August 07, 2026

ACT Association for Competitive Technology

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

RE: ACT Comments on Memorandum 2026-29 (Draft Language Options for Mergers and Acquisitions)

Dear Chairperson Simpson and Members of the Commission,

We at the Association for Competitive Technology (ACT) appreciate the opportunity to submit these supplemental comments to the California Law Revision Commission regarding Memorandum 2026-29 on Draft Language Options for Mergers and Acquisitions.[1] This letter builds on the written comments ACT submitted on March 30, 2026, and the verbal comments provided at the Commission's March 20, 2026, meeting.[2] ACT represents the small business and startup technology developer community around the world that creates the software and connected devices driving internet of things (IoT) use cases across consumer and enterprise contexts. Today, the domestic value of the ecosystem ACT represents is approximately $1.8 trillion, supporting 6.1 million U.S. jobs, and serving as a key driver of the $8 trillion IoT revolution.[3] Our members rely on predictable, evidence-based merger enforcement to raise capital, scale their innovations, and compete in the marketplace.

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[1] California Law Revision Commission, Memorandum 2026-29, Draft Language Options for Mergers and Acquisitions (July 24, 2026), https://clrc.ca.gov/pub/2026/MM26-29.pdf.

[2] Association for Competitive Technology (ACT), *Follow-Up Comments on Memorandum 2026-14 (Draft Language Options for Mergers and Acquisitions)* 1 (Mar. 30, 2026) (noting that the submission "serves to reiterate and expand upon the verbal comments provided by ACT at the Commission's March 20, 2026, meeting"), https://actonline.org/2026/03/31/act-comments-to-the-california-law-revision-commission-on-proposed-merger-provisions/.

[3] Association for Competitive Technology, Fast Facts, https://actonline.org/wp-content/uploads/Fast-FactS_Website.pdf.

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While ACT strongly supports effective competition enforcement aimed at protecting consumers, we remain deeply concerned with the revised draft language options presented in Memorandum 2026-29. Reorganizing the prior options into a Basic Merger Framework and optional additions does not resolve their central defects. The Basic Framework would establish a California-specific merger cause of action, codify a structural presumption drawn from *United States v. Philadelphia National Bank*, and direct courts to harmonize the statute with the 2023 Federal Merger Guidelines. The additional options include fixed concentration thresholds, a restrictive rebuttal standard, or an untested "appreciable risk" test. ACT opposes any California-specific merger standard that departs from the well-established federal framework that currently allows procompetitive technology mergers to proceed.

California Already Has the Tools and Information Needed to Review Mergers

Before recommending a new substantive merger standard, the Commission should identify the problem that existing law cannot solve. California is already an active merger enforcer and has adopted targeted pre-merger notification requirements where the legislature identified a specific need. Acquisitions of retail grocery firms and retail drug firms are already subject to notice to the Attorney General of California, generally at least 180 days before closing.[4] California has also enacted the California Uniform Antitrust Premerger Notification Act, commonly described as a state-level "mini-HSR" law. Beginning January 1, 2027, certain parties filing federally will be required to provide the California Attorney General with a complete electronic copy of the federal Hart-Scott-Rodino (HSR) form within one business day, along with the same additional documentary material in specified circumstances. These laws give California early and detailed visibility into transactions with a meaningful connection to the state, while the California Attorney General's existing federal enforcement authority provides a mechanism to challenge transactions that threaten competition, without creating a separate merger standard.[5]

These are already being put into use. For example, in July 2026, the California Attorney General led a coalition of 12 state attorneys general in challenging Paramount Skydance Corporation's proposed acquisition of Warner Bros. The states secured a temporary restraining order and then an agreement preventing the parties from merging until June 1,

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[4] Cal. Corp. Code §§ 14700-14707; 2023 Cal. Stat. ch. 457 (AB 853), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB853.

[5] Cal. Bus. & Prof. Code §§ 16780-16787; 2026 Cal. Stat. ch. 3 (SB 25). The Act applies to federal premerger notifications filed on or after January 1, 2027. https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202520260SB25.

2027, or until after a decision on the merits, whichever occurs first. Whatever one's view of that transaction, the matter demonstrates that California can investigate, challenge, and halt a merger under the existing federal standard when it believes the evidence supports intervention.[6] A separate state standard would add uncertainty and litigation risk without addressing a demonstrated enforcement gap.

