California Chamber Of Commerce Testimony To The California Law Revision Commission Regarding The Legislative Proposal Of The Single-Firm Conduct Working Group

Good afternoon. My name is Eric Enson. I'm an antitrust lawyer with the law firm of Crowell & Moring. I've been helping clients in antitrust litigation and providing antitrust counseling for over 20 years. I am appearing today on behalf of the California Chamber of Commerce. CalChamber is a non-profit that acts to improve the state's economic and jobs climate on a broad range of legislative, regulatory and legal issues.

We thank the Commission for allowing us to comment on the work the Commission is performing with respect to California's antitrust laws. I understand that the Commission has the written, public comment that CalChamber submitted last week. So, I will be brief and will focus on the Proposal made by the Single-Firm Conduct Working Group, who we also thank for their work.

I plan on touching on three topics today. One, the lack of a demonstrated need for revising California's antitrust laws and the lack of an economic analysis that justifies revision. Two, the real-world impact the Proposal will have on competition in the State. In short, the Proposal fails to distinguish between what is and what is not anticompetitive, which will chill the very competition it seeks to protect. And three, there are robust laws already in place for government and private enforcers to prosecute and deter anticompetitive, single-firm conduct.

To start with, statutory reforms are appropriate when there is a demonstrated need for reform. Likewise, antitrust policy is most likely to benefit competition and consumers when it is based on sound economic analysis. But the Proposal does not demonstrate a need for revising California's antitrust laws and it provides no economic analysis of its likely impact.

For example, the Proposal is based on a belief that California's Cartwright Act is "deficient" because it does not regulate single-firm conduct. Yet there is no showing that this purported deficiency has negatively impacted Californians through higher prices, inferior products, less competition or any other measure.

Likewise, the Proposal does not include economic analysis of the costs of new regulations or how the Proposal would impact competition in California.

Perhaps more importantly, the Commission now has two economic studies that measure the financial impact of adopting a law like this Proposal, one from the Computer & Communications Industry Association, and another from the Data Catalyst Institute. Both of these studies find that the costs of passing a law like this are in the billions of dollars, from lost sales, disruption of online marketplaces, and costs associated with the uncertainty surrounding new and innovative offerings. The Proposal does not take these costs into account, but we request that this Commission do just that.

Moving on to the real-world implications of the Proposal. If adopted, the Proposal will stifle competition, innovation and entry in California and will lead to increased litigation that will result in inconsistent rulings, making doing business in California more expensive, riskier and less desirable, all to the detriment of California consumers and workers.

The Proposal seeks to outlaw what is described as "single-firm anticompetitive exclusionary conduct." This is a new legal term that has never been interpreted or analyzed by any court in the United States, as far as I'm aware. The sheer novelty of this legal term, by itself, will bring great uncertainty as to where the line is between lawful and unlawful business.

The Proposal's main focus is on curbing increases in market power. But one of the hallmarks of competition is an effort to increase market share and market power at the expense of rivals, especially less-efficient and less-innovative rivals. Many times, businesses increase market power and undercut competitors by entering into new geographic regions, by offering an innovative product or product upgrade or by slashing prices to attract competitors' customers, all of which has commonly been viewed as good for consumers.

But the Proposal does not provide meaningful guidance on how courts should differentiate between pro-competitive increases in market power, and anticompetitive increases in market power.

Instead, the Proposal rejects decades of teachings from courts and economists on how to identify dangerous increases in market power. For example, the Proposal does away with the bedrock principle that single-firm conduct must be evaluated within a properly-defined "relevant market." A relevant market is where competition takes place. It includes the product at issue and those that are good substitutes for that product. This means that establishing a violation under the Proposal will not require an economic analysis of competing products that may chasten any increase in a firm's market power.

Likewise, the definition of "anticompetitive exclusionary conduct" does not require any measure of market share, which is traditionally used to assess increases in market power. As a matter of economics, businesses with market shares below certain levels, say below 50%, are generally not expected to have the requisite power to harm consumers or rivals through unilateral conduct. Despite this, the Proposal states that plaintiffs need not establish any threshold of market share or market power when prosecuting an action. This means that increases in market power by small and medium-sized businesses, in otherwise competitive markets, would be subject to expensive and protracted antitrust litigation.

In addition, the Proposal states that "depending on the circumstances" common, competitive practices could be unlawful – such as loyalty rebates, exclusive dealing arrangements and most-favored nations clauses. Yet the Proposal does not define what "circumstances" may make these common, and generally pro-competitive, practices unlawful. This means that the Proposal may make illegal your local coffee shop rewards program, may bar an arrangement by which a restaurant carries only one brand of soft drinks, and may outlaw an agreement between a grocery store and a produce supplier to provide the grocery with the best wholesale prices, regardless of the market shares of the businesses involved or whether competition has actually been foreclosed.

This uncertainty, the rejection of economic learning about single-firm conduct and the questioning of common business practices will have a significant impact on competition in the State. The Proposal's imprecision and lax standards are likely to chill competition and new innovation. They will also lead to increased litigation that will almost certainly result in

inconsistent rulings making it more difficult to do business, and increasing the costs of doing business, in California.

Finally, it is important to note that there are robust competition laws that government and private enforcers can use to reach, punish and deter anticompetitive, single-firm conduct. Chief among these is Section 2 of the federal Sherman Act, which prohibits monopolization and attempts to monopolize. Section 2 jurisprudence has adapted over decades and it is the best vehicle for plaintiffs—including state governments—to address single-firm conduct.

The California Attorney General has used Section 2 in scores of lawsuits over the years to address single-firm conduct. In fact, the California AG is currently litigating against some of the world's largest companies – including Google, Meta and Apple – under Section 2 for their alleged single-firm conduct.

We have also seen private and government enforcers use California's Unfair Competition Law to enjoin allegedly anticompetitive, single-firm conduct.

Californians are protected from anticompetitive, single-firm conduct under existing law.

In conclusion, the Proposal is not narrowly-tailored to rein in defined anticompetitive conduct by unlawful monopolies. It is, instead, so broad and far-reaching that it will chill and impinge legitimate competition at every level of the California economy.

With that, I thank you for your time and am happy to answer any questions you may have.