

BILL ANALYSIS

Senate Research Center
87R5019 MWC-F

S.B. 1247
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As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Summary of Subject Matter of Legislation:

The proposed legislation seeks to increase and clarify confidentiality protections afforded to common investigative materials and information under Chapter 15 of the Texas Business & Commerce Code. The proposed legislation also clarifies that ATD is permitted to share civil investigative demand (CID) materials with our agents and other states and territories.

The proposed legislation also addresses various issues such as:

- (1) clarifying contents of notice regarding objections to a CID;
- (2) allowing electronic service of CIDs;
- (3) including Travis County as a district court in which ATD may file to enforce a CID;
and
- (4) clarifying that documents may be produced to the Office of the Attorney General (OAG) (in addition to making documents available for inspection and copying).

Brief Background/Problem Legislation Addresses:

As ATD's recent investigation and litigation with Google has demonstrated, Chapter 15 of the Texas Business & Commerce Code will benefit from legislation clarifying that ATD is authorized to disclose CID materials to its agents and adding confidentiality protections for common investigative materials and information.

Last fall, Google took advantage of ambiguities in the statute and used them as a basis to challenge ATD's CID. While Google and ATD ultimately reached a mutually agreed-upon resolution, the litigation highlighted the need for amending the statute to correct certain ambiguities and potential problems.

Additionally, ATD could more efficiently obtain information from market participants and other potential witnesses if the statute were clarified to maintain the confidentiality of third-party communications, interviews, and records of meetings after the investigation or litigation is concluded. ATD collects a lot of sensitive business information. In order to promote and encourage robust and voluntary cooperation, third-party communications and related documents should enjoy clear protection from public disclosure both during and after the investigation or litigation.

As proposed, S.B. 1247 amends current law relating to the Texas Free Enterprise and Antitrust Act of 1983.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 15.03, Business & Commerce Code, by adding Subdivision (2-a), to define "investigative file" for purposes of the Texas Free Enterprise and Antitrust Act of 1983.

SECTION 2. Amends Section 15.10, Business & Commerce Code, by amending Subsections (b), (c), (e), (g), (h), (i), and (k), as follows:

(b) Authority to Issue Demand. Authorizes the attorney general, whenever the attorney general has reason to believe that any person may be in possession, custody, or control of any documentary material or may have any information relevant to a civil antitrust investigation, prior to the institution of a civil proceeding, to issue in writing and serve upon such person a civil investigative demand requiring the person to produce or make available, rather than procedure, such documentary material for inspection and copying, to answer in writing written interrogatories, to give oral testimony, or to provide any combination of such material, answers, and testimony; provided, however, that the attorney general may not issue and serve a demand for documentary material upon a proprietorship or partnership whose annual gross income does not exceed \$5 million.

(c) Contents of Demand.

(1) Requires that each demand advise the person upon whom the demand is to be served that objections to the demand may be made in accordance with this chapter, rather than requiring that the demand advise the person upon whom the demand is to be served that the person has the right of object to the demand as provided for in this section.

(2) Requires each demand for production of documentary material to:

(A) and (B) makes no changes.

(C) identify the individual or individuals acting on behalf of the attorney general to whom the material is to be produced or made available for inspection and copying.

(3) - (5) Makes no changes.

(e) Service; Proof of Service.

(1) - (3) Makes no changes.

(4) Authorizes service of any demand to be made upon any person by e-mail or other electronic means if the person being served has consented to the electronic service in writing. Provides that electronic service is complete upon sending, but electronic service is not effective if the attorney general learns that the demand did not actually reach the person to be served. Provides that written confirmation of receipt through electronic service by the person being served constitutes proof of the service.

(g) Makes a conforming change to this subsection.

(h) Failure To Comply With Demand:

(1) Petition for Enforcement. Authorizes the attorney general, whenever any person fails to comply with any demand duly served on such person under Section 15.10 (Civil Investigative Demands), to file in the district court in Travis County or in the county in which the person resides, is found, or transacts business and serve on the person a petition for an order of the court for enforcement of this section. Deletes text requiring that the petition, if the person transacts business in more than one county, be filed in the county of the person's principal office or place of business in the state or in any other county as may be agreed upon by the person and the attorney general.

(2) Makes no changes to this subdivision.

(i) Disclosure and Use of Material and Information.

(1) Requires that no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, be available for examination or used by any person other than by an authorized official, employee, or agent of the attorney general, except:

(A) by court order for good cause shown;

(B) with, rather than without, the consent of the person who produced the material, answers, or testimony, and in the case of any product of discovery, the person from whom the discovery was obtained;

(C) to an agency of this state, the United States, or another state or territory for official law enforcement purposes; or

(D) as provided elsewhere in this section.

Makes conforming and nonsubstantive changes.

(2) Makes no changes to this subdivision.

(3) Authorizes the attorney general to make available for inspection or prepare copies of documentary material, answers to interrogatories, or transcripts of oral testimony in his or her possession as he or she determines may be required for official use by any officer of the State of Texas, the United States, or another state or territory charged with the enforcement of the laws of the State of Texas, the United States, or that state or territory, as applicable; provided that any material disclosed under this subsection may not be used for criminal law enforcement purposes. Makes nonsubstantive changes.

(3-a) Authorizes the attorney general to make available for inspection or prepare copies of documentary material, answers to interrogatories, or transcripts of oral testimony in the attorney general's possession as may be required for official use by any authorized official, employee, or agent of the attorney general.

(4) Makes no changes to this subdivision.

(5) Requires the attorney general, not later than 15 days prior to making public, rather than disclosing, any documentary material or answers to written interrogatories designated as containing trade secrets or confidential information under this subsection, to notify the person who produced the material of the attorney general's intent to make the information public. Authorizes the person who produced the documentary material or answers to written interrogatories to petition a district court in any county of this state in which the person resides, does business, or maintains its principal office for a protective order limiting the terms under which the attorney general may use the trade secrets or confidential information in public, including in public court filings.

(6) Makes no changes to this subdivision.

(k) Nonexclusive Procedures. Provides that information, documentary materials, and communication with the attorney general provided under a procedure not specified in this section is confidential but is authorized to be used in a judicial proceeding at the attorney general's discretion.

SECTION 3. Amends Section 15.12, Business & Commerce Code, as follows:

Sec. 15.12. ADDITIONAL PROCEDURES. (a) Authorizes the attorney general and any other party to a suit brought by the attorney general, in addition to procedures set forth in this subchapter, to enforce any of the prohibitions in Section 15.05 of this Act may request discovery and production of documents and other things, serve written interrogatories, and subpoena and depose witnesses in accordance with the applicable provisions of the Texas Rules of Civil Procedure and other state law relating to discovery. Makes a conforming change.

(b) Provides that documents and other information discovered or produced under Subsection (a) are confidential.

SECTION 4. Amends Subchapter B, Chapter 15, Business & Commerce Code, by adding Section 15.14, as follows:

Sec. 15.14. CONFIDENTIALITY OF INVESTIGATIVE FILES AND OTHER INFORMATION. Provides that the attorney general's investigative file, wholly or partly, and any other information or documentary material provided to the attorney general under Chapter 15 (Monopolies, Trusts and Conspiracies in Restraint of Trade) are confidential and not subject to disclosure under Chapter 552 (Public Information), Government Code.

SECTION 5. Makes application of this Act prospective.

SECTION 6. Effective date: September 1, 2021.