Acquisition is a Core Pathway for Startup Success and Innovation

For the startups and small businesses we represent, acquisition is often the most realistic and pro-consumer path to success. Initial public offerings are costly, risky, and inaccessible to most small firms. Recent market data underscores this reality: initial public offerings accounted for only 3.8 percent of all U.S. venture-backed exits between 2023 and 2025, while mergers and acquisitions dominated, accounting for 73.7 percent of those exits.[7] Acquisition allows innovative products and services to reach scale quickly by combining them with complementary resources, technical expertise, and distribution networks.

Crucially, even for firms not actively seeking an acquisition, closing down or severely restricting acquisition prospects negatively impacts their enterprise value. This directly affects a startup's ability to negotiate with potential investors. Founders maintain leverage when investors know the company has value on the open market. A merger policy that undermines this pathway risks reducing startup formation, deterring early-stage investment, and ultimately weakening long-run competition.[8]

The average duration of a significant U.S. merger investigation reached 12.3 months in 2025, compared with an average of 8.1 months between 2011 and 2016. Delay itself can force parties to abandon a transaction irrespective of the merits, and the costs fall hardest on startups for whom time and capital are the scarcest resources. Layering a separate California standard onto an already lengthy and uncertain national process would compound those harms.[9]

Strict Structural Presumptions Risk Punishing Procompetitive Innovation

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[6] California Office of the Attorney General, "Attorney General Bonta Files Lawsuit to Block $110 Billion Warner Bros./Paramount Merger" (July 13, 2026), https://oag.ca.gov/news/press-releases/attorney-general-bonta-files-lawsuit-block-110-billion-warner-brosparamount.

[7] Ashurst Perkins Coie, "10 Ways to Exit Your Startup" (Aug. 19, 2025) (citing PitchBook's 2025 U.S. Venture Capital Outlook), https://www.ashurstperkinscoie.com/en/insights/10-ways-to-exit-your-startup/.

[8] Mercatus Center, George Mason University, "Prioritizing Innovation in Antitrust Merger Analysis" (August 15, 2024), https://www.mercatus.org/research/policy-briefs/prioritizing-innovation-antitrust-merger-analysis.

[9] Association for Competitive Technology, M&A Review in the AI Era: Why Fast, Predictable Merger Timelines Matter for Small Businesses (2026), https://actonline.org/wp-content/uploads/MA-Review-in-the-AI-Era-June-2026.pdf.

ACT is particularly concerned that the Basic Merger Framework would codify the *Philadelphia National Bank* structural presumption, while the optional Federal Merger Guidelines language would add fixed Herfindahl-Hirschman Index (HHI) and market-share thresholds to California law. Under that option, a merger would be presumed unlawful if it resulted in a market with an HHI above 1,800 and an increase above 100 points, or a firm with more than 30 percent market share and an HHI increase above 100 points. The merging parties could rebut that presumption only by satisfying a demanding standard that limits consideration of procompetitive benefits to the same relevant market.

Market share and concentration measures can be poor proxies for competitive dynamics in innovation-driven markets. *Philadelphia National Bank* itself involved a horizontal merger between two commercial banks. The Supreme Court did not create a universal 30 percent bright line, and Memorandum 2026-29 acknowledges the same and that no particular percentage was deemed critical. California should not transform the facts of a 1963 horizontal banking case into a statutory presumption governing vertical transactions, multi-sided platforms, artificial intelligence partnerships, and zero-price digital markets.[10]

The mismatch is particularly clear in zero-price and multi-sided markets, where competition often occurs through quality, privacy, security, functionality, innovation, attention, and access rather than a posted price. Small app developers and connected device companies rarely build products that fit neatly into a single market. Their innovations touch multiple markets simultaneously, operating as multi-sided platforms that coordinate demands across distinct groups of users. A static share calculated in a contested market definition cannot substitute for evidence that a transaction is likely to harm competition.[11]

Furthermore, codifying specific enforcement thresholds into statute is a drastic step. Federal merger guidelines have been revised numerous times since 1968 precisely because markets and economic understanding evolve. Locking any single iteration into permanent California law is a blunt and disproportionate response. The Commission should not elevate a time-bound agency policy document into a durable rule that will apply long after federal policy and market conditions have changed.[12]

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[10] United States v. Philadelphia National Bank, 374 U.S. 321, 364-65 (1963); California Law Revision Commission, Memorandum 2026-29, at 6 & n.34 (July 24, 2026) (noting that the case did not establish a bright line and that the Court did not deem any particular market-share percentage critical).

[11] David S. Evans, "The Antitrust Economics of Multi-Sided Platform Markets," Yale Journal on Regulation (2003), https://gai.gmu.edu/wp-content/uploads/sites/27/2021/05/Session-13_Evans-Platforms.pdf.

