THIRD SUPPLEMENT TO MEMORANDUM 2024-13

Antitrust Law: Status Update
(Power Point Presentations from Experts and Public Comment)

This supplement provides power point presentations for the expert reports to be presented at the Commission's May 2, 2024, meeting.[1] It also includes additional public comments that the staff has received relative to the Antitrust Study. The first comment is a letter addressed to Governor Newsom relating to the Antitrust Study from a "coalition of Innovation Economy business associations throughout California." The second is a submission from the Computer and Communications Industry Association (CCIA) that is responsive to the expert report on Single Firm Conduct. CCIA has previously submitted public comment and information about CCIA and its previous comment is included in the First Supplement to Memorandum 2024-13 at pages 2-3 and as Exhibit 3 at page 46.

These materials are all attached as Exhibits.

Respectfully submitted,

Sharon Reilly
Executive Director

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise. The Commission welcomes written comments at any time during its study process.

Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets

Group 7 Presentation
California Law Revision Commission
May 2, 2024

EX 1

Committee Members

- **Cheryl Johnson** - Deputy Attorney General (Emeritus), California Department of Justice
- **Dean Harvey** - Partner, Lieff Cabraser Heimann & Bernstein
- **Diana Moss** - Vice President and Director of Competition Policy, Progressive Policy Institute
- **Barak Richman** - Katharine T. Bartlett Distinguished Professor of Law, Duke Law School
- **Shana Scarlett** - Partner, Hagens Berman

Overview

- Introduction
- Labor
- Food and Agriculture
- Healthcare and Pharmaceuticals
- Entertainment
- Summary and Discussion

Introduction

Why Competition is Vital in California

- California is the largest “sub-national” economy in the world with GSP of $3.6T in 2022
- Competition has a strong impact on:
  - The California economy and the state’s role in national and global markets
  - The ability to attract business and labor to California
- As measured by GSP and potential for employment and job growth, several sectors have an outsized impact
- CLRC inquiry is central to importance of competition in California and promoting markets, innovation, and growth

Indicators of Declining Competition

- Declining competition in the U.S. economy is a public policy concern
- Major indicators that consolidation has driven adverse outcomes:
  - Rising market concentration – resulting in loss of choice, price increases, wage decreases, higher markups
  - Slowing rates of market entry – resulting in higher barriers to entry and adverse impact on small business
  - Growing income and wealth inequality – driven by wider gaps between most and least profitable firms

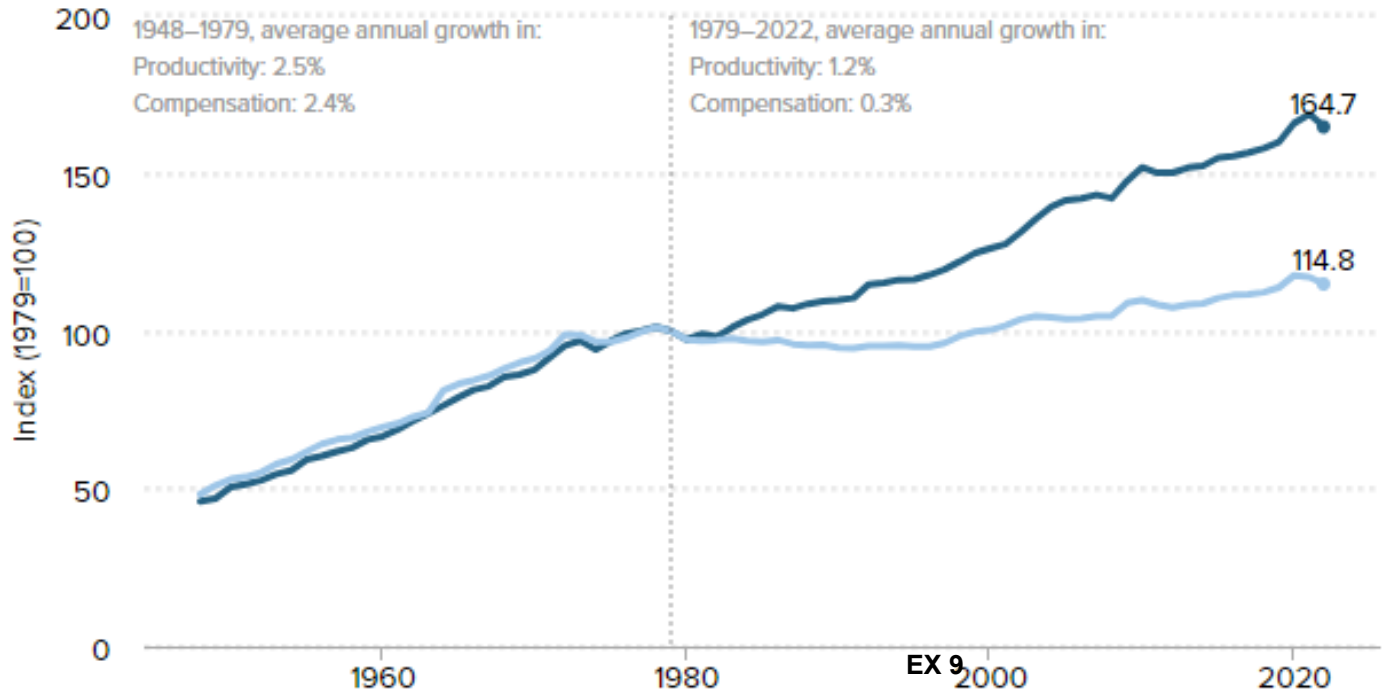
Policy Responses to Rising Concentration

