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Trade Secrets

Public sources indicate that under the Obama Administration, the U.S. government made substantial efforts to combat trade secret theft through an increase by the Department of Justice prosecutions, and evidence suggests that the new Trump Administration will take an equally, if not even more, aggressive approach to protecting intellectual property, particularly from foreign parties, the authors write.

How Will Criminal Trade Secret Prosecutions Fare Under President Trump?

BY BARAK COHEN AND CHELSEA CURFMAN

For many companies, protecting intellectual property is a significant concern made more difficult in recent years by the persistent efforts of foreign agents to steal valuable trade secrets. Analysis of public sources indicates that under the Obama Administration, the U.S. government made substantial efforts to combat this theft through an increase by the U.S. Department of Justice (DOJ) in the number of criminal trade secret prosecutions. The question now is whether President Donald Trump, who has only been in office for a little more than three months, will follow suit. While the answer is uncertain, statements by the President and his U.S. Attorney General, Jeff Sessions, suggest that the Trump administration may be equally, if not more, likely to encourage prosecution of suspected trade secret theft, particularly when foreign nationals and national security are involved.

The Economic Espionage Act The Economic Espionage Act (EEA) of 1996 criminalizes (1) theft of trade secrets for the benefit of a foreign entity (''economic espionage''), and (2) theft of trade secrets for pecuniary gain, regardless of who benefits (''trade secret theft''). Convictions under both offenses require the government to prove: (1) the defendant stole or, without authorization of the owner, obtained, destroyed or conveyed information; (2) the defendant knew this information was proprietary; and (3) the information was in fact a trade secret (a broadly defined term). To establish economic espionage, the government must also show that the defendant knew the offense would benefit, or was intended to benefit, a foreign government, foreign instrumentality or foreign agent.

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On the other hand, establishing trade secret theft requires additional proof that (4) the defendant intended to convert the trade secret to the economic benefit of anyone other than the owner; (5) the defendant knew or intended that the owner of the trade secret would be injured; and (6) the trade secret was related to, or was included in a product that was produced or placed in, interstate or foreign commerce.

Both individuals and companies can be charged under the EEA for either offense. The DOJ advises its prosecutors, through its U.S. Attorneys' Manual (which provides key policy guidance) to consider various discretionary factors before deciding whether to initiate a prosecution under the EEA, including: (a) the scope of the criminal activity, including evidence of involvement by a foreign government, foreign agent, or foreign instrumentality; (b) the degree of economic injury to the trade secret owner; (c) the type of trade secret misappropriated; (d) the effectiveness of available civil remedies; and (e) the potential deterrent value of the prosecution. U.S. Attorneys' Manual, Title 9: Criminal § 9-59.100 (hereinafter ''USAM'').

If charged and convicted of economic espionage, individuals face up to 15 years in prison and fines as high as $5 million; for trade secret theft, individuals face up to 10 years in prison and fines of not more than

$250,000. On the other hand, organizations convicted of economic espionage face fines of up to $10 million or three times the value of the stolen trade secret, whichever is greater. The maximum fine for trade secret theft by an organization is $5 million.

Trade Secret Prosecutions Under the Obama Administration Under the Obama administration, the U.S. government consistently stressed the importance of protecting the intellectual property of U.S. companies. For example, in its February 2013 white paper titled, ''Administration Strategy on Mitigating the Theft of U.S. Trade Secrets,'' the Obama Administration recognized that ''trade secret theft threatens American businesses, undermines national security, and places the security of the U.S. economy in jeopardy.'' EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, *Administration Strategy on Mitigating the Theft of U.S. Trade Secrets*, p. 1 (Feb. 2013).