[12] U.S. Department of Justice & Federal Trade Commission, 2023 Merger Guidelines (noting previous issuances and revisions in 1968, 1982, 1984, 1992, 1997, 2010, and 2020), https://www.justice.gov/atr/2023-merger-guidelines.

Consider a small startup that develops an artificial intelligence algorithm capable of substantially improving medical-imaging diagnoses. The startup possesses valuable technology but lacks the computing infrastructure, hospital relationships, regulatory expertise, cybersecurity systems, and distribution network needed to deploy it at scale. A larger health-technology company may provide those complementary assets, allowing hospitals and clinicians to adopt the technology sooner and enabling patients to benefit from faster and more accurate diagnoses.

The transaction may also present legitimate competitive questions, such as whether the acquirer could restrict the technology to its own platform or disadvantage rival diagnostic tools. But those risks must be weighed against benefits occurring across the broader health-technology ecosystem. A structural presumption based only on the acquirer's share of a narrowly defined health-software market could condemn the transaction without adequately considering improved access for hospitals, better outcomes for patients, lower deployment costs, and stronger opportunities for continued innovation. A rebuttal rule that recognizes benefits only within the narrowly alleged market would ignore the cross-market efficiencies that often make acquisitions of small technology companies valuable in the first place.

The Unique Risks in the Artificial Intelligence Era

The risks of these proposals are especially acute in the artificial intelligence era. Artificial intelligence requires immense computational resources and capital. The next generation of artificial intelligence innovation will come from startups partnering with, or being acquired by, larger firms that can provide the necessary infrastructure. If California makes these acquisitions presumptively illegal based on rigid structural shortcuts, the state risks choking off the very ecosystem that makes California the global leader in artificial intelligence.

Speed is a decisive competitive factor in markets for AI models, tools, and services. Offerings that reflect the state of the art today may be surpassed within months, and competitive advantage depends on rapid access to complementary inputs such as data, talent, compute, distribution, security, and implementation expertise. AI transactions can combine these capabilities to help products reach customers faster, improve product quality, expand output, and strengthen competition in infrastructure markets. A static presumption built around concentration or a 30 percent share is poorly suited to that dynamic process.[13]

[13] Association for Competitive Technology, *supra* note 9.

Novel Standards and Purpose Statements Create Unprecedented Uncertainty

The "appreciable risk" option remains especially troubling. Replacing the established Clayton Act standard with an untested prohibition on mergers that create an "appreciable risk" of lessening competition by more than a *de minimis* amount introduces unprecedented uncertainty. This novel standard has never been adopted as the operative merger test by any jurisdiction. Former federal antitrust economists have warned that an "appreciable risk" standard represents the smallest risk that might be deemed sufficient, raising serious concerns about over-enforcement. That kind of uncertainty chills the very exit opportunities that drive early-stage investment and startup formation in California.[14]

Memorandum 2026-29 also presents a new "reasonable probability" alternative. That formulation is materially less problematic than the "appreciable risk" option because it preserves the familiar Clayton Act text and draws on existing legislative history and case law. However, the proposed language states that courts shall not require more certainty than a reasonable probability, without equally making clear that a mere possibility is insufficient.

Finally, the proposed Purpose Statement, which directs courts to treat federal case law as nonbinding while separately requiring courts to consider and harmonize the statute with the 2023 Federal Merger Guidelines, would sever California from decades of precedent that provides predictability to the market. It would create an unjustified asymmetry by diminishing judicial precedent while elevating a nonbinding agency policy document. A divergent California merger law would lead to a patchwork of state-level regulations, increasing compliance costs and delaying transactions critical to business growth. A patchwork of state laws creates significant uncertainty for developers and deployers, especially small businesses that lack the resources of larger competitors.[15]

Conclusion

ACT urges the Commission to reject these divergent standards. California's existing industry-specific notification laws, the newly enacted California Uniform Antitrust Premerger Notification Act, and the Attorney General's active use of Section 7

[14] Gregory J. Werden, Comments on Draft Merger Guidelines (2023), https://downloads.regulations.gov/FTC-2023-0043-0624/attachment_1.pdf.

[15] Eric J. Stock, "State Antitrust Enforcement in the National Economy: Promoting More Democratic and Effective Outcomes Through State Reliance on Federal Law," Antitrust Magazine, Vol. 39, Issue 2, Spring 2025, https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/2025/vol-39-issue-2/state-antitrust-enforcement.pdf.

demonstrate that the state already has the information and authority needed to identify and challenge potentially anticompetitive mergers.

We stand ready to work with the Commission to support responsible competition enforcement that protects consumers while ensuring that small business innovators can continue to compete and contribute to California's technological leadership.

Sincerely,

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