

U.S. Senate Passes Defend Trade Secrets Act

April 5, 2016

Public Policy & Government Affairs

On Monday, April 4, 2016, the U.S. Senate passed the Defend Trade Secrets Act of 2016 (the “DTSA,” S. 1890), as amended, by a unanimous vote of 87-0. S. 1890 was introduced by Senators Orrin Hatch (R-UT) and Chris Coons (D-DE), and supported by 65 cosponsors. Companion legislation in the U.S. House of Representatives (H.R. 3326) has been introduced by Representatives Doug Collins (R-GA) and Jerrold Nadler (D-NY), and it is already supported by 128 bipartisan cosponsors.

The DTSA would amend the Economic Espionage Act of 1996 (“EEA”) to create a federal civil claim and remedy for trade secret misappropriation. Currently, while owners of patents, copyrights, and trademarks can enforce their rights under federal law, trade secret owners must rely on an array of state laws to protect their rights when their know-how is stolen. The DTSA would modernize trade secret protection by creating a unified, consistent body of law nationwide, without displacing existing state laws.

The DTSA uses the EEA’s definition of a “trade secret,” defines “misappropriation” consistently with the Uniform Trade Secrets Act (“UTSA”) already adopted by almost every state, and mirrors the UTSA’s statute of limitations and remedies provisions. In addition to providing federal court jurisdiction and streamlining the discovery and subpoena process in multi-jurisdictional cases, the DTSA provides expedited relief on an ex parte basis in “extraordinary” circumstances. By allowing a limited seizure of the allegedly stolen trade secret from a party accused of misappropriation, the DTSA facilitates the immediate, cross-jurisdictional action often necessary to prevent destruction or dissemination of stolen trade secrets.

The seizure provision of the DTSA contains a number of checks to ensure it is not abused. Among other requirements, seizure applicants must demonstrate a likelihood of success in showing that the information is a trade secret and that it has been misappropriated; that the defendant would not comply with an injunction or similar court order; that immediate and irreparable injury would occur without the seizure order; and that the potential harm to the applicant outweighs the interests of the defendant and any harm to third-parties.

Seizure orders themselves are also subject to a number of requirements. Courts must provide for the narrowest seizure necessary, minimize interruption to the legitimate business operations of the defendant and third-parties, set a hearing date within seven days, provide guidance to law enforcement conducting the seizure, and protect seized property from disclosure.

The DTSA includes a cause of action for any party damaged by a wrongful or excessive seizure, and courts must require seizure applicants to post security before the court issues a seizure order. Finally, the DTSA contains important provisions requiring courts to comply with applicable state laws prohibiting restraints on employment, and providing immunity for confidential disclosure of trade secrets in judicial proceedings.

Covington represents the Protect Trade Secrets Coalition, a cross-industry group of leading American companies working in support of a federal civil remedy for trade secret theft. The coalition includes innovative businesses in a wide range of industries, including biotech, software, semiconductors, consumer goods, medical devices, automobiles, aerospace, and agriculture. The legislation is also supported by a number of other corporations and several trade associations and industry groups, including the U.S. Chamber of Commerce; the National Association of Manufacturers; BSA The Software Alliance; the Information Technology Industry Council; the Alliance of Automobile Manufacturers; the Association of Global Automakers; the Internet Commerce Coalition; the New England Council; the Semiconductor Industry Association; the Software and Information Industry Association; and the Telecommunications Industry Association.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Trade Secrets practice group:

Richard Hertling	+1 202 662 5669	rhertling@cov.com
Layth Elhassani	+1 202 662 5063	lehassani@cov.com
Daniel Spiegel	+1 202 662 5347	dspiegel@cov.com
Kurt Calia	+1 650 632 4717	kcalia@cov.com
Richard Shea	+1 202 662 5599	rshea@cov.com
Dan Johnson	+1 202 662 5224	dejohnson@cov.com
Richard Rainey	+1 202 662 5565	rrainey@cov.com

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