Consistent with such pronouncements, an extensive review of publicly-available information regarding federal criminal trade secret investigations and prosecutions under the EEA indicates that the number of prosecutions during the Obama Administration increased significantly compared to years prior. It was not possible to conduct an exhaustive analysis of all matters because recent indictments may still be under seal, and also because of the secrecy that typically shields from publicity matters that do not result in charges. A review of public sources, however, such as official press releases, federal district court dockets, news articles, and published case opinions, indicates that the government filed merely *96* criminal trade secret cases in the 13 years between 1996, when the EEA was enacted, and Jan. 20, 2009, when President Obama took office (an average of 7.2 cases per year). In contrast, in the relatively short period since Obama took office, the government has brought *69* criminal trade secret cases (an average of 8.6 cases per year), which represents a 20 percent increase over the prior period. Further, these more recent prosecutions reflect some notable trends.

Increasing scale. First, federal trade secret prosecutions under the Obama administration grew in scale, with more cases involving multiple defendants charged as participants in wide-ranging conspiracies to steal trade secrets. In the last eight years, roughly one out of every six federal criminal trade secret cases involved charges against three or more defendants. That is more than three times the rate of multi-defendant trade secret prosecutions in the years before Obama took office, when only one in 20 cases involved three or more defendants. As a result, while the average number of federal trade secret cases filed each year increased under President Obama, the number of defendants charged across those cases increased even more rapidly, by nearly 55 percent (from fewer than ten defendants per year, on average, between 1996 and 2001, to 15 defendants per year since 2009).

Moreover, many of these multi-defendant cases included charges against corporate defendants. For example, in 2012, in *U.S. v. Kolon Industries*, No. 3:12-cr-137 (E.D. Va.), the DOJ obtained an indictment charging South Korean company Kolon Industries, and five Kolon executives, with conspiring to steal trade secrets regarding DuPont's Kevlar technology. Kolon Industries ultimately pleaded guilty to the conspiracy in April 2015, and was sentenced to pay $85 million in criminal fines and $275 million in restitution to DuPont.

Increasing focus on foreign nationals. Second, an increasing percentage of indictments under the EEA involved foreign nationals stealing trade secrets from U.S. companies and attempting to transport the information to companies overseas. Just 45 percent of the federal trade secret cases filed in 2009 involved a defendant providing the stolen trade secrets to a foreign entity. By 2015, on the other hand, the beneficiary of the stolen trade secrets was a foreign company in over 83 percent of cases. In addition, in the overwhelming majority of these cases (71percent), the individuals and companies involved were Chinese. For example, as recently as 2016, prosecutors in *U.S. v. Yu Xue*, 2:16-cr-00022 (E.D. Pa.) charged GlaxoSmithKline plc (GSK) research scientists Yu Xue and Lucy Xi, along with three other Chinese nationals, with theft of trade secrets relating to the manufacturing process for various cancer treatment drugs GSK was developing. Xue and Xi allegedly provided the trade secrets to the other defendants, who worked for the Chinese startup Renopharma, which provides contract research services for early drug discovery. According to the indictment, Xue had an ownership interest in Renopharma, and hoped the company would profit from GSK's proprietary information.

The government's trend toward focusing its efforts on cases involving foreign nationals, while notable, is not surprising. After all, as discussed above, DOJ explicitly specifies that a key factor when deciding whether to bring charges under the EEA is ''the scope of the criminal activity, including evidence of involvement by a foreign government, foreign agent, or foreign instrumentality.'' USAM § 9-59:100.

Greater role of Main Justice. Third, the last eight years also saw DOJ's headquarters' component in Washington, DC (often referred to as ''Main Justice'') taking a more active role in criminal trade secret prosecutions. During President Obama's second term, the Criminal Division's Computer Crime and Intellectual Property Section and the National Security Division's Counterintelligence and Export Control Section of Main Justice assisted U.S. Attorney's Offices or took leading roles in the prosecution of more than 30 percent of EEA cases. In comparison, Main Justice was involved in only 20 percent of federal trade secret prosecutions between 2009 and 2012. Main Justice's increased participation in recent EEA prosecutions appears to go hand-in-hand with the increase in cases involving foreign nationals, with Main Justice more likely to be involved when the theft of trade secrets involved foreign actors.