- Public and private enforcement response
  - Federal and state antitrust enforcers have intensified efforts
  - Private enforcement is major mechanism for obtaining restitution for victims
- Legislative and Soft Policy responses
  - Revisiting state-level antitrust statutes
  - Revised 2023 DOJ/FTC Merger Guidelines
  - Revised Hart Scott Rodino merger filing requirements

Labor Markets

Productivity / Wage Gap

- Beginning in 1979, there has been an increasing gap between productivity and worker pay.
- Productivity has increased by about 65%, while pay has increased by just 15%.



EX 9

Employer Market Power Over Workers

- Employer market power over workers is substantial and pervasive.
- The employment relationship is very different from other economic transactions.
- Labor is often the largest cost facing employers, and employers have strong incentives to minimize that cost however they can.

Areas of Concern

- Agreements among rival employers not to compete for each other's employees.
- Non-compete agreements between employers and employees.
- Mandatory arbitration in employment agreements.
- Mergers that consolidate labor markets and increase employer concentration.
- Misclassification of workers as independent contractors.

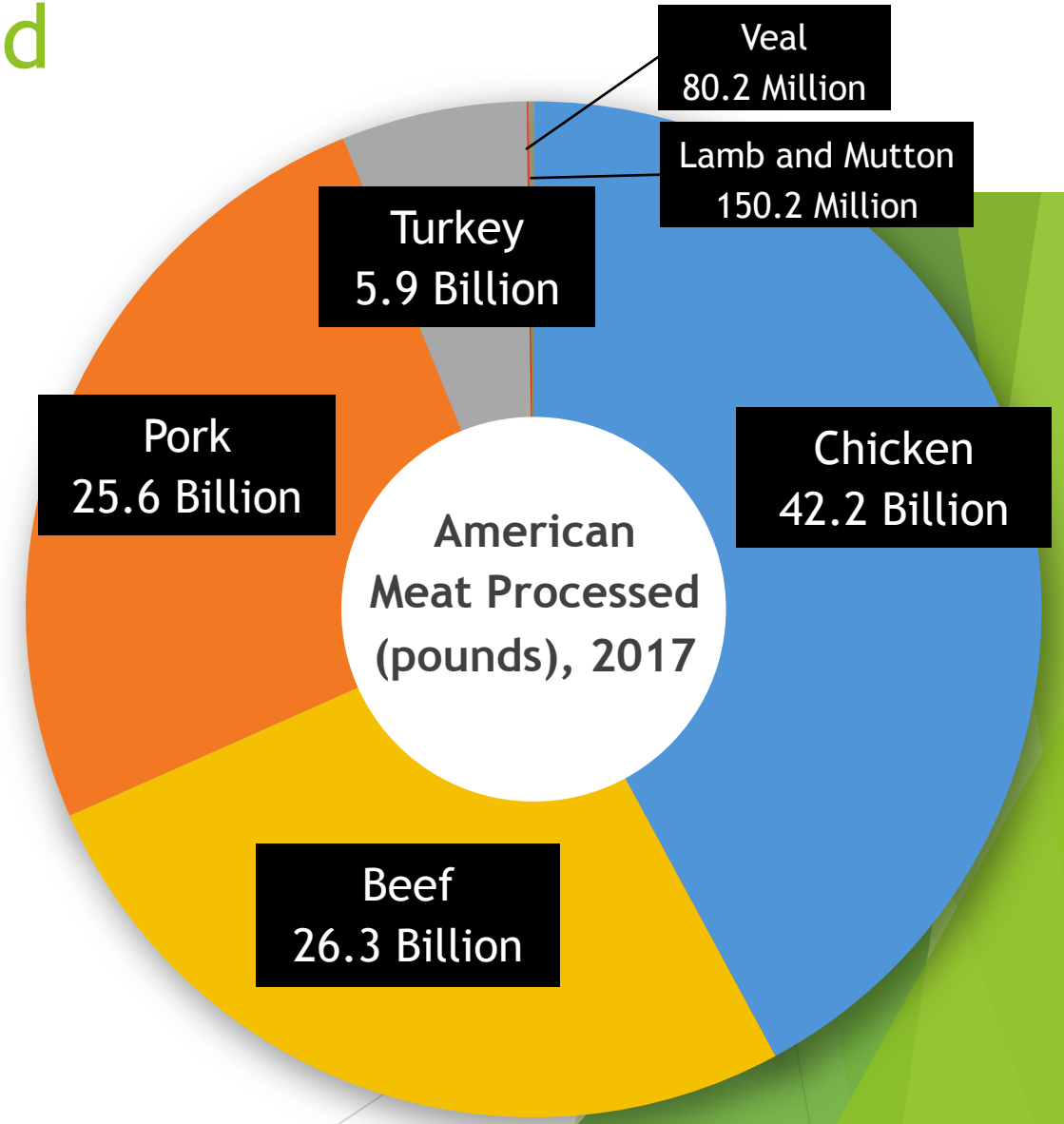
Modernizing Antitrust Law to Address Labor Markets

- Market definition and market power.
- Categorical prohibitions to provide employers, employees, and courts with clear rules.

