way to measure profit sacrifice, the Recommendation risks having courts assess the merits of refusals to deal through an assessment of whether the consumer benefits of the refusal outweigh the harms—turning antitrust enforcement into *de facto* regulation by giving judges "*carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[26]

RECOMMENDATIONS

For these reasons, ITIF has concerns with the Recommendation and respectfully offers the following:

- **Unilateral Conduct Liability Should Attach to Monopoly Power**: While ITIF does not object in principle to the Recommendation's proposal for the introduction of a state single firm conduct regime in California, the creation of a unilateral restraint of trade offense untethered to actual or attempted monopoly (or monopsony) power is a dangerous expansion of antitrust law that raises serious administrability and error cost concerns.
- **Antitrust Is Not About Fairness or Politics**: Antitrust is designed to protect competition and consumers, and allowing courts to take into account notions of fairness and political goals will only exacerbate concerns about inadequate administrability and chill procompetitive conduct.
- **Competition on the Merits Should be Lawful**: By banning the use of a prior course of dealing requirement, a price-cost test, the no economic sense test, and the equally efficient competitor standard, the Recommendation both opens the door to courts condemning broad swaths of behavior that reflect competition on the merits and risks creating an administrability and legitimacy crisis in which courts are routinely required to act like regulators and weigh the costs and benefits of unilateral business decisions.

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[23] Aspen Skiing Co. v. Aspen Highlands Skiing Corp, 472 U.S. 585, 605 (1985) (noting that "it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers").

[24] United States v. Colgate Co., 250 U.S. 300, 307 (1919).

[25] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

[26] *Id.* at 415-16.

CONCLUSION

While it is true that state antitrust regimes may go beyond the scope of federal antitrust law, that does not justify the radical departure from the Sherman Act contemplated by the Recommendation in terms of the principles, standards, and rules that should define sound antitrust enforcement at all levels of government. In particular, by creating single firm conduct liability for firms untethered to monopoly (or monopsony) power, sanctioning fairness and political objectives as part of the purpose of antitrust enforcement, and banning courts from applying a variety of tests that ensure only conduct that harms the competitive process is condemned, the Recommendation risks creating a highly unadministrable antitrust enforcement system in California that would significantly stifle procompetitive behavior that benefits consumers.

Thank you for your consideration.

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