

1 **ANTITRUST AMENDMENTS**

2 2015 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Curtis S. Bramble**

5 House Sponsor: Mike K. McKell

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies the Utah Antitrust Act.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ authorizes the attorney general to enter into a confidentiality agreement when
- 13 conducting a civil antitrust investigation;
- 14 ▶ authorizes a court to issue a confidentiality order in any civil antitrust action;
- 15 ▶ specifies conditions and requirements regarding a confidentiality agreement or a
- 16 confidentiality order;
- 17 ▶ defines terms; and
- 18 ▶ makes technical corrections.

19 **Money Appropriated in this Bill:**

20 None

21 **Other Special Clauses:**

22 None

23 **Utah Code Sections Affected:**

24 AMENDS:

25 **76-10-3103**, as renumbered and amended by Laws of Utah 2013, Chapter 187

26 **76-10-3107**, as renumbered and amended by Laws of Utah 2013, Chapter 187

28 *Be it enacted by the Legislature of the state of Utah:*

29 Section 1. Section **76-10-3103** is amended to read:

30 **76-10-3103. Definitions.**

31 As used in this [act] part:

32 (1) "Attempt to monopolize" means action taken without a legitimate business purpose
33 and with a specific intent of destroying competition or controlling prices to substantially lessen
34 competition, or creating a monopoly, where there is a dangerous probability of creating a
35 monopoly.

36 (2) "Attorney general" means the attorney general of the state or one of the attorney
37 general's assistants.

38 [~~(2)~~] (3) "Commodity" includes any product of the soil, any article of merchandise or
39 trade or commerce, and any other kind of real or personal property.

40 [~~(3)~~] (4) "Manufacturer" means the producer or originator of any commodity or service.

41 [~~(4)~~] (5) "Service" includes any activity that is performed in whole or in part for the
42 purpose of financial gain including, but not limited to, personal service, professional service,
43 rental, leasing or licensing for use.

44 [~~(5)~~] (6) "Trade or commerce" includes all economic activity involving, or relating to,
45 any commodity, service, or business activity, including the cost of exchange or transportation.

46 Section 2. Section **76-10-3107** is amended to read:

47 **76-10-3107. Civil antitrust investigations -- Demand for production of documents**
48 **and responses to written interrogatories -- Oral examination -- Judicial order for**
49 **compliance -- Confidentiality -- Subpoenas precluded.**

50 (1) When the attorney general has reasonable cause to believe that any person may be
51 in possession, custody, or control of any information, including any document, material, or
52 testimony, relevant to a civil antitrust investigation, [~~he~~] the attorney general may, prior to the
53 commencement of a civil action [~~thereon~~], issue and cause to be served upon that person a
54 written civil investigative demand requesting that person to:

55 (a) produce [~~the documentary~~] any document or material for inspection, copying, or
56 reproduction by the state where the [~~documents are~~] document or material is located or
57 produced;

- 58 (b) give oral testimony under oath, concerning the subject of the investigation;
- 59 (c) respond to written interrogatories; or
- 60 (d) furnish any combination of these.
- 61 (2) (a) Each demand shall state:
 - 62 (i) the nature of the activities under investigation, constituting the alleged antitrust
 - 63 violation, which may result in a violation of this ~~[act]~~ part and the applicable provision of law;
 - 64 (ii) that the recipient is entitled to counsel;
 - 65 (iii) that the ~~[documents, materials, or testimony]~~ information received in response to
 - 66 the demand may be used in a civil or criminal proceeding;
 - 67 (iv) that if the recipient does not comply with the demand, the ~~[Office of the Attorney~~
 - 68 ~~General]~~ attorney general may compel compliance by appearance, upon reasonable notice to
 - 69 the recipient, before the district court in the judicial district ~~[wherein]~~ where the recipient
 - 70 resides or does business and only upon a showing before that district court that the
 - 71 requirements of Subsection (7) have been met;
 - 72 (v) that the recipient has the right at any time before the return date of the demand, or
 - 73 within 30 days, whichever period is shorter, to seek a court order determining the validity of
 - 74 the demand; and
 - 75 (vi) that at any time during the proceeding the person may assert any applicable
 - 76 privilege.
- 77 (b) If the demand is for production of ~~[documentary material, it]~~ any document or
- 78 material, the demand shall also:
 - 79 (i) describe the ~~[documentary]~~ document or material to be produced with sufficient
 - 80 definiteness and certainty as to permit the document or material to be fairly identified;
 - 81 (ii) prescribe return dates that provide a reasonable period of time within which the
 - 82 document or material demanded may be assembled and made available for inspection and
 - 83 reproduction; and
 - 84 (iii) identify the individual at the ~~[attorney general's office]~~ Office of the Attorney
 - 85 General to whom the document or material shall be made available.