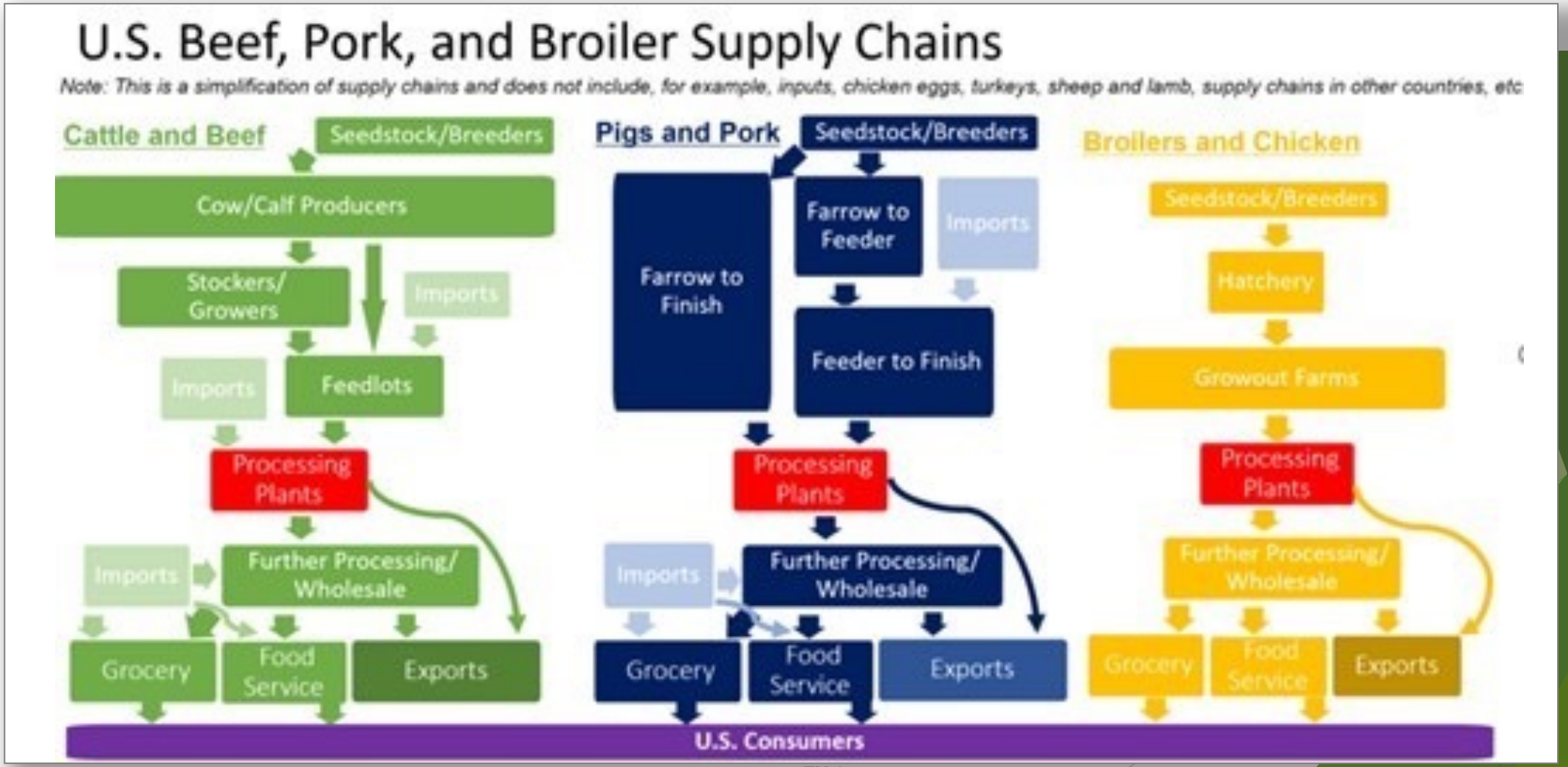
Food & Agriculture

Consolidation in the Food and Agricultural Markets

- Food represents a large piece of the consumer wallet:
  - Annually, a California family of four spends $10,016 per year. $662 more than the national average.
  - Four meats dominate consumers' plates:

