RESPONDING TO CIVIL INVESTIGATIVE DEMANDS IN TEXAS

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The Texas Attorney General is vested with broad civil investigation powers, including the authority to issue civil investigative demands and similar requests (***CIDs***) that resemble traditional civil discovery. In general, a CID can seek material or information that would be discoverable under the Texas Rules of Civil Procedure. But the rights respondents enjoy are more limited than those of the typical civil litigant, and pitfalls in the CID procedure can result in an inadvertent waiver of even those rights.

1. A Brief Overview of Civil Investigative Powers

Many state and federal agencies are authorized to conduct civil investigations,[1] and administrative subpoenas, CIDs, and other administrative compulsory processes are essential to those efforts.[2] As a general rule, the courts do not distinguish between these investigative tools in assessing their enforceability or permissible scope.[3]

Texas case law on administrative compulsory process is sparse, in part because there is no right to appeal unless the statute so authorizes.[4] Federal case law is more developed, and it is instructive because Texas courts generally regard those opinions as persuasive authority.[5]

CIDS are subject to the constitutionally-based requirement reasonableness and relevance limitations.[6] Texas courts generally require that CIDs (a) be issued for an authorized purpose, (b) follow the necessary statutory procedures, (c) describe the documents sought with adequate particularity, meaning that the scope of its demand for documents must be

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1 *See* 32 CHARLES H. KOCH, JR. AND CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 8144 (2006).

2. *Id.*, § 8145.

3 *Id.* ("courts may be inclined to consider CID's as just another form of subpoenas unless a contrary intent is clear"); *Houston Industries Inc. v. Kaufman*, Civil Action No. H-95-5237, 1996 U.S. Dist. LEXIS 13766, at *3-*4 (S.D. Tex. March 7, 1996) (evaluating CID based on administrative subpoena principles).

4 *See Pelt v. State Bd of Ins.,* 802 S.W.2d 822, 825-29 (Tex. App.—Austin 1990, no writ)(dismissing appeal from order denying motion to quash administrative subpoena; explaining that mandamus is the appellate remedy absent a statute authorizing appeal).

5 *See, e.g., Sinclair* v. *Sav. & Loan Comm'r of Tex.,* 696 S. W.2d 142, 151-52 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Attorney General of Texas* v. *Allstate Ins. Co.,* 687 S.W.2d 803, 806-07 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (Texas Free Enterprise and Antitrust Act, under which the CID was issued, should be read in harmony with comparable federal antitrust statutes); *see also* TEX. BUS. & COM. CODE § 15.04 (requiring Texas to harmonize the Texas Free Enterprise and Antitrust Act "with federal judicial interpretations of comparable federal antitrust statutes").

6 *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950) (outlining the constitutional limitations on subpoena power); *Associated Container Transp. (Australia), Ltd. v. United States*, 705 F.2d 53, 55-56, 58 (2d Cir. 1983)(standards for CIDs).

adequate, but not excessive for the purposes of the inquiry, and (d) avoid unnecessary burden and excessive redundancy with information the agency already possesses.[7]

2. The Statutory Sources of the Attorney General's CID Powers

Three Texas statutes authorize the Attorney General to issue CIDs:

The first is the Texas Free Enterprise and Antitrust Act (***TFEAA***), which charges the Attorney General with responsibility to investigate potential violations of state and federal antitrust laws, and review proposed mergers to determine if they will substantially lessen competition.[8] These investigations are often conducted jointly with the Federal Trade Commission, the U.S. Department of Justice, and other state attorneys general.[9]

The second statute is the Texas Medicaid Fraud Prevention Act, under which the Attorney General's office and *qui tam* plaintiffs have recovered hundreds of millions of dollars in recent years.[10] Medicaid Fraud investigations frequently involve authorities with criminal jurisdiction, as well as federal agencies.

The third statute is the Texas Deceptive Trade Practices Act (***DTPA***), which empowers the Attorney General to investigate potential violations of the consumer safeguards in Chapter 17 of the Texas Business and Commerce Code.[11]

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7 *See Sinclair,* 696 S.W.2d at 151-52 ("(1) The agency must conduct its investigation pursuant to an authorized purpose and the subpoena must be relevant to that purpose. (2) The agency must follow the necessary statutory procedures. (3) The subpoena must describe the documents sought with adequate particularity. This means that the scope of its demand for documents must be adequate, but not excessive, for the purposes of the inquiry. (4) The subpoena must not unnecessarily or excessively seek information which the agency already possesses. (5) The respondent may show that the subpoena is unnecessarily burdensome to him."); *Houston Industries Inc.,* 1996 U.S. Dist. LEXIS 13766, at *3-*4 ("subpoenas should only be enforced where (1) the inquiry is within the statutory subpoena authority of the agency, (2) the demand is not unreasonably broad or burdensome, and (3) the information sought is reasonably relevant to the investigation") (citing *Burlington Northern R.R. Co. v. Office of Inspector General,* 983 F.2d 631, 638 (5th Cir. 1993)).

8 *See* TEX. BUS. & COM. CODE § 15.10(b).

9 Office of The Attorney General, Antitrust Division, https://www.oag.state.tx.us/consumer/antitrust.shtml (last visited September 24, 2014).

10 TEX. HUM. RES. CODE §§ 36.001-132; *see generally* Jack Meyer and Chris Wolff, *Fighting Medicaid Fraud in Texas* 1 (March 2013) (finding that from 2006 through 2012 Texas recovered over $821 million for state and federal taxpayers after subtracting the relators' (citizen plaintiffs) shares and the state's attorneys' fees and costs), *available at* www.taf.org (last visited Jan. 30, 2015).

11 The Attorney General also enjoys a broad right to inspect corporate books and records under the Texas Business Organizations Code. *See* TEX. BUS. ORGS. CODE § 12.151 (authorizing the Attorney General to inspect the books and records any "filing entity" or "foreign filing entity" to the extent he "considers necessary in the performance of a power or duty of" his office); *Humble Oil & Refining Co. v. Daniel*, 259 S.W.2d 580, 588 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.) (granting partial relief under a declaratory judgment action challenging a request to examine); *Chesterfield Finance Co. v. Wilson* 328 S.W.2d 479, 482-83 (Tex. Civ. App.—Eastland 1959, no writ) (holding the Attorney General was vested with unrestricted power to examine and copy records to investigate potential usury).

