

Oregon Department of Justice

Office of the Attorney General

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Civil Enforcement Updates: Antitrust (SB 310) and False Claims Act (SB 311)

Background

The Oregon Department of Justice (DOJ) enforces Oregon's Antitrust and False Claims Acts. We propose two bills to update and enhance these laws.

Antitrust: Oregon's Antitrust Act passed in 1975. The intent of the law is "to encourage free and open competition in the interest of the general welfare and economy of Oregon." The law aims to prevent and rectify anticompetitive conduct such as price fixing, market collusion, bid-rigging, and abuses of monopoly power. When this conduct happens, consumers are impacted by higher prices and limited choices, and businesses are unable to compete fairly. Antitrust matters often are national or regional in scope and can involve other state and federal enforcers. Significant past cases have involved manufacturers who price-fixed semiconductor chips, televisions, and computer displays. Ongoing cases include an action against generic drug manufacturers for price fixing and large technology companies for anticompetitive conduct.

False Claims Act: Oregon's False Claims Act passed in 2009. The law allows the State to recover for "false claims" made to a governmental entity. A false claim is a request or demand to a public agency that is based on false information, contains untrue statements, or omits information that could have a material effect on the value, validity, or authenticity of the claim. The Attorney General has successfully used the False Claim Act to recover funds for a variety of state and local entities.

Concepts

Antitrust: To improve the enforcement of Oregon's antitrust law, a few clarifications and updates are proposed.

Clarifications: This proposal updates terms for "public body" and improves clarity. To create consistency with court rulings, the proposal specifies that disgorgement of illicit gains by a defendant is a form of equitable relief. It also removes a venue provision that is no longer necessary.

Penalty amount: For some very large companies, the current maximum penalty of \$250,000, unchanged since 1999, is not a deterrent for unlawful conduct. To make an impact this penalty should be up to \$1 million. Judges can still assess each case and use discretion in setting an appropriate penalty, weighing such as the conduct and other remedies available.

Criminal liability: Criminal prosecution under Oregon antitrust law has been extremely rare due to a very old provision that precludes any contemporaneous civil recovery. So, if a criminal antitrust prosecution has begun under Oregon law, the civil case cannot proceed (regardless of the outcome). This would be the equivalent of a government prosecuting a defendant for an assault, theft, or DUII, and preventing the victim from recovering damages in a civil action. The proposed change would allow for both criminal prosecution and a civil action for recovery.

False Claims Act: Like the antitrust provisions, Oregon's False Claims Act could benefit from a few clarifications and updates.

Penalty Amount: Current penalties are \$10,000 per violation. Alternatively, the court may award double the amount gained by the fraudulent actor, but the resources needed to establish damages in these cases (experts, etc.) is often so costly that it is prudent to seek the per-violation penalty instead. This can result in very low damages for cases that involve millions of dollars in false claims, yet include only one or a few violations. To serve as a more substantial deterrent for bad conduct, we propose bringing the penalty up to \$50,000 per violation.

Statute of Limitations: Clarification regarding when the statute of limitations begins to run is necessary to ensure that the State may enforce the False Claims Act. The statute of limitations is currently tied to the agency's "discovery" of the violation. However, it can sometimes take several years before the Attorney General becomes aware of what has happened. The proposal modestly increases from 3 to 5 years from time when the Attorney General's discovers of the conduct. This does not change the statute of ultimate repose, which requires claims to be filed within 10 years from the date the violation occurred.

Confidentiality: This proposal takes the confidentiality provision that is in our existing antitrust law and copies it into the False Claims Act. This will protect businesses both under investigation and third parties from having their trade secrets and other sensitive business information disclosed as part of the investigation.

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