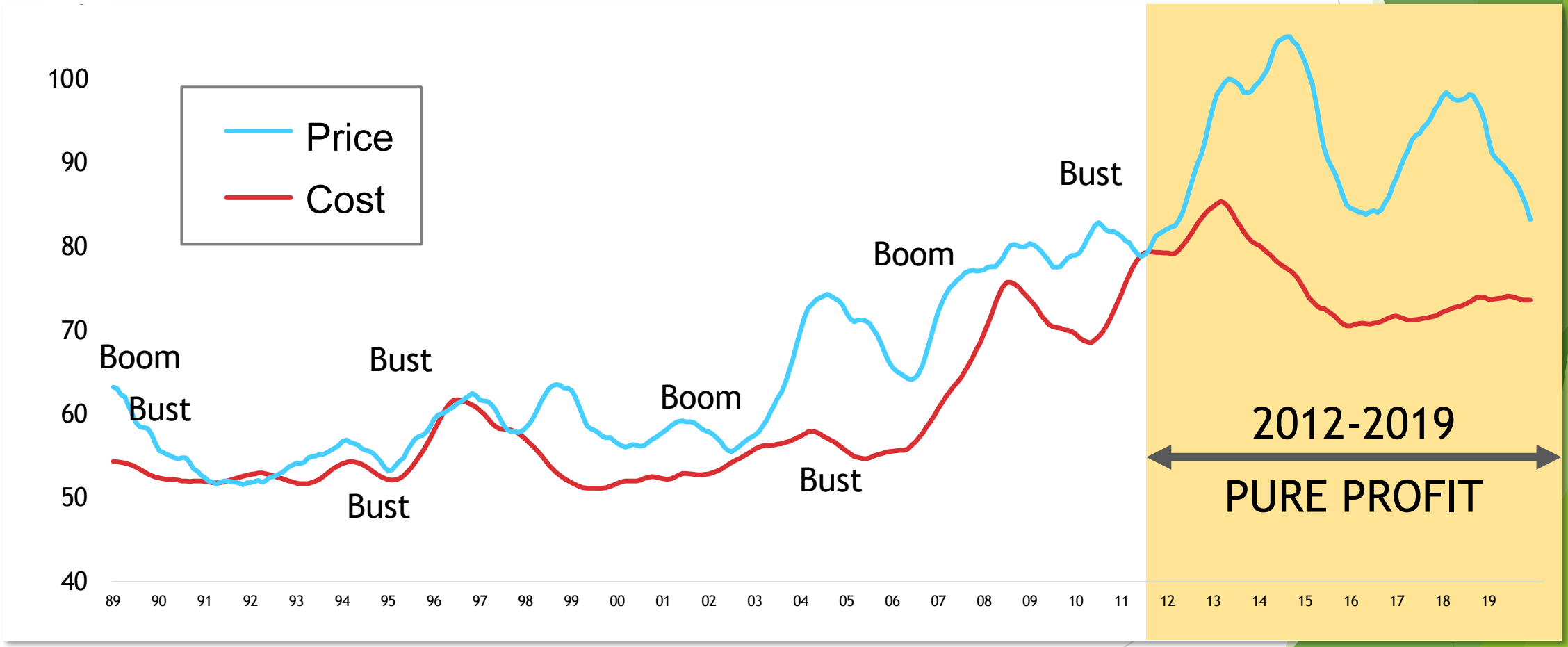


Impact of Consolidation on California's Wallets is Clear



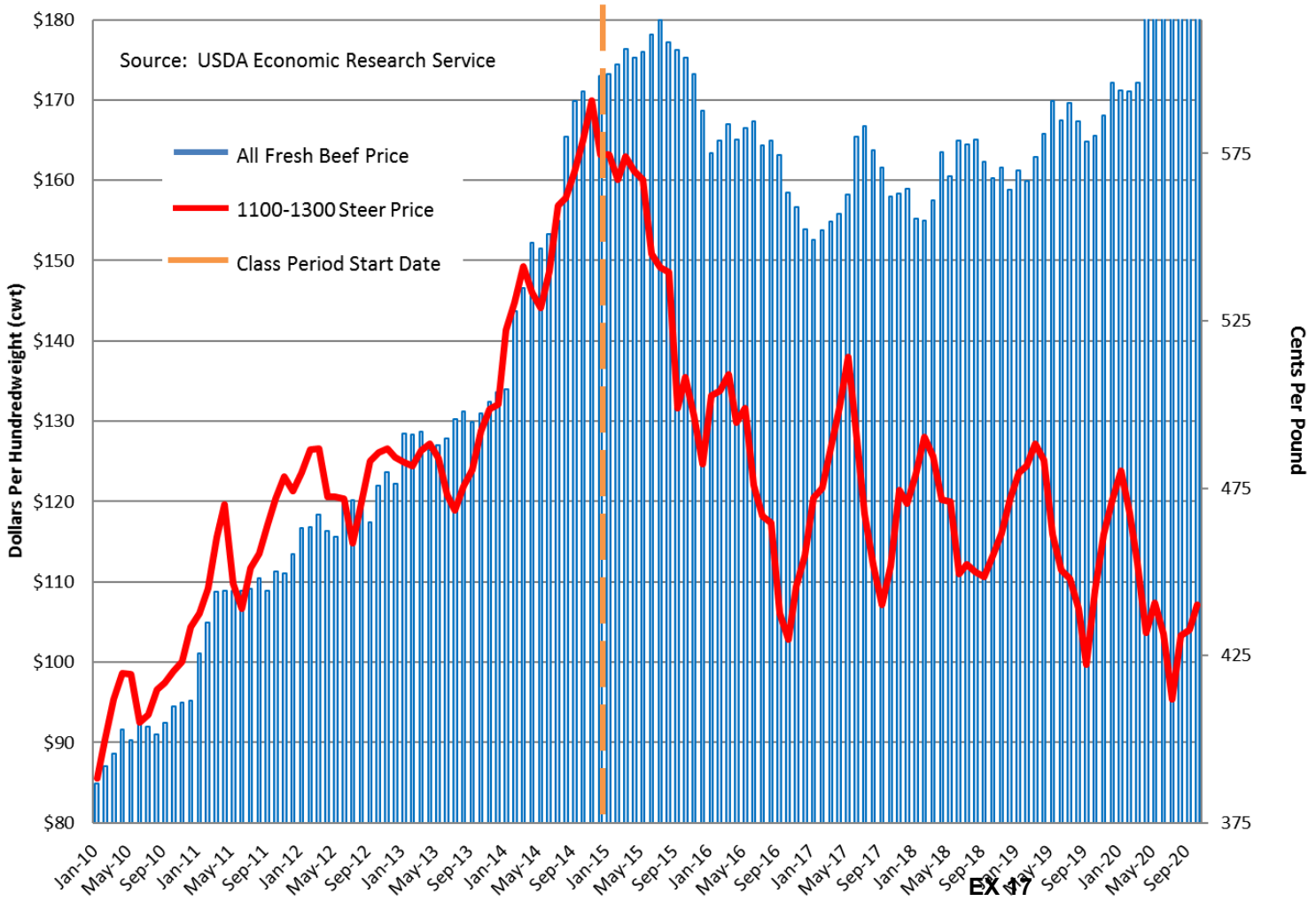
EX 15

The price of chicken separated from