3. The Individuals and Entities the Attorney General is Statutorily-Authorized to Serve Versus Those He Purports to Serve

In general, the Attorney General may serve a CID on not only a target of the investigation, but also any other individual or entity believed to have relevant information.[12] CIDs typically define the recipient "Company" broadly to include affiliated entities (*e.g.*, parent corporations, subsidiaries, joint ventures) and individuals (*e.g.*, directors, officers, agents, attorneys, and consultants).[13] Thus, CIDs often presume to reach entities and individuals with little or no connection to Texas or the subject matter of the investigation.

For many corporate respondents, this expansive definition can raise several issues regarding the extent of their compliance obligations:

- A respondent's document production obligation attaches only to material in its "possession, custody, or control,"[14] which the Texas Supreme Court has construed to include the *legal right* to possess or obtain the material, as opposed to naked possession or mere access.[15] In the case of affiliated corporations (or other entities), they frequently lack any *legal right* to each other's documents.[16]

- Relatedly, subsidiaries and parent corporations are deemed "separate and distinct 'persons' as a matter of law," and Texas courts are bound to honor the distinction between them even where one company "may dominate or control, or even treat another company as a mere department, instrumentality, or agency."[17] In civil discovery, the Texas Rules place

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12 *See* TEX. BUS. & COM. CODE § 15.10(b).

13 *See, e.g.*, Civil Investigative Demand to Google, Inc. at 6 (July 29, 2010) (definition of "you," "your," "the Company," "Google," and "Google, Inc." in antitrust CID), *available at* http://www.josemilagre.com.br (last visited Sept. 25, 2014); Civil Investigative Demand to Trump University at 4 (Jan. 6, 2010) (definition no. 1 for "you" and "your" in DTPA CID); Civil Investigative Demand to Patriot Leasing Company at 6 (Oct. 27, 2004) (definition no. 1 for "Company" in DTPA CID).

14 TEX. BUS. & COM. CODE ANN. § 15.10(b).

15 *See In re Hal G. Kuntz,* 124 S.W.3d 179, 183-84 (Tex. 2003) ("Like a bank teller with access to cash in the vault, [an employee] has neither possession nor any right to possess [his employer's] trade secret [documents]."); *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) ("The right to obtain possession is a *legal right* based upon the relationship between the party from whom a document is sought and the person who has actual possession of it.") (emphasis added).

16 *See, e.g., Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.,* 233 F.R.D. 143, 145 (D. Del. 2005) ("A subsidiary, by definition, does not control its parent corporation."); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1144-45, 1151-52 (N.D. Ill. 1979) (holding documents of parent's foreign, wholly-owned subsidiaries were within the parent corporation's control but those of 43.8%-owned subsidiaries were not).

17 *In re U-Haul Int'l, Inc.*, 87 S.W.3d 653, 656-57 (Tex. App.—San Antonio 2002, orig. proceeding) (reversing sanctions against responding party for failing to produce its' affiliates' documents); *Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 501-02 (D. Kan. 2001) (cited with approval in *In Re Kuntz,* the district court held that the president and minority shareholder of nonparty corporation could not be compelled to produce corporate documents in a suit brought against him personally absent evidence he was the alter ego of the corporation).

the burden on the requesting party to come forward with evidence that overcomes this corporate maxim.[18]

- Finally, where the definition of the recipient company reaches unnamed affiliates, there is reason to question whether the Attorney General has any "reason to believe" they possess pertinent material, and whether the entity in fact has any connection to the subject matter of the investigation.[19]

4. CID Basics

Deadlines. CIDs are not subject to the familiar 30-day response periods for written discovery under Texas and Federal Rules.[20] The antitrust CID procedures set a concrete timeline for a limited category of document requests addressed below; otherwise, the Attorney General is given wide discretion in setting deadlines.[21]

Scope. The CID statutes incorporate the discoverability standards in the Texas Rules of Civil Procedure.[22] Like the Federal Rules, the Texas Rules define the permissible scope of discovery broadly:

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18 *See In re U-Haul Int'l, Inc.*, 87 S.W.3d at 656 ("The plaintiffs had the burden of proving UHI had constructive possession or the right to obtain possession of the requested documents from Republic.").

19 *See* TEX. BUS. & COM. CODE § 15.10(b) ("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, the attorney general may, prior to the institution of a civil proceeding, issue in writing and serve upon such person a civil investigative demand. . . .") (emphasis added); TEX. HUM. RES. CODE § 36.053(a) ("The attorney general may take action under Subsection (b) if the attorney general *has reason to believe* that: (1) a person has information or custody or control of documentary material relevant to the subject matter of an investigation of an alleged unlawful act; (2) a person is committing, has committed, or is about to commit an unlawful act; or (3) it is in the public interest to conduct an investigation to ascertain whether a person is committing, has committed, or is about to commit an unlawful act.") (emphasis added); TEX. BUS. & COM. CODE § 17.61(a) ("Whenever the consumer protection division *believes* that any *person may be in possession, custody, or control of the original copy of any documentary material relevant to the subject matter of an investigation of a possible violation of this subchapter*, an authorized agent of the division may execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying.") (emphasis added).

20 *See* TEX. R. CIV. P. 194.3 (requests for disclosure), 196.2(a) (document requests), 197.2(a) (interrogatories), 198.2(a) (requests for admission); FED. R. CIV. P. 33(b)(2) (interrogatories), 34(b)(2) (document requests), 36(a)(3) (requests for admission).

21 *Compare* TEX. BUS. & COM. CODE § 15.10(c)(2) (antitrust CIDs must prescribe a "reasonable period" for production of documents), § 15.10(c)(4)(A) (antitrust CID deposition notices must "prescribe a reasonable date, time, and place") *with* TEX. HUM. RES. CODE § 36.054(b) (no express reasonableness standard), TEX. BUS. & COM. CODE § 17.61(c) (same).

22 TEX. BUS. & COM. CODE § 15.10(d)(1) ("A demand may require the production of documentary material, the submission of answers to written interrogatories, or the giving of oral testimony only if the material or information sought would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery."); TEX. HUM. RES. CODE § 36.054(b) (providing that a Medicaid CID "may require disclosure of any documentary material that is discoverable under the Texas Rules of Civil Procedure"); TEX. BUS. & COM. CODE § 17.61(c) (a DTPA "civil investigative demand may contain a requirement or disclosure of documentary material which would be discoverable under the Texas Rules of Civil Procedure").