Increased emphasis on protecting military secrets. Finally, particularly in the last four years of the Obama Administration, the government increased its focus on prosecuting theft of trade secrets from U.S. defense contractors and companies whose products have military applications. Since 2011, at least 11 EEA cases involving defense technology were filed, and Main Justice took an active role in prosecuting more than half of them. For example, in 2015, in *U.S. v. Wei Pang*, No. 15-cr-00106, the U.S. Attorney's Office for the Northern District of California charged six Chinese nationals with economic espionage for their role in stealing from their U.S. employers proprietary information about the companies' ''film bulk acoustic resonator'' (FBAR) technology, which has applications in military communications. The defendants allegedly provided the stolen in-

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formation to a Chinese state-owned university, which used the information to obtain military contracts. A May 19, 2015 DOJ press release announcing the charges notes that combatting such ''complex foreign-government sponsored schemes'' remains a top priority, as the theft of sensitive technology ''undercut[s] our national security.'' Press Release, DEP'T OF JUSTICE, *Chinese Professors Among Six Defendants Charged with Economic Espionage and Theft of Trade Secrets for Benefit of People's Republic of China* (May 19, 2015). This focus on protecting sensitive military technology is consistent with the U.S. Attorneys' Manual, which identifies the ''type of trade secret misappropriated'' as one of the discretionary factors to be considered when prosecutors are deciding whether to initiate a prosecution under the EEA. USAM § 9-59:100.

Trade Secret Enforcement Under the Trump Administration Given the expansion of criminal trade secret prosecutions by President Obama's DOJ, what can we expect from President Trump? Evidence suggests that the new administration will take an equally, if not even more, aggressive approach to protecting intellectual property, particularly from foreign parties.

First, when campaigning, Trump signaled that his administration would ''adopt a zero tolerance policy on intellectual property theft,'' ''enforce stronger protections against Chinese hackers,'' and take ''swift, robust and unequivocal'' action in response to the theft of trade secrets. DONALD J. TRUMP FOR PRESIDENT, INC., *Trump: Reforming the U.S.-China Trade Relationship to Make America Great Again* (Nov. 10, 2015). While campaign rhetoric is no ironclad commitment, it definitely holds predictive weight, particularly given the President-elect's strong campaign statements about aggressively protecting American interests.

Second, as discussed above, theft of trade secrets by Chinese nationals has been a significant issue in recent years. This issue is unlikely to disappear any time soon, as is evidenced by the charges announced by DOJ, on Dec. 27, 2016, against three Chinese nationals who hacked U.S. law firms in order to profit from non-public information on pending client mergers. Press Release, DEP'T OF JUSTICE, *Manhattan U.S. Attorney Announces Arrest of Macau Resident and Unsealing of Charges against Three Individuals for Insider Trading Based on Information Hacked from Prominent U.S. Law Firms* (Dec. 27, 2016). Given Trump's focus on the U.S. trade deficit with China, it can be assumed that he will continue to demand that Chinese nationals who manipulate that trade relationship by stealing trade secrets be held accountable for their actions. As he has stressed, ''If China wants to trade with America, they must agree to stop stealing and to play by the rules.'' DONALD J. TRUMP FOR PRESIDENT, INC., *Trump: Reforming the U.S.-China Trade Relationship to Make America Great Again* (Nov. 10, 2015).

Finally, Trump's selection of Jeff Sessions for Attorney General further suggests that DOJ will continue to focus on the EEA. In his prior role as Senator, Sessions co-sponsored the Federal Defend Trade Secrets Act, which became law in 2016. The statute creates a federal civil remedy for theft of trade secrets, in addition to the already-existing criminal penalties under the EEA.

In conclusion, it is still too early to discern precisely what direction the Trump administration will take in the investigation and prosecution of criminal trade secret offenses. But the preliminary signs are that companies should continue to expect DOJ to respond vigorously to concerns regarding economic espionage. Conversely, companies—especially multi-nationals or companies with strong overseas ties—should also be ready to respond to government scrutiny when questions arise regarding the provenance of trade secrets.