the cost of chicken in 2012 and has not returned.



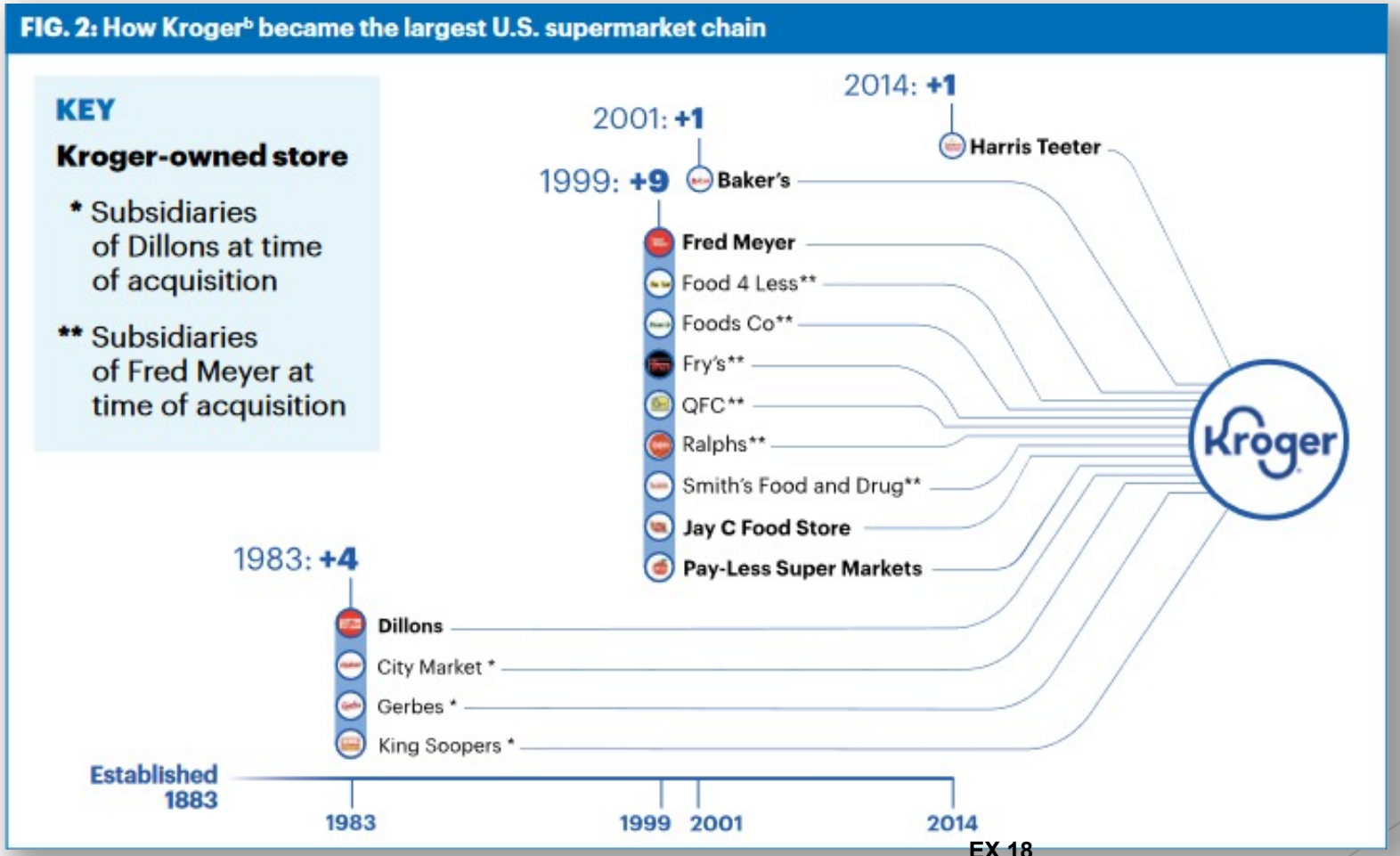
EX 16

The price of beef separated from the cost of beef in 2015 and has not returned.