> In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[23]

To enable recipients to assess the relevance of the documents or information sought, CIDs must specify the subject matter of the investigation and the statute or other law that may have been violated.[24]

Document Requests. As soon as a company has reason to believe it will be investigated, a litigation hold should be put in place.[25] In all CID investigations, the Attorney General is authorized to obtain documents and the statutes require that his office describe the materials sought with "reasonable specificity."[26] The DTPA further authorizes requests for merchandise or samples to examine, and, when authorized by court order, impoundment of them until the conclusion of the investigation.[27]

The document request procedure under the antitrust statute includes four features not found in the other two statutes:

First, it carves out an exemption for any "*proprietorship or partnership* whose annual gross income does not exceed $5 million."[28] But no protection is afforded to small *corporations*, and small proprietorships and partnerships are not otherwise exempt from CID requests (*e.g.*, interrogatories and depositions).[29]

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23 TEX. R. CIV. P. 192.3(a); *compare* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

24 *See* TEX. BUS. & COM. CODE § 15.10(c)(1) ('Each demand shall describe the nature of the activities that are the subject of the investigation and shall set forth each statute and section of that statute that may have been or may be violated as a result of such activities."); TEX. HUM. RES. CODE § 36.054(a)(1) ("An investigative demand must . . . state the rule or statute under which the alleged unlawful act is being investigated and the general subject matter of the investigation"); TEX. BUS. & COM. CODE § 17.61(b)(1) ("Each demand shall . . . state the statute and section under which the alleged violation is being investigated, and the general subject matter of the investigation").

25 *See* Robert Hoff and Natalie Shonka, *When to "Reasonably Anticipate" a Government Investigation*, 11 CRIM. LIT. (ABA, Chicago, IL), Spring 2011, at 1.

26 TEX. BUS. & COM. CODE § 15.10(c)(2)(A); TEX. HUM. RES. CODE § 36.054(a)(2); TEX. BUS. & COM. CODE § 17.61(b)(2).

27 TEX. BUS. & COM. CODE § 17.60(3) and (4).

28 *Id.*, § 15.10(b).

29 *Id.*

Second, the "production of documentary material in response to any demand [must] be made under a sworn certificate in such form as the [CID] designates by a natural person having knowledge of the facts and circumstances relating to such production to the effect that all of the requested material in the possession, custody, or control of the person to whom the demand is directed has been produced."[30] The instructions also demand that the certificate vouch for the fact that the copies are true, correct, and complete duplicates of the originals.[31]

Third, the statute establishes a special procedure when the CID seeks any "product of discovery,"[32] a defined term that includes depositions and other material in the respondent's possession as a result of prior or ongoing litigation.[33] The Attorney General must serve notice on "the person from whom the discovery was obtained" and then wait at least twenty days before obtaining it from the CID respondent.[34] This time period affords the third-party an opportunity to file a petition to quash or modify (addressed below).[35] A preexisting protective order does not dispense with the need for a petition because the statute purports to trump such safeguards.[36]

Fourth, the statute specifies that the Attorney General must bear "the expense of copying."[37] Some antitrust CIDs omit mention of the obligation.[38] Others purport to limit it to *pre-approved* expenses for *hard-copies*. There is no reported precedent on the subject, and it is unlikely that any CID recipient will hazard relations with the Attorney General over such a narrow point, but this exclusion of electronic discovery expenses is doubtful. For example, prevailing parties in federal court are statutorily-entitled to recoup the "costs of making copies,"[39] and the full expense for typical e-discovery processes is commonly included in such awards.[40]

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30 *Id.*, § 15.10(g)(3)(B).

31 *See* Civil Investigative Demand to Google, Inc. at 4 (July 29, 2010) (instruction no. 5), *available at* http://www.josemilagre.com.br (last visited Sept. 25, 2013).

32 TEX. BUS. & COM. CODE § 15.10(c)(5).

33 *Id.*, § 15.10(a)(6) ("the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature; any digest, analysis, selection, compilation, or other derivation thereof, and any index or manner of access thereto").

34 *Id.*, § 15.10(c)(5).

35 *Id.*, § 15.10(f).

36 *Id.*, § 15.10(d)(2) ("Any demand for a product of discovery supersedes any inconsistent order, rule, or provision of law (other than this subchapter) preventing or restraining disclosure of such product of discovery; provided, however, that voluntary disclosure of a product of discovery under this section does not constitute a waiver of any right or privilege, including any right or privilege which may be invoked to resist discovery of trial preparation materials, to which the person making the disclosure may be entitled.").

37 *Id.*, § 15.10(g)(3)(A).

38 *See* Civil Investigative Demand to Google, Inc. at 4 (July 29, 2010) (instruction no. 5), *available at* http://www.josemilagre.com.br (last visited Sept. 25, 2013).

39 *See* 28 U.S.C. § 1920(4) (enumerating the litigation expenses that qualify as taxable costs, including "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily

Interrogatories. In a Medicaid Fraud or DTPA investigation, the Attorney General may require the respondent to provide a sworn statement or report "as to all the facts and circumstances concerning" the alleged violation or any other information the Attorney General deems necessary.[41] The antitrust CID statute authorizes the Attorney General to pose interrogatories worded with "definiteness and certainty."[42] They must be answered separately and in writing with a sworn certificate affirming that all of the requested information in the respondent's possession, custody, control, and knowledge has been set forth fully and accurately unless objected to, in which case the grounds may be set forth in lieu of an answer.[43] If the respondent must indicate "in writing which if any of the answers contains trade secrets or confidential information."[44]

Depositions. The Medicaid Fraud and DTPA statutes authorize the Attorney General to "examine under oath" any person "in connection with" the alleged violation.[45] The statutes are otherwise silent on the procedure for such examinations.

The antitrust CID statute is more detailed. Absent agreement, testimony must be taken in the county where the witness resides, is found, or transacts business.[46] While the witness may be represented and advised by counsel during the antitrust CID deposition, neither he

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obtained for use in the case"); FED. R. CIV. P. 54(d) ("[u]nless a federal statute, these rules, or court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party").