86 (c) If the demand is for the giving of oral testimony, [it] the demand shall also:
87 (i) prescribe the date, time, and place at which oral testimony shall be commenced;
88 (ii) state that [~~a member~~] an employee of the [~~attorney general's office staff~~] Office of
89 the Attorney General shall conduct the examination; and
90 (iii) state that the recording or the transcript of [~~such~~] the examination shall be
91 submitted to and maintained by the Office of the Attorney General.
92 (d) If the demand is for responses to written interrogatories, [it] the demand shall also:
93 (i) state that each interrogatory shall be answered separately and fully in writing and
94 under oath, unless the person objects to the interrogatory, in which event the reasons for
95 objection shall be stated in lieu of an answer;
96 (ii) state that the answers are to be signed by the person making them, and the
97 objections are to be signed by the attorney making them;
98 (iii) identify by name and address the individual at the Office of the Attorney General
99 on whom answers and objections provided under this Subsection (2)(d) are to be served; and
100 (iv) prescribe the date on or before which these answers and objections are to be served
101 on the identified individual.
102 (3) The civil investigative demand may be served upon any person who is subject to
103 the jurisdiction of any Utah court and shall be served upon the person in the manner provided
104 for service of a subpoena.
105 (4) (a) [~~The documents~~] Any document or material submitted in response to a demand
106 served under this section shall be accompanied by an affidavit, in the form the demand
107 designates, by the person, if a natural person, to whom the demand is directed or, if not a
108 natural person, by a person having knowledge of the facts and circumstances relating to the
109 production.
110 (b) The affidavit shall state that [~~all of the documentary~~] every document or material
111 required by the demand and in the possession, custody, or control of the person to whom the
112 demand is directed has in good faith been produced and made available to the Office of the
113 Attorney General.

114 (c) The affidavit shall identify any demanded [~~documents~~] document or material that
115 [~~are~~] is not produced and state the reason why each [~~document~~] item was not produced.

116 (5) (a) [~~The~~] An examination of any person pursuant to a demand for oral testimony
117 served under this section [~~shall~~] may only be taken before an officer authorized to administer
118 oaths or affirmations by the laws of the United States or of the place where the examination is
119 held. The officer before whom the testimony is to be taken shall put the witness on oath or
120 affirmation and shall personally, or by someone acting under [~~his~~] the officer's direction and in
121 [~~his~~] the officer's presence, record the testimony of the witness. If the testimony is taken
122 stenographically, it shall be transcribed and the officer before whom the testimony is taken
123 shall promptly transmit the transcript of the testimony to the Office of the Attorney General.

124 (b) When taking oral testimony, all persons other than personnel from the [~~attorney~~
125 ~~general's office~~] Office of the Attorney General, the witness, counsel for the witness, and the
126 officer before whom the testimony is to be taken shall be excluded from the place where the
127 examination is held.

128 (c) The oral testimony of any person taken pursuant to a demand served under this
129 section shall be taken in the county where the person resides or transacts business or in any
130 other place agreed upon by the attorney general and the person.

131 (d) When testimony is fully transcribed, the transcript shall be certified by the officer
132 before whom the testimony was taken and submitted to the witness for examination and
133 signing, in accordance with [~~Rule 30(e) of~~] the Utah Rules of Civil Procedure, Rule 30(e). A
134 copy of the deposition shall be furnished free of charge to [~~each~~] a witness upon [~~his~~] the
135 witness's request.

136 (e) Any change in testimony recorded by nonstenographic means shall be made in the
137 manner provided in [~~Rule 30 of~~] the Utah Rules of Civil Procedure, Rule 30, for changing
138 deposition testimony recorded by nonstenographic means.

139 (f) Any person compelled to appear under a demand for oral testimony under this
140 section may be accompanied, represented, and advised by counsel. Counsel may advise the
141 person, in confidence, either upon the request of the person or upon counsel's own initiative,

142 with respect to any question asked of the person. The person or counsel may object on the
143 record to any question, in whole or in part, and shall briefly state for the record the reason for
144 the objection. An objection may properly be made, received, and entered upon the record when
145 it is claimed that the person is entitled to refuse to answer the question on grounds of any
146 constitutional or other legal right or privilege, including the privilege against
147 self-incrimination. If the person refuses to answer any question, the attorney general may
148 petition the district court for an order compelling the person to answer the question.

149 (g) If any person compelled to appear under a demand for oral testimony or other
150 information pursuant to this section refuses to answer any questions or produce information on
151 grounds of the privilege against self-incrimination, the testimony of that person may be
152 compelled as in criminal cases.