EX 17

Consumers also face consolidation threats at the retail grocery level.



EX 18

Healthcare & Pharmaceuticals

California Healthcare and Drug Costs

- Healthcare spending per capita was about $10K in 2020, 33% of state budget is spent on healthcare
- 3 health insurers control 80% of healthcare insurance and 3 PBMs control 75% of all prescriptions (especially high-cost)
- 2020 California Blue Ribbon Report on PBMs identified transparency and competition concerns

EX 20

Major Competition Concerns in Pharma and PBMs

- Pharmaceutical companies grow largely through successive acquisition
  - FTC has exhibited inconsistent policy towards mergers divestitures, especially as industry has changed
  - PBM concentration enables anticompetitive foreclosures (e.g., Botox, Voyant, and Praulent cases)
- PBMs steer the most profitable business away from nonaffiliated pharmacies:
  - Favor their own mail order and specialty affiliates
  - “Indies” make up 33% of total pharmacies in California

PBMs Consolidation and Integration

graphic showing the increasingly consolidated control large pharmacy benefit managers have over the prescription drug market. Image via Pharmaceutical Research and Manufacturers of America.

EX 22

Hospital Systems in California

- Over last 35 years, hospital prices increased 600%, margins also increased
- Systems have grown larger, 8 systems control 40% of state's hospital beds
- Findings of Petris Center (UCBerkeley) study:
  - 75% of Cal counties had "highly concentrated" hospital and commercial markets
  - In 39 counties >75% physicians worked for large corporate entities
  - Concentration is associated with higher prices
  - High concentration aligns with prices that are 35-79% higher than in less concentrated areas

Hospital Case Study - Sutter

- Example of “dominance through serial acquisition”
- Grew from 2 to 24 hospitals, 36 ASCs, 53K employees, and almost $15B in annual revenue
- California AG failed to stop merger of Sutter and Summit, which controlled Alameda County hospital market
- Settlement for $575M with AG and private plaintiffs on claims that prices increased from anticompetitive conduct
- In 2023, Sutter bought the dominant physician practice in Santa Barbara

Hospital Case Study - Cedars-Sinai and Huntington

- A “must have” hospital expands
- Cedars (~ 2K beds) merged with Huntington (~ 620 beds)
- California AG concerned that:
  - prices for Huntington patients would increase by over 30%
  - conditionally approved with price caps and other conditions
- Hospitals sued AG but settled prior to trial with ban on certain contracting and pricing practices

Entertainment

Entertainment in California

- The average household spent over $3K on entertainment in 2022
- Film & television produces over 700K jobs, $70B in wages, $100B in tourism, and adds $20B to the state economy
- Music industry is the largest of any state, producing 430K jobs, and adds $40B to the state economy
- The gaming market has grown exponentially and is worth about $160B

Major Trends in Entertainment

- Major transition from traditional movie and television revenue streams to digital and streaming
- Transformation driven by M&A within markets, and across markets such as content, film, streaming, TV, music, and technology
  - Music - Big 4 control 85% of production and distribution
  - Media – 6 companies control all broadcast and basic cable television, newspapers, publishing houses, etc.
  - Film – small handful of studios control almost 65% of film industry
- Growing competitive concerns, including Live Nation-Ticketmaster monopoly and Microsoft-Activision merger

Summary

Summary

- The working group encourages the CLRC to identify the policy toolkit that is suited to addressing competition concerns in California
- Tools in the policy toolkit include antitrust enforcement, sector regulation, and labor and intellectual property law and policy.
- An overarching goal is to pursue policies that work together to promote the benefits of competition in California

Single-Firm Conduct Working Group

Presentation to the California Law Reform Commission

Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton and Carl Shapiro

2 May 2024

Single-Firm Conduct

What Is Single-firm Conduct?

- Purely Unilateral Conduct: Refusal to Deal
- Agreements With Others: Exclusive Dealing

Goal: Prohibit Single-Firm Conduct That Harms Competition

Competition Delivers Many Benefits to California

Federal Law: Sherman Act Section 2

- Monopolization

California Law: Gap in Cartwright Act

- Does Not Reach Purely Unilateral Conduct

Why Not Just Copy the Sherman Act?

Sherman Act Section 2 is Rather Vague

- Prohibits “Monopolization”

Economic Learning Has Advanced Since 1890

Case Law Has Evolved Since 1890

Widespread View that the Federal Courts Have Overly Narrowed the Sherman Act

- Creates Opportunity to Improve Upon Federal Law

We Can Do Better with a 21st Century Statute

- Faithful to Fundamental Antitrust Principles which have Longstanding Bipartisan Support

Examples of Exclusionary Conduct

Exclusive Dealing Provisions

Loyalty Rebates

Most-Favored Nation Clauses

Discrimination Against Rivals

Agreements to Limit Competition

Predatory Pricing

See Page 15 of Report

Anticompetitive Exclusionary Conduct

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.

