



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

LATE TESTIMONY

ON THE FOLLOWING MEASURE:

H.B. NO. 2418, RELATING TO THE ATTORNEY GENERAL.

BEFORE THE:

HOUSE COMMITTEE ON ECONOMIC REVITALIZATION AND BUSINESS

DATE: Thursday, February 2, 2012 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 312

TESTIFIER(S): David M. Louie, Attorney General, or
Rodney I. Kimura, Deputy Attorney General;

Chair McKelvey and Members of the Committee:

The Department of the Attorney General appreciates the intent of this bill to assist local small businesses. We oppose this bill, however, because it may not provide the intended protection from antitrust scrutiny due to existing federal law.

The purpose of this bill is to allow businesses with less than 150 employees to enter into cooperative or joint purchasing agreements, and to exempt such agreements and the participating businesses from antitrust scrutiny.

Collaboration agreements among competitors could yield benefits such as lower input costs, and lower transaction costs. However, such arrangements among competitors can also foster anticompetitive activity to the detriment of the market and consumers, thus exposing participating businesses to antitrust scrutiny.

This bill seeks to protect participating businesses from antitrust scrutiny by basically declaring that the parties to a joint purchasing agreement and the agreement itself are not in violation of the antitrust laws. But this declaration may not afford the intended protection from antitrust scrutiny.

Both state and federal laws govern what constitutes an antitrust violation. Thus, certain private conduct permitted by state law might nevertheless violate federal law.

Under the "state action" doctrine, the anticompetitive activities of private parties may be shielded from federal antitrust scrutiny if the conduct is pursuant to a clearly articulated and affirmatively expressed state policy, and actively supervised by the State.

While this bill declares that the contemplated agreements and their participants are not in violation of the antitrust laws, it does not, however, provide a process for active supervision of the conduct of the participants by the State.

Thus, while this bill may provide protection for these cooperative purchasing agreements and their participants only under state law, it may expose the agreements and the participants subject to investigation by the United States Department of Justice and the Federal Trade Commission under the federal antitrust laws, and subject to prosecution, depending on the agreements established.

The bill also contains certain technical issues. The joint purchasing agreement is supposed to provide purchasing power “necessary to acquire discounts on purchases of goods and to thereby lower costs for themselves and consumers.” There is no mechanism or process in the bill for ensuring that any cost savings arising from joint purchases will be passed on to consumers. Moreover, nothing in the bill specifies how cost savings are to be calculated, nor the level of and duration of the cost savings that must be passed on to consumers.

For these reasons, the Department respectfully recommends that this bill be held.