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Economic Espionage And Trade Secrets Enforcement Under the Trump Administration

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In the recent presidential election, President-elect Donald Trump promised, if elected, to act more assertively to protect the economic interests of the United States and its citizens against unfair foreign competition by "putting America first" and using "every lawful presidential power to remedy trade disputes if China does not stop its illegal activities, including its theft of American trade secrets … ."[1]

Sen. Jeff Sessions—President-elect Trump's choice for Attorney General to lead the U.S. Department of Justice (DOJ)—has publicly expressed similar concerns about unfair foreign competition. Sen. Sessions wrote in 2015 that China has "undermine[d] the principles of free trade and free enterprise by ignoring the rules that they promised to uphold." Sen. Sessions further stated that China "shouldn't be allowed to skirt the rules while arguing that it's not doing enough damage to our people to justify relief."[2]

There are several potential policies the Trump Administration may advance to implement its stated agenda of protecting Americans against unfair foreign competition, including renegotiating trade agreements, imposing tariffs on certain imports to the United States, and restricting immigration.

In the white-collar arena, the Trump Administration may also seek to protect the interests of U.S. companies (and their workers) whose intellectual property is the target of foreign espionage or theft through another powerful tool—enhanced DOJ enforcement of economic espionage/trade secrets laws.

SHUTTERSTOCK

The Economic Espionage Act

The Economic Espionage Act of 1996 (EEA) allows the U.S. government to criminally prosecute individuals or organizations (1) who steal, or without authorization of the owner, obtain, destroy or convey information; (2) who knew the information was proprietary; (3) when the information was in fact a trade secret; and (4) who knew the offense would benefit or was intended to benefit a foreign government, foreign instrumentality, or foreign agents. An individual who is guilty of violating the EEA is subject to a fine of up to $5 million and/or imprisonment for up to 15 years. Similarly, an organization that violates the EEA may be fined up to $10 million or three times the value of the stolen trade secret to that organization, including "expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided."

The Obama DOJ prosecuted several high profile EEA cases. Most recently, in December 2016, a senior engineer from a private defense contractor of the U.S. government pled guilty to economic espionage charges related to his stealing copies of military aircraft designs from his employer and knowingly providing them to China's state-run Shenyang Institute of Automation. In response, the U.S. Attorney for the District of Connecticut, Deirdre M. Daly, publicly stated that the DOJ "will relentlessly investigate and prosecute those who steal, or attempt to steal, trade secrets and sensitive military information whether for their own personal gain or for the benefit of foreign actors."[3] Other successful DOJ EEA prosecutions have resulted in substantial prison sentences for defendants.

Inherent Challenges

Although the EEA is a powerful tool, DOJ's position has historically been that the "EEA

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is not intended to criminalize every theft of trade secrets for which civil remedies may exist under state law." Rather, "[i]t was passed in recognition of the increasing importance of the value of intellectual property in general, and trade secrets in particular to the economic well-being and security of the United States and to close a federal enforcement gap in this important area of law."

Setting aside prior DOJ policy, any Trump Administration effort to significantly ramp up prosecution of economic espionage could face several potential practical challenges.

First, to successfully prove an EEA case, DOJ must prove beyond a reasonable doubt that a trade secret is involved. Proving a trade secrets case is therefore a necessary but not sufficient condition to proving an economic espionage case. And proving a trade secrets case is a complex and resource intensive exercise that generally requires, among other things, proof that the owner of the intellectual property derived economic value from the fact that the information was not generally known. Whether the information at issue is "generally known" is complicated in light of the increasing prevalence of saving and accessing information on the Internet. The "generally known" element also requires DOJ to establish that the aggrieved entity took "reasonable steps" to ensure the information was secure, such as limiting access to the information and taking measures to ensure that those with access were aware that the information was proprietary and confidential. The question of what are "reasonable steps" is highly subjective, and may lend itself to the type of "battle of the experts" that presents inherent challenges to the government given their high burden of proof in criminal cases.

Second, DOJ must also establish that the offense was done knowingly to benefit a foreign government, foreign instrumentality, or foreign agent. This element of the EEA involves several complex and subjective areas, such as (1) what constitutes a "benefit;" (2) "how much" is the benefit; (3) is the benefit sufficient for prosecution; and (4) what entities are considered "foreign instrumentalities."

Third, EEA prosecutions often necessarily have an extraterritorial scope that may hinder prosecution in a U.S. federal court. Defendants in EEA cases often reside abroad in countries where extradition to the U.S. is difficult if not practically impossible. The United States government may face difficulty in obtaining documents and testimony from relevant witnesses located abroad. Recent EEA prosecutions also have shown that DOJ can face challenges regarding the service of indictments on foreign defendants.

In the event that DOJ chooses not to pursue an EEA prosecution, it can still potentially pursue a trade secrets criminal prosecution. An individual who is guilty of criminal trade secrets theft is subject to a fine and/or imprisonment for up to 10 years. Similarly, an organization that is guilty of trade secrets theft may be fined up to $5 million or three times the value of the stolen trade secret to that organization, including "expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided."

The DTSA offers **additional hope** for the increased protection of American intellectual property interests.

Defend Trade Secrets Act of 2016

A recently passed law offers additional hope for the increased protection of American intellectual property interests. In 2016, Congress passed the Defend Trade Secrets Act (DTSA) to provide aggrieved U.S. companies with some additional protections of their intellectual property from unfair foreign competition. Specifically, the DTSA provides U.S. companies with a federal private cause of action that enables trade secret owners to file a lawsuit in federal court to recoup damages for the theft of trade secrets in interstate or foreign commerce. The DTSA also provides a uniform definition of trade secrets, a uniform standard for misappropriation, nationwide service of process and execution of judgments, and will coexist with—rather than preempt—state-level trade secret laws.

The passage of the DTSA also could substantially affect white-collar enforcement. The DTSA provides certain whistleblower protections to employees who, acting as whistleblowers, disclose confidential information to law enforcement or as part of an anti-retaliation lawsuit. As demonstrated in other sectors of the law, these whistleblower protections are likely to increase the number of potential matters that will be brought to DOJ's attention and thus shape white collar enforcement activity.

Conclusion

The Trump Administration may increase DOJ enforcement of economic espionage/trade secrets theft to further its broader goal of protecting the economic interests of the United States and its citizens against unfair foreign competition. As discussed above, economic espionage/trade secrets theft prosecutions are not without some inherent challenges. However, increased DOJ activity in the economic espionage/trade secrets area would not only advance a Trump Administration policy priority but also be consistent with the broader (and perhaps inexorable) recent trend of increased globalization of U.S. white-collar enforcement. This trend has been clearly demonstrated in recent years in areas such as the Foreign Corrupt Practices Act and criminal antitrust. Companies who would like to avoid or minimize potential issues related to criminal economic espionage/trade secrets theft should look to counsel who have significant prior experience working with the DOJ. Law firms with a substantial global footprint are uniquely well positioned to provide value added services to potential white-collar clients.

1. https://www.donaldjtrump.com/policies/trade.
2. http://thehill.com/blogs/congress-blog/foreign-policy/247529-itc-must-act-to-stop-chinas-predatory-tire-trade-practices.
3. https://www.law360.com/articles/874736?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared.

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