153 (h) Any person appearing for oral examination pursuant to a demand served under this
154 section is entitled to the same fees and mileage which are paid to witnesses in the district courts
155 of the state of Utah. Witness fees and expenses shall be tendered and paid as in any civil
156 action.

157 (6) The providing of any [~~testimony, documents, or objects~~] information in response to
158 a civil investigative demand issued pursuant to the provisions of this [~~act~~] part shall be
159 considered part of an official proceeding as defined in Section [76-8-501](#).

160 (7) (a) If a person fails to comply with the demand served upon him under this section,
161 the attorney general may file in the district court of the county in which the person resides, is
162 found, or does business, a petition for an order compelling compliance with the demand.
163 Notice of hearing of the petition and a copy of the petition shall be served upon the person,
164 who may appear in opposition to the petition. If the court finds that the demand is proper, that
165 there is reasonable cause to believe there has been a violation of this [~~act~~] part, and that the
166 information sought [~~or document or object demanded~~] is relevant to the violation, it shall order
167 the person to comply with the demand, subject to modifications the court may prescribe.

168 (b) (i) At any time before the return date specified in a demand or within 30 days after
169 the demand has been served, whichever period is shorter, the person who has been served may

170 file a petition for an order modifying or setting aside the demand. This petition shall be filed in
171 the district court in the county of the person's residence, principal office, or place of business,
172 or in the district court in Salt Lake County. The petition shall specify each ground upon which
173 the petitioner relies in seeking the relief sought. The petition may be based upon any failure of
174 the demand to comply with the provisions of this section or upon any constitutional or other
175 legal right or privilege of the petitioner. The petitioner shall serve notice of hearing of the
176 petition and a copy of the petition upon the attorney general. The attorney general may submit
177 an answer to the petition within 30 days after receipt of the petition.

178 (ii) After a hearing on the petition described in Subsection (7)(b)(i), and for good cause
179 shown, the court may make any further order in the proceedings that justice requires to protect
180 the person from unreasonable annoyance, embarrassment, oppression, burden, or expense. At
181 any hearing pursuant to this section it is the attorney general's burden to establish that the
182 demand is proper, that there is reasonable cause to believe that there has been a violation of this
183 ~~[act] part~~, and that the information sought ~~[or document or object demanded]~~ is relevant to the
184 violation.

185 (8) (a) The attorney general may enter into a confidentiality agreement in lieu of, or in
186 addition to, issuing a civil investigative demand, when the attorney general has reasonable
187 cause to believe that any person may be in possession, custody, or control of any information
188 relevant to a civil antitrust investigation or civil antitrust action.

189 (b) In any civil antitrust action, the court may issue a confidentiality order, which may
190 incorporate a confidentiality agreement.

191 (c) The confidentiality agreement or confidentiality order may address any procedure,
192 testimony taken, or document or material produced under this section. The agreement or order
193 may define to whom access will be given, the conditions and the restrictions to the access, and
194 how the testimony, document, or material will be safeguarded. The agreement or order may
195 require that documentation of testimony and any other document or material:

196 (i) be returned to the designated person; or

197 (ii) notwithstanding the provisions of Section [63A-12-105](#) and any retention schedule

198 promulgated pursuant to Section 63G-2-604, be destroyed by the attorney general at a
199 designated time, in which case this requirement is binding upon the attorney general.

200 ~~[(8)]~~ (9) (a) Any procedure, testimony taken, or document or material produced under
201 this section, whether produced pursuant to a civil investigative demand, confidentiality
202 agreement, or confidentiality order, shall be kept confidential by the attorney general unless
203 confidentiality is waived in writing by the person who has testified, or produced ~~[documents]~~ a
204 document or ~~[objects]~~ material.

205 (b) Any testimony taken or document or material produced under this section may be
206 used in a civil antitrust action, provided that the use is not restricted or prohibited under a
207 confidentiality agreement or confidentiality order, unless that restriction or prohibition is
208 waived by the person from whom the information was obtained.

209 ~~[(b)]~~ (c) Notwithstanding any other provision of this section, the attorney general may
210 disclose testimony taken or ~~[documents]~~ a document or material obtained under this section,
211 without either the consent of the person from whom it was received or the person being
212 investigated, to:

213 (i) any grand jury; and

214 (ii) officers and employees of federal or state law enforcement agencies, provided the
215 person from whom the information~~[-documents, or objects were]~~ was obtained is notified 20
216 days prior to disclosure, and the federal or state law enforcement agency certifies that the
217 information will be:

218 (A) maintained in confidence, as required by Subsection ~~[(8)]~~ (9)(a); and

219 (B) used only for official law enforcement purposes.

220 ~~[(9)]~~ (10) Use of a civil investigative demand under this action precludes the
221 invocation by the attorney general of Section 77-22-2.