40 *See*, *e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 165-70 (3rd Cir. 2012) (limiting the prevailing defendants' e-discovery cost recovery under section 1920(4) to the conversion of native files to .tif format, scanning, and transferring VHS recordings to DVD format, reasoning that these services were equivalent to making copies of materials); *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) (conversion costs are taxable under section 1920(4)); *Romero v. City of Pomona*, 883 F.2d 1418, 1428 (9th Cir. 1989) ("fees are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production"); *Petroliam Nasional Berhad v. GoDaddy.com, Inc.*, No. C 09-5939 PJH, 2012 WL 1610979, at *4 (N.D. Cal. May 8, 2012) (taking note of *Race Tires*, "but conclud[ing] that in the absence of directly analogous Ninth Circuit authority, broad construction of § 1920 with respect to electronic discovery costs – under the facts of this case – [was] appropriate"); *but see Roehrs v. Conesys, Inc.,* No. 3:05-CV-829, 2008 WL 755187, at *3 (N.D. Tex. Mar. 21, 2008) (denying conversion costs because digital versions of the documents "were merely more convenient for counsel to search and examine" and not "necessary").

41 *See* TEX. HUM. RES. CODE § 36.053(b)(1) (Attorney General may "require the person to file on a prescribed form a statement in writing, under oath or affirmation, as to all the facts and circumstances concerning the alleged unlawful act and other information considered necessary by the attorney general"); TEX. BUS. & COM. CODE § 17.60(1) (Attorney General may "require the person to file on the prescribed forms a statement or report in writing, under oath or otherwise, as to all the facts and circumstances concerning the alleged violation and such other data and information as the consumer protection division deems necessary");

42 TEX. BUS. & COM. CODE § 15.10(c)(3)(A).

43 *Id.*, § 15.10(g)(4)(A)&(B).

44 *Id.*, § 15.10(g)(4)(A).

45 *See* TEX. HUM. RES. CODE § 36.053(b)(2) (" In investigating an unlawful act, the attorney general may . . . examine under oath a person in connection with the alleged unlawful act"); TEX. BUS. & COM. CODE § 17.60(2) (authorizing the Attorney General to "examine under oath any person in connection with this alleged violation").

46 TEX. BUS. & COM. CODE § 15.10(g)(5)(B).

nor counsel may object, refuse to answer, or interrupt the examination, except to object and refuse to answer based on a constitutional or other legal right or privilege.[47]

The statute authorizes the Attorney General to secure a district court order that (a) immunizes a recipient from criminal prosecution and (b) compels compliance over an assertion of the Fifth Amendment privilege.[48] Such an order may be issued in advance, but is not effective until the person asserts the privilege and is informed of the order.[49] A person who testifies in compliance with the court's order may not be criminally prosecuted for any act, transaction, matter, or thing about which he or she is ordered to testify or produce.[50] On the other hand, a person who fails to testify in compliance with the court's order may be punished for contempt.[51]

5. Contesting a CID

Although CID procedures resemble civil discovery, the Attorney General expects CID respondents to chart a more forthcoming course than the typical civil litigant:

> In contrast to adversarial discovery in private litigation, the Attorney General's office encourages private parties who receive a CID to work cooperatively with the State, and to provide comprehensive rather than grudging responses to the CID, in order to demonstrate the party's good faith desire to comply with the law.[52]

CIDs, therefore, invite respondents to contact the Office of Attorney General with any questions, including concerns over the burden imposed by the requests.[53]

In negotiating with the Attorney General, respondents must be mindful that leverage shifts to the Attorney General when the deadline to challenge the CID passes. That short-lived right expires the earlier of (a) the response deadline in the CID, or (b) twenty days after service.[54]

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47 *Id.*, § 15.10(g)(5)(C)&(E).

48 *Id.*, §§ 15.13(a), (b).

49 *Id.*, § 15.13(c).

50 *Id.*, § 15.13(d).

51 *Id.*

52 Brief for the State of Texas as *Amicus Curiae*, in the Supreme Court of Texas, Cause No. 08-1046, *In re Memorial Hermann Healthcare Systems*, filed Nov. 24, 2009.

53 *See, e.g.*, Letter from Kim Van Winkle, Assistant Attorney General, to Matthew Bye, Google, Inc. (July 29, 2010), *available at* http://www.josemilagre.com.br (last visited Sept. 25, 2013).

54 *See* TEX. BUS. & COM. CODE § 15.10(f) ("At any time before the return date specified in a demand or within 20 days after the demand has been served, whichever period is shorter, the person who has been served . . . may file a petition for an order modifying or setting aside the demand"); TEX. HUM. RES. CODE § 36.054(f) ("A petition [to modify or set aside] . . . must be filed before the earlier of: (1) the return date specified in the demand; or (2) the 20th day after the date the demand is served."); TEX. BUS. & COM. CODE § 17.61(g) ("At any time before the return date specified in the demand, or within 20 days after the demand has been served,

Antitrust CIDS may be contested by filing a petition to modify or set aside in a district court in either Travis County or the county of the person's residence or company's principal office.[55] Medicaid CIDs may be challenged only in a Travis County district court.[56] A DTPA CID's request for documents may be contested in Travis County or the county of the person's residence or company's principal office.[57] But the DTPA does not specify any procedure for contesting interrogatories or deposition notices.[58]

A petition challenging an antitrust CID differs in an important respect from a petition under the Medicaid Fraud and DTPA statutes: Compliance with *contested requests* is stayed while the proceeding is pending.[59] Compliance with Medicaid Fraud and DTPA CIDs is required despite the pendency of a petition unless a court intervenes and orders otherwise.[60]

Prospects for a petition *to quash or set aside* are daunting. Challenges to the Attorney General's investigative jurisdiction have been unsuccessful,[61] as have similar challenges to the jurisdiction of federal agencies.[62] A petition to quash an *antitrust CID* must overcome a

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whichever period is shorter, a petition to extend the return date for, or to modify or set aside the demand, stating good cause . . . .").

55 *See* TEX. BUS. & COM. CODE § 15.10(f) ("a petition for an order modifying or setting aside the demand [shall be filed] in the district court in the county of the person's residence or principal office or place of business or in a district court of Travis County."); TEX. BUS. & COM. CODE § 17.61(g) ("a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the district court in the county where the parties reside, or a district court of Travis County.").