See Page 16 of Report

Improvements Over Sherman Act

Clearer Standard for Antitrust Liability

- Provides Much More Guidance to the Courts

Focus is Directly on Harm to Competition

- Existing Jurisprudence Often Relies on Proxies, Leading to Errors

Fills Gap in Sherman Act

- Asks Whether Defendant is Powerful Enough to Materially Harm Competition, Not Whether Defendant is a “Monopolist”

Actions are Not Illegal if Trading Partners Benefit

Fitting Into California Antitrust Law

Fills Gap in California Antitrust Law

- California is Currently an Outlier Among States

Advances Goals of the Cartwright Act

- To Promote Competition and Protect Consumers

No Federal Preemption Issue

California Courts Have Experience Evaluating Effects of Business Conduct on Competition

California Can Be a Leader Here

Federal Law is Outdated, Not Working Well

- California Law Can Fix, But Currently Silent

We Know How to Do Better

- Direct Approach Based on Extensive Experience
- Articulate Concerns, Give Guidance to Courts
- Pragmatic, Flexible, and Workable

Anticipating Objections

- Does Not Go Far Enough?
- Too Tough on California Businesses?

➢ We Welcome Questions

April 30, 2024

Governor Gavin Newsom
1021 O Street
Suite 9000
Sacramento, CA 95814

Dear Governor Newsom:

We write to share our concerns about recent proposals to drastically change California antitrust law. While we support antitrust enforcement to protect robust competition, we're concerned this particular thought experiment would, if adopted, produce real-world harm for consumers and businesses in California.

California's technology industry supports nearly 1.5 million jobs, in both technical and non-technical roles, which includes 57,000 tech businesses, and accounts for 7.8 percent of the state's workforce. The industry's economic impact totals more than $542 billion and is 16.7 percent of California's entire economy. In fact, just our four largest tech companies account for $5 billion in annual tax revenue, equaling 6 percent of total income-tax withholding. Our innovation ecosystem, which includes companies large and small, higher education and our venture capital community has helped propel California to be the fifth-largest economy in the world.

Our state's existing laws have served California's citizens well for more than one hundred years, supporting the development of the world's most innovative economy. Our businesses have grown alongside the state, making California a world leader in many fields, from technology, medicine, and entertainment to emerging fields such as Artificial Intelligence. As the Attorney General's office can attest, our state and federal antitrust enforcers have used our current laws to great effect to ensure California consumers receive the best products, in the greatest number, at the lowest prices. California also enjoys robust private antitrust enforcement.

The California Law Revision Commission is now studying potential changes to California antitrust law. We support sensible reforms, such as enacting a California ban on monopolization like the one already found in the federal Sherman Act and in the laws of numerous sister states.

However, another proposal would replace our current tried-and-true California antitrust laws with an academic wish-list of changes that have never been attempted

before in the real world. We fear these changes would harm California businesses, consumers, and workers alike, increasing costs, reducing quality, and discouraging innovation.

California consumers and businesses deserve better. We urge you and the rest of our elected leaders to consider sensible, well-grounded reforms that would deliver real benefits to Californians.

Sincerely,

Los Angeles County Business Federation
Silicon Valley Leadership Group
Bay Area Council
San Mateo County Economic Development Association
Torrance Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Employers Group
La Cañada Flintridge Chamber of Commerce and Community Association
Chamber San Mateo County

May 1, 2024

California Law Revision Commission
Attn: Sharon Reilly, Executive Director
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: California Law Revision Commission - Study B-750 (Antitrust Law), Single Firm Conduct Report

Dear Executive Director Reilly and Members of the California Law Revision Commission:

On behalf of the Computer & Communications Industry Association (CCIA)[1], I write in response to the California Law Revision Commission's ongoing work pursuant to Study B-750 (Antitrust Law). CCIA has long advocated for sound competition policy and antitrust enforcement. We appreciate the opportunity to provide input to the Commission's ongoing study of antitrust law, and acknowledge the Commission's continued effort during this study to analyze the state's best approach towards antitrust regulation.

As the Commission begins its series of meetings focused on specific areas of antitrust law, we write to offer comments in response to the published Single Firm Conduct report authored by Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton and Carl Shapiro. CCIA is grateful for the opportunity to expand on our feedback and looks forward to the Commission's upcoming meeting on May 2.

CCIA supports the report's recommendation that California avoid pursuing an approach similar to New York State's 'Twenty-First Century Anti-Trust Act". As previously shared[2] with the Commission, we agree with the report's authors that this would not serve as a good model for California. It risks creating uncertainty surrounding a new state-specific "abuse of dominance" standard, for which there is no existing federal U.S. precedent. In addition, New York's proposal could harm competition while providing little to no benefit to workers and consumers.

