

CLIENT ALERT

Congress Increases Criminal Penalties for Trade Secrets Theft

Feb.11.2013

For the second time in as many months, Congress has amended the Economic Espionage Act (EEA). Last month, President Obama signed into law the Foreign and Economic Espionage Penalty Enhancement Act of 2012. As the name suggests, the new law enhances the EEA's criminal penalties in response to a marked increase in international trade secret misappropriation and the widespread perception that the existing penalties were not sufficient.

As amended, the maximum fine for individual perpetrators is increased from \$500,000 to \$5,000,000. The new penalty for organizations is somewhat more complex. The maximum fine is changed from simply \$10,000,000 to "the greater of \$10,000,000 or 3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided."

The U.S. Sentencing Commission is also directed to review—and authorized to amend—the federal sentencing guidelines to reflect Congress' intent that trade secret theft and economic espionage be penalized in a manner that reflects the seriousness of those offenses. The Commission is directed to "consider whether additional enhancements in the Federal sentencing guidelines and policy statements are appropriate to account for" crimes under the EEA. Accordingly, this new law may not simply increase the maximum statutory penalty; it may ultimately result in harsher penalties throughout the range of fines. The Commission is given 180 days to finish its review.

These sentencing enhancements were proposed as early as March 2011 by an Obama Administration white paper. The House Judiciary Committee later endorsed the idea in a July 2012 report, warning that "U.S. businesses are increasingly targeted for and vulnerable to the theft of their intellectual capital." The new law, it said, "responds to the significant and persistent threat of foreign economic espionage" by "increasing the costs of doing business" for perpetrators.

This is only the latest expansion of the EEA. In late December, the President signed the Theft of Trade Secrets Clarification Act of 2012. That law brought service-related trade secret theft within the EEA's coverage and relaxed the Act's interstate or foreign commerce requirement. Crowell & Moring summarized that development here.

There is also speculation that these amendments are steps on the path toward creating a private cause of action under the EEA. Such a bill, the Protecting American Trade Secrets and Innovation Act of 2012, was introduced in the Senate this past July but was never taken up by the Judiciary Committee. Crowell & Moring summarized that development here.

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