56 *See* TEX. HUM. RES. CODE § 36.054(f) ("A petition under this section shall be filed in a district court of Travis County.").

57 *See* TEX. BUS. & COM. CODE § 17.61(g) ("a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the district court in the county where the parties reside, or a district court of Travis County").

58 *See* TEX. BUS. & COM. CODE § 17.60 (authorizing the Attorney General to take such actions, but silent as to any challenge to them).

59 *See* TEX. BUS. & COM. CODE § 15.10(g)(2) ("The time for compliance with the demand in whole or in part shall not run during the pendency of any petition filed under Subsection (f) of this section; provided, however, that the petitioner shall comply with any portions of the demand not sought to be modified or set aside.").

60 *See* TEX. HUM. RES. CODE § 36.054(g) (compliance is required "[e]xcept as provided by court order"); TEX. BUS. & COM. CODE § 17.61(h) ("A person on whom a demand is served under this section shall comply with the terms of the demand unless otherwise provided by a court order.").

61 *See, e.g., Allstate Ins. Co.,* 687 S.W.2d at 805-06 (holding the Attorney General acted within his office's authority because (a) the State Board of Insurance was not given exclusive jurisdiction over the industry, and (b) the federal "business of insurance" exemption from the antitrust laws did not reach the activities that were the subject of the CID); *Humble Oil & Refining Co. v. Daniel,* 259 S.W.2d 580, 590 (Tex. Civ. App.—Beaumont 1953, writ ref d n.r.e.) (holding the Attorney General had the authority to issue a request for examination of corporate books and records), *cert, denied,* 347 U.S. 936 (1954).

62 *See, e.g., United States v. Time Warner,* Misc. Action No. 94-338 (HHG), 1997 U.S. Dist. LEXIS 2752, at *17 (D.D.C. Jan. 22, 1997) (refusing to quash CIDs on the grounds that the activity under investigation fell outside the territorial reach of the antitrust laws as amended by the Foreign Trade Improvements Act); *Houston Industries, Inc.,* 1996 U.S. Dist. LEXIS 13766, at *4-*5 (concluding that challenge based on the state action doctrine was premature where the application of the doctrine would turn on the "facts gleaned from the DOJ's investigation and any specific actions that are charged as antitrust violations"); *Audubon Life Ins. Co. v. FTC,* 543 F. Supp. 1362, 1364 (M.D. La. 1982) ("The plaintiffs contend that the investigation being conducted by the

statutory presumption that the request was issued in good faith and within the scope of the Attorney General's authority.[63]

Prospects for a petition *to modify* are far better, but even then the Attorney General generally bears only a modest burden to prove the relevancy of the documents or information requested.[64] The respondent bears the burden of demonstrating that the CID is overbroad or unreasonably burdensome in order to pare down the requests.[65]

6. Asserting Privilege

CID respondents are not stripped of the privileges that civil litigants enjoy. The Texas Rules, which are incorporated into the CID statutes, define the scope of discovery in terms of relevant, *non-privileged* documents and information.[66] Moreover, the antitrust CID statute specifically authorizes a CID recipient to file a petition to modify or set aside to protect "any constitutional or other legal right *or privilege*."[67]

F.T.C. is an investigation of the 'business of insurance' under the McCarran-Ferguson Act. . . . [T]he Court finds that plaintiffs' suit in this Court is premature because plaintiffs have an adequate remedy under the Federal Trade Commission Act. Since this case is not ripe for adjudication, defendants' motion to dismiss is hereby granted.").

63 TEX. BUS. & COM. CODE § 15.10(f) ("In ruling on the petition, the court shall presume absent evidence to the contrary that the attorney general issued the demand in good faith and within the scope of his or her authority.").

64 *See In re NASDAQ Market-Makers Antitrust Litig.,* 929 F. Supp. 723, 725 (S.D.N.Y. 1996) (requests for revenue, cost, profits and losses derived from trading NASDAQ's sureties were relevant in an investigation of price fixing of spreads of stock traded on the NASDAQ exchange; other information was relevant to the issue of whether a class should be certified); *In re Rabbinical Seminary Netzach Ramailis,* 450 F. Supp. 1078, 1084 (E.D.N. Y. 1978) (burden would be satisfied by a showing that the material may have some "possible connection" to the subject matter of the investigation).

65 *See Schade,* 150 S.W.3d at 552 (noting "the respondent may show that the subpoena is unnecessarily burdensome" but rejecting unsubstantiated estimate of 40 to 80 hours of work); *U.S. Commodity Futures Trading* v. *McGraw-Hill,* 390 F. Supp. 2d 27, 35 (D.D.C. 2005) (burden is on the party resisting the subpoena); *McGraw-Hill,* 390 F. Supp. 2d at 35-36 (modifying requests that "were excessively broad on their face"); *Houston Industries Inc.,* 1996 U.S. Dist. LEXIS 13766, at *12 ("[T]he Court is concerned that some elements of the CID may be overbroad and burdensome. . . . [I]n the absence of agreement between the parties to modify the CID, the Court finds that an additional hearing is needed to address the specific objections outlined in HII's request for modification."); *First Multiple Listing Serv., Inc. v. Shenefield,* No. 79-1891A, 1980 U.S. Dist. LEXIS 15492, at *6-*8 (N.D. Ga. Sept. 3, 1980) (modifying the CID where "FMLS submitted affidavits as to the time and cost required to respond to the CIDs" and the district court concluded that "the request for information as originally drafted to burdensome").

66 *See* TEX. R. CIV. P. 193.2(a) ("In general, a party may obtain discovery regarding any matter that is *not privileged* and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.") (emphasis added); TEX. BUS. & COM. CODE § 15.10(d)(1) ("A demand may require the production of documentary material, the submission of answers to written interrogatories, or the giving of oral testimony only if the material or information sought would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery."); TEX. HUM. RES. CODE § 36.054(b) (providing that a Medicaid CID "may require disclosure of any documentary material that is discoverable under the Texas Rules of Civil Procedure"); TEX. BUS. & COM. CODE § 17.61(c) (a DTPA "civil investigative demand may contain a requirement or disclosure of documentary material which would be discoverable under the Texas Rules of Civil Procedure").

