

CLIENT ALERT

Congress Broadens Federal Criminal Trade Secrets Statute

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On December 18, 2012, Congress approved an amendment to the Economic Espionage Act (EEA) to cover service-related trade secrets and relax the interstate-commerce jurisdictional requirement. President Obama is expected to sign the amendment into law without delay.

The amendment was in direct response to the Second Circuit's restrictive interpretation of the EEA earlier this year in *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012). Defendant Sergey Aleynikov, a former employee of a major financial services firm, had been indicted and convicted by the trial court for stealing source code for financial services firm's proprietary software for its high frequency trading program. The Second Circuit reversed the conviction, holding that the theft of the source code did not state an offense under the EEA because the source code was not, as required by the statute, "related to or included in a *product* that is *produced for or placed in* interstate or foreign commerce." 18 U.S.C. § 1832(a) (emphasis added). The court took the view that because the high frequency trading program, "was not designed to enter or pass in commerce, or to make something that does," the theft of source code relating to that system was not an offence under the EEA. *Id.* The decision was widely criticized as contrary to the purposes of the EEA and at odds with the avowed federal policy to enhance trade secret protection and criminal enforcement.

The amendment just approved by Congress expands liability in two ways. First, the amendment criminalizes the theft of service-related trade secrets, regardless of whether they are related to a physical product offered for sale. Specifically, the EEA now covers trade secrets "related to a product *or service*" and thereby closes the loop on the exception the Second Circuit relied upon in the Aleynikov matter.

Second, the amendment relaxes the language of the statute's interstate or foreign commerce requirement. Prior to the Amendment, the EEA required that the product to which the trade secret related must be "produced for" or "placed in" interstate or foreign commerce. The amendment changes that language to require merely that the product or service to which the trade secret relates be "used in" or "intended for use in" interstate or foreign commerce.

The upshot is that it is now crystal clear that the EEA covers software-related and other trade secrets developed and used solely within a company if they are used in any way to facilitate the sale of products or services. The federal jurisdictional hurdle, which was rather low to begin with, is now even lower, which broadens the universe of criminal trade secrets cases to which federal law may apply. As before, companies committed to aggressively protecting their trade secrets should consider criminal prosecution as a potential weapon in that war, and weigh the merits of seeking to initiate federal criminal proceedings under the EEA when valuable trade secrets have been compromised. By virtue of the amendments, that weapon could now be available in a broader set of cases.

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