CCIA aligns with the authors in advising against approaches to antitrust law that seem to abandon evidence-based enforcement that has protected competition and consumers for decades. The report acknowledges that evaluating anticompetitive conduct involves a balancing of benefits and harms, which can be challenging. It is important to identify and stop anticompetitive conduct without impairing or preventing normal competitive practices that ultimately result in lower prices, greater choice, or better quality for consumers. However, as noted in the report, these considerations are inherently complex because courts have

[1] CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more information, visit www.ccianet.org.
[2] *California Law Revision Commission,* "FIRST SUPPLEMENT TO MEMORANDUM 2024-13 Antitrust Law: Status Update (Public Comment)" Apr 10, 2024 at page 46, http://www.clrc.ca.gov/pub/2024/MM24-13s1.pdf.

identified conduct that may weaken competition amongst rivals yet also provide benefits to trading partners. Traditionally, federal and California state law have tackled this conundrum by relying on rigorous, evidence-based analysis using "*ex-post*" enforcement of antitrust rules. Under this framework, judges decide on the legality of conduct based on the evidence of the positive and negative effects of a business' practice. This approach is critical in ensuring that only relevant issues are taken into consideration, thereby avoiding social and political goals that are subject to volatility, and avoiding inappropriate antitrust actions that could harm competition and consumers.

The report acknowledges that newer, far less rigorous antitrust "*ex-ante*" frameworks, as used in Europe, would replace this "*ex-post*" tradition. Because the "*ex-ante*" approach does not rely as heavily on evidence to guide a thorough assessment, it risks applying broad and sweeping bans that could prohibit pro-competitive conduct when applied in the wrong context[3] with negative consequences for both consumers and workers. For example, *ex-ante* rules could focus merely on company size, which is not an assured predicate for anticompetitive conduct, and they may not consider other beneficial effects such as lower prices or streamlined provision of goods and services to the consumer.

However, CCIA is concerned that certain report recommendations could unintentionally harm competition and consumers. While the report's authors caution against *ex-ante* rules, the report nevertheless goes on to suggest that the Commission consider recommending changes that would instruct judges to "err on the side of enforcement when the effect of the conduct at issue on competition is uncertain." This suggestion appears to abandon the evidence-based approach that the authors themselves tout as being preferred. As previously noted, the *ex-post* framework that currently governs antitrust enforcement helps to ensure that judges carefully consider the evidence and follow the facts. Mandating that judges consider certain factors over others would likely complicate the ability to reach correct antitrust judgments, particularly if other political dynamics are considered in lieu of evidence.

CCIA encourages the Commission to review these suggestions in the report with skepticism. While CCIA primarily focuses on promoting competition in the technology sector, our experience tells us that sweeping regulations may impact the business community writ large. We strongly advise against adopting broad new policy changes that will likely lead to unintended consequences for all business sectors, including the tech sector that has grown to be a huge economic driver in California.

As CCIA has previously noted,[4] courts have continued to use the *ex-post* antitrust framework even in the midst of the rapidly evolving technology space. As also evidenced in the D.C. Circuit's landmark 2001 ruling holding Microsoft liable for unlawful monopolization, courts have persisted in applying the test for illegal monopolization, determining a methodological way to identify anticompetitive conduct, employing the "rule of reason" balancing analysis, and deciding whether illegal monopolization has harmed competitors with "no procompetitive

[3] *See* Kay Jebelli, "The DMA's Missing Presumption of Innocence", *Truth on the Market (*Mar 5, 2024), https://truthonthemarket.com/2024/03/05/the-dmas-missing-presumption-of-innocence/.
[4] *The Enduring Potency of the Microsoft Decision,* CCIA (Apr. 2020), https://ccianet.org/wp-content/uploads/2020/04/CCIA_Paper_MSFT_Decision_8.5x11-1.pdf.

justification."[5] Courts have relied on this framework and precedent to judge anticompetitive enforcement actions in other dynamic markets. Thus, this analytical framework has proven repeatedly that it is well-suited to protect consumers as well as the ability of firms to innovate to improve their products.

Senior FTC officials have themselves endorsed the framework established by the 2001 *Microsoft* decision. For example, in 2006, then-FTC Chair Deborah Platt Majoras noted that the framework "incorporates principles for which there is wide consensus" to create a "sensible 'weighted' balancing approach." Majoras also observed that the court "did not attempt to substitute ex post facto its judgment for that of business judgments that were made *ex-ante*." This ensured that consumers would be protected from anticompetitive conduct while avoiding chilling incentives to innovate that would arise from the prospect of an *ex-post* analysis with the benefit of hindsight. Majoras praised the Microsoft court's painstaking analysis of the facts, "taking care to ensure not to chill procompetitive behavior."[6]

For these reasons, we urge the Commission not to advance any recommendations that would dilute the current *ex-post* framework that has consistently guided sound decisions and allowed competition to flourish while addressing anticompetitive behavior. This helps ensure that antitrust enforcement remains based on evidence and facts.

* * * * *

We appreciate your consideration of these comments. We look forward to continuing to participate in the Commission's ongoing study process including reviewing and providing feedback on the series of expert reports. We hope the Commission will consider CCIA as a resource as these discussions progress.

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association

[5] U.S. v. Microsoft Corp., 253 F. 3d 34, 72 (D.C. Cir. 2001).

[6] Deborah Platt Majoras, Chairman, Federal Trade Commission, *The Consumer Reigns: Using Section 2 to Ensure a "Competitive Kingdom"* (June 20, 2006), https://www.justice.gov/atr/deborah-platt-majoras-remarks.