67 TEX. BUS. & COM. CODE § 15.10(f) (emphasis added).

The Texas Rules nominally prohibit privilege objections to written discovery (no adverse consequence results from objecting).[68] To preserve privilege, the responding party is required to include the following information in its response (or an amended or supplemental response) or a separate document: (a) a disclosure that responsive information or material has been withheld, (b) some reference to the request(s) to which the information or material is responsive, and (c) the privilege or privileges asserted.[69] The Texas Rules also spell out a regimen for requesting and receiving a privilege log.[70] CIDs typically include instruction that adopt some approximation of that procedure.[71]

As noted above, the Attorney General's civil investigations are often conducted with the joint participation of other agencies or with other independent investigations already underway. These other investigations might involve criminal investigators and prosecutors. But a corporate respondent may not invoke the Fifth Amendment as a basis for not responding to a CID.[72] "This is true whether the corporation is being compelled to produce records and papers or whether an officer of the corporation is testifying directly."[73]

The Texas Rules of Civil Procedure generally exempt work product from discovery.[74] An attorney's "mental impressions, opinions, conclusions, [and] legal theories" are "not discoverable."[75] Other work product is discoverable only when the requesting party shows "substantial need" and an inability "without undue hardship to obtain the substantial equivalent of the material by other means."[76] The Texas Rules exclude from work product several categories of materials typically generated during civil *litigation*, as opposed to civil *investigations*.[77]

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68 *See* TEX. R. CIV. P. 193.2(f) ("A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged . . . . A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.").

69 *See* Tex. R. Civ. P. 193.3(a).

70 *See* TEX. R. CIV. P. 193.3(b) (providing that the request should be made after the response, and that, "[w]ithin 15 days of service of that request, the withholding party must serve a response that: (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld.").

71 *See, e.g.,* Civil Investigative Demand to Google at 4 (instruction no. 3).

72 *See Super X Drugs of Texas, Inc. v. State of Texas*, 505 S.W.2d 333, 337 (Tex. Civ. App.—Houston 1974, no writ) (corporation has no Fifth Amendment right and "may not claim this privilege in order to escape discovery efforts").

73 *Id.*

74 TEX. R. CIV. P. 192.5.

75 TEX. R. CIV. P. 192.5(b)(1).

76 TEX. R. CIV. P. 192.5(b)(2).

77 *See* TEX. R. EVID. 503(d).

The Texas Rules of Evidence also recognize a privilege for trade secrets.[78] Under the pertinent rule, the respondent bears the initial burden to demonstrate that the documents or information qualify as a trade secret, then burden shifts to the requesting party to demonstrate that the information is necessary for a just adjudication of the case.[79] The information must be *essential*, not merely *useful*, and it must not be available through some reasonable alternate avenue of proof.[80]

The Texas Rules of Evidence also recognize privileges for returns and reports required by law "if the law requiring it" affords an exemption from discovery,[81] attorney-client communications,[82] husband-wife communications,[83] clergy communications,[84] political votes,[85] informant identities,[86] physician-patient communications,[87] and mental health information.[88]

7. Obtaining CID Materials and Information from the Attorney General or the Producing Party

Subject to exceptions addressed below, the Attorney General may not disclose *documents* obtained pursuant to a CID, unless (a) the producing party consents or (b) a court orders

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78 TEX. R. EVID. 507; *see also In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998) (orig. proceeding).

79 *See In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998) (orig. proceeding).

80 *See In re Union Pac. R.R.*, 294 S.W.3d 589, 592–93 (Tex. 2009) (orig. proceeding) ("Even if we assume that Constanzo needs to make this argument, we do not see why Constanzo 'needs' the actual rate structures to advance the argument. Constanzo claims she has no alternative means of proving that Union Pacific recognized, yet disregarded, a higher duty with respect to hazardous materials. It is unclear to us, and Constanzo has not explained, why she needs the *specific* rate structures to advance this negligence theory.") (emphasis in original); *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732-33 (Tex. 2003) (orig. proceeding) ("Just as a party who claims the trade secret privilege cannot do so generally but must provide detailed information in support of the claim, so a party seeking such information cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat."); *In re Refining-Texas, LP*, No. 01-13-00611-CV, 2013 Tex. App. LEXIS 12962, at *7-*8 (Tex. App.—Houston [1st Dist.] Oct. 17, 2013, orig. proceeding) (conditionally granting mandamus to vacate order requiring refinery to produce trade secret internal accounting records, financial projections, and similar materials in ad valorem tax appraisal challenge where the district's "expert did not conclude that the cost or market-data-comparison methods are inappropriate or inapplicable," nor that "the income method [was] the most appropriate valuation method," nor that the disputed information was "essential to create an accurate appraisal")(citations omitted); *In re XTO Res. I, LP*, 248 S.W.3d 898, 905 (Tex. App.—Fort Worth 2008, orig. proceeding) (no necessity when expert testified that information would be useful, but acknowledged he could form an opinion without it).

81 TEX. R. EVID. 502.

82 TEX. R. EVID. 503.

83 TEX. R. EVID. 504.

84 TEX. R. EVID. 505.

85 TEX. R. EVID. 506.

86 TEX. R. EVID. 508.

87 TEX. R. EVID. 509.

88 TEX. R. EVID. 510.

disclosure for "good cause shown."[89] Thus, such documents are not obtainable from the Attorney General's office through Public Information Act requests.[90]

In contrast to the TFEAA and Medicaid Fraud statutes, the DTPA does *not* protect *testimony* or *sworn statements* obtained in a DTPA investigation; thus, the Attorney General's Open Records Division has opined that such information *is* obtainable through a Public Information Request.[91]

The Texas Supreme Court's opinion in *State v. Lowry*[92] illustrates the operation of the "good cause" standard. The Attorney General issued "numerous CIDs" to obtain documents and testimony involving potential antitrust violations by a number of insurance companies.[93] After the Attorney General filed suit against the insurers, they sought the CID documents relating to the claims against them.[94] The Attorney General produced only the material his office intended to use at trial and identified the balance in a privilege log, but refused to disclose the names of the CID respondents.[95] The defendants sought to compel production arguing that "good cause" existed, because they had a substantial need for the materials and were unable without undue hardship to obtain substantially equivalent materials by other means.[96]

The Court found that the insurers demonstrated "substantial need" by pointing to the fact that the information had been "gathered by the State during the investigation that led to the filing of [the] antitrust enforcement action."[97] The insurers could not be expected to make a

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89 *See* TEX. BUS. & COM. CODE § 15.10(i)(1) ("Except as provided in this section *or ordered by a court for good cause shown*, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person *without the consent of the person who produced the material*, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.") (emphasis added); TEX. HUM. RES. CODE § 36.054(e) ("The office of the attorney general may not produce for inspection or copying or otherwise disclose the contents of documentary material obtained under this section except: (1) by court order for good cause shown; (2) with the consent of the person who produced the information") (emphasis added); TEX. BUS. & COM. CODE § 17.61(f) ("No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the office of the attorney general without the consent of the person who produced the material.") (emphasis added).

90 *See* Tex. Att'y Gen Op. No. OR2009-07195 (2009) (determining documents requested in an open records request that were produced in response to an antitrust CID are exempt from disclosure based on the confidentiality provisions of the antitrust CID statute); Tex. Att'y Gen Op. No. MB-2311 (1999) (determining documents produced in response to a DTPA CID are exempt from disclosure based on the confidentiality provisions of the DTPA CID statute).

91 *See* Tex. Att'y Gen. Op. No. AC-1007 (2001).

92 802 S.W.2d 669 (Tex. 1991).

93 *Id.* at 670.

94 *Id.* at 671-73.

95 *Id.* at 670-71.

96 *Id.* at 673.

97 *Id.*

more particularized showing given that "the contents were unknown to them."[98] As for hardship, the Court found that replicating the CID material would entail "extreme difficulty," given the State's refusal to identify the CID respondents, and unwarranted delay and expense, even if the State capitulated on their identities.[99] Thus, the Court concluded that the insurers had shown good cause and "the trial judge properly ordered production."[100]

The Houston Court of Appeals' opinion in *In re Memorial Hermann Healthcare Systems*[101] points out that CID respondents face the prospect of producing their CID information and materials not only to the Attorney General, but also to their opponents in parallel or subsequent civil litigation over the same subject matter. There, the owner of a failed hospital filed suit under the Texas antitrust statute against Memorial Hermann Hospital System.[102] The Attorney General then opened an investigation and issued an antitrust CID.[103]

When the antitrust plaintiff requested the documents produced in response to the CID, Memorial Hermann produced most of the materials it had provided to the Attorney General, but withheld thousands of pages, insisting they were subject to a "blanket privilege" under section 15.10(i)(1) of the TFEAA's prohibition on disclosure:

> Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.[104]

"Read in context, however," the Houston Court of Appeals found that "section (i)(1) precludes the attorney general—but nobody else—from seeking to examine the materials unless either (1) the producing party consents, or (2) the person seeking to examine the materials obtains a court order permitting access."[105] Therefore, the Court held that "the plain statutory language [did] not confer a privilege upon the producing person (here, Memorial Hermann) in a . . . lawsuit."[106]

8. The Attorney General's Use or Disclosure of CID Materials in Related Litigation and Investigations

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98 *Id.*

99 *Id.*

100 *Id.*

101 274 S.W.3d 195 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

102 *Id.* at 197.

103 *Id.*

104 *Id.* at 198 (*quoting* TEX. BUS. & COM. CODE § 15.10(i)(1)).

105 *Id.* at 199.

106 *Id.*

Trade secret materials are afforded some protection, but the CID statutes otherwise authorize the use and disclosure of CID material in judicial proceedings and for administrative enforcement.

Trade Secrets. As noted above, trade secret material is discoverable only when it is essential to the case (*see supra* at 12-13). The TFEAA and DTPA address the Attorney General's use or disclosure of any such material produced in response to a CID.

First, however, an antitrust respondent must identify in writing documents or interrogatory answers that contain confidential or trade secret information or the Attorney General will presumably view such protection waived.[107] The DTPA does not require any particular method of designating information as containing trading secrets, and there is no provision that expressly requires the responding party to designate documents as trade secrets at the time of production.

In the case of antitrust CID material "designated as containing trade secrets or confidential information," the Attorney General must give the producing party 15 days advance notice of the use or disclosure to permit the producing party to petition a district court for a protective order.[108] In the case of DTPA material, the Attorney General may not present any trade secret material to a court without court approval after adequate notice to the producing party.[109] Adequate notice is not defined, in contrast to the antitrust CID statute's 15-day provision.[110]

Antitrust CID Material. The TFEAA otherwise grants the Attorney General broad authority to disclose the antitrust respondent's documents, interrogatory answers, and testimony for enforcement purposes:

- First, he can do so as he "determines may be required by the state in the course of any investigation or a judicial proceeding in which the state is a party."[111]

- Second, he may do so as he determines "may be required for official use by an officer of the State of Texas or the United States charged with the enforcement of the laws of the State of Texas or the United States; provided that any material disclosed . . . may not be used for criminal law enforcement purposes."[112]

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107 TEX. BUS. & COM. CODE § 15.10(g)(3)(A) (documents) & (4)(A) (interrogatory answers).

108 *Id.*, § 15.10(i)(5).

109 TEX. BUS. & COM. CODE *Id.*, § 17.62(f).

110 TEX. BUS. & COM. CODE *Id.*, § 15.10(i)(5).

111 *Id.*, § 15.10(i)(2).

112 *Id.*, § 15.10(i)(3).

Medicaid Fraud CID Material. The Medicaid Fraud statute authorizes the Attorney General to use CID material "as [he] determines necessary in the enforcement of this chapter, including presentation before a court."[113]

Additionally, the Attorney General's office may disclose CID material to (a) an employee of the attorney general, (b) an agency of this state, the United States, or another state, (c) any attorney representing the state false claims act lawsuit, (d) a political subdivision of the State of Texas, or (e) any other person authorized by the attorney general to receive the information.[114]

DTPA CID Material. The DTPA authorizes the Attorney General's Consumer Protection Division to use CID material "as it determines necessary in the enforcement of the DTPA, including presentation before any court."[115]

Lacking the specific authority for the Attorney General to disclose information to other agencies, states or the federal government, the scope of the Attorney General's authority to do so is unclear. On one hand, the exclusion of specific disclosure authority—such as found in the antitrust CID statute—could be argued to prohibit disclosure. On the other hand, the antitrust CID statute may be viewed as more restrictive by identifying specific circumstances the Attorney General may disclose information, where the DTPA grants the Attorney General broad discretion to make that determination.

9. Other Considerations in Responding to a Texas CID

Consider Disclosure and Its Consequences. If your company is publicly traded, the CID might raise disclosure concerns, if not immediately then as the investigation develops.[116] Shareholder agreements and debt instruments also might impose disclosure obligations. Even where disclosure is not required, consider the implications of disclosure since a court action is the backstop on preserving your rights and such a filing would put the matter into the public record.

Check Your Insurance. Your company should review any insurance policies that might provide coverage to determine (a) whether the insurer must be notified of the investigation,[117] and (b) whether the insurance will cover your attorneys' fees.[118] When

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113 *Id.*, § 36.054(e-1); *see also id.*, § 36.053(d) (same authority with respect to "documentary material derived from" answers to interrogatories, sworn statements, and transcripts).

114 TEX. HUM. RES. CODE *Id.*, § 36.054(e); *see also id.*, § 36.053(c) (same obligation and exception with respect to information in or documents "derived from" answers to interrogatories, sworn statements, and transcripts).

115 *Id.*

116 *See generally* Alison B. Miller, *Navigating the Disclosure Dilemma: Corporate Illegality and the Federal Securities Laws*, 102 GEO. L.J. 1647 (2013-2014); David M Stuart and David A. Wilson, *Disclosure Obligations under the Federal Securities Laws in Government Investigations*, 64 BUS. LAW. 973 (Aug. 2009).

117 *See, e.g.*, *Employers' Fire Insurance Co. v. Promedica Health Systems, Inc.*, No. 12-3104, 2013 U.S. App. LEXIS 8943, at *17, 2013 FED. App. 0432N (6th Cir. April 30, 2013) (rejecting the insurer's contention that "a 'claim' arose in August 2010 when the FTC began to formally investigate ProMedica's acquisition of [a] hospital," the court concluded that a "claim" must involve an allegation and the FTC made no allegation in connection with its merger investigation; instead, the "FTC did not 'allege' antitrust violations until . . . it

coverage is provided, policies typically require agreement on representation before any expenses are incurred.[119]

Be Mindful of Possibility of a Parallel Investigation. In general, parallel civil and criminal investigations into the same conduct are permissible.[120] A parallel criminal investigation violates a defendant's due process or other rights only where there is "[d]eception as to the purposes of the investigation, or using meaningless civil proceedings as a pretext for acquiring evidence for a criminal prosecution, taking advantage of a person who does not have counsel or other special circumstances may invalidate the prosecution."[121]

The government agencies involved in the civil investigation are not required to disclose the parallel criminal probe.[122] They cannot, however, affirmatively misrepresent the nature of the investigation to lull the target into disclosing information.[123]

An Attorney General investigation may involve other agencies, some of which have the responsibility for criminal prosecutions.[124] Your company should be mindful of the

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commenced an administrative action against ProMedica, asserting that it '[had] reason to believe' that ProMedica's acquisition of St. Luke's violated . . . the Clayton Act and describing the specific ways that it believed the acquisition would impair competition").

118 *See, e.g., Agilis Benefit Services LLC v. Travelers Casualty and Surety Company of America*, No. 5:08-CV-213, 2010 U.S. Dist. LEXIS 144491, at *16 (E.D. Tex. April 30, 2010) (where the policy defined a covered "claim" to include a "written demand for monetary or non-monetary relief," the court held that "a demand for 'relief' is broad enough to include a demand for something due, including a demand to produce documents or appear before a grand jury"); *Ace American Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 794-98 (D. Md. 2008)(holding that the company's E&O insurer was liable for the past and future costs of responding to a Texas Attorney General CID and an administrative subpoena issued by the Maryland Attorney General).

119 *See* 7-122 SECURITIES LAW TECHNIQUES § 122.03[3] (MB 2013) ("D&O policies generally provide that the insured must obtain the insurer's consent to the incurrence of defense costs. Failure to obtain consent may lead an insurer to deny coverage. Notably, many policies provide that the insurer may not unreasonably withhold its consent.").

120 *See United States v. Kordel*, 397 U.S. 1, 11, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970) ("It would stultify enforcement of federal law to require a governmental agency . . . FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial."); *SEC v. Dresser Industries, Inc.,* 202 U.S. App. D.C. 345, 628 F.2d 1368, 1377 (D.C. Cir. 1980) (en banc) ("Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously.").

121 *United States v. Setser*, 568 F.3d 482, 493 (5th Cir. 2009).

122 *See United States v. Carriles*, 541 F.3d 344, 355 (5th Cir. 2008), *cert. denied*, 556 U.S. 1130 (2009) ("we have consistently adhered to the rule . . . that the 'mere failure' of a government official to warn that an investigation may result in criminal charges does not constitute fraud, deceit, or trickery"); *United States v. Powell*, 835 F.2d 1095, 1099 (5th Cir. 1988) ("revenue agents have no duty to inform taxpayers that the agents' investigations might result in criminal charges"); *United States v. Caldwell*, 820 F.2d 1395, 1400 (5th Cir. 1987) (same).

123 *See Carriles*, 541 F.3d at 355 ("a government official may not make 'material misrepresentations' about the nature of the investigation or inquiry"); *United States v. Blocker,* 104 F.3d 720, 729 & n.11 (5th Cir. 1997) (subject must show that he was intentionally misled).

124 *See* Office of the Attorney General and Texas Health and Human Services Commission, JOINT SEMI-ANNUAL INTERAGENCY COORDINATION REPORT, SEPTEMBER 1, 2012 THROUGH FEBRUARY 28, 2013 at 2-5

possibility that a civil investigation may turn into a criminal matter regardless of whether a criminal investigator is visibly active in the probe.[125]

(recounting, *inter alia*, civil and criminal investigations in the area of Medicaid reimbursement), *available at* http://www.oag.state.tx.us/criminal/mfcu_reports.shtml (last visited Oct. 15, 2014).

125 *See* Pravin B. Rao, *Dealing with Parallel Investigations,* Volume 17, Issue 1, ABA Criminal Justice Section Newsletter at 5 (Fall 2008)*, available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_practicetips_parallelinvestigationstip.authcheckdam.pdf (last visited Oct. 15, 2014).