Updates
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Criminal Trade Secret Prosecutions Under Trump—One Year Later

In early January 2017, just weeks before Donald Trump was to take the helm as the President of the United States, we assessed the government's efforts to protect against the persistent financial and strategic threat posed by the theft of valuable intellectual property from U.S. companies by foreign agents and others. As part of that assessment, we discussed the steps taken by the U.S. Department of Justice (DOJ) during the Obama administration to protect trade secrets, steps that resulted in a significant increase in criminal trade secret prosecutions under the Economic Espionage Act (EEA) of 1996. We also attempted to predict the trajectory of criminal trade secret enforcement under the Trump administration. Now, approximately 16 months later, we are better positioned to assess the Trump administration's law enforcement priorities regarding intellectual property protection, and forecast the future of the DOJ's trade secret investigations and prosecutions.

Where We Were

Last year, we addressed the EEA, which 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 the beneficiary ("trade secret theft").

When we reviewed historical EEA prosecutions, we found that the government had brought approximately 96 criminal trade secret cases in the 13 years between 1996, the year the EEA was enacted, and January 20, 2009, when Barack Obama took office. This represents an average of 7.2 cases per year.

In contrast, during the eight years of the Obama administration, the government brought approximately 69 criminal trade secret cases (an average of 8.6 cases per year), almost a 20% increase over the former period. The increased rate of prosecutions under the Obama administration indicated certain key trends.

First, under the Obama administration, the DOJ prosecuted cases on a larger scale than in years prior. These prosecutions involved multiple defendants who were purported to have engaged in wide-ranging conspiracies to steal trade secrets.

Second, a significant number of cases involved foreign nationals and entities. For example, 45% of the federal trade secret cases filed in 2009 involved a defendant who allegedly provided or intended to provide stolen trade secrets to a foreign entity. By 2015, this percentage had risen to over 83%.

Third, concurrent with the increased scale of the government's prosecutions, we found that attorneys from DOJ components (e.g., the Computer Crime and Intellectual Property Section) appeared to be serving greater roles in cases—either as lead prosecutors or as co-counsel with their U.S. Attorney's Office (USAO) counterparts. For example, DOJ attorneys were involved in approximately 20% of trade secret prosecutions between 2009 and 2012; that number increased to more than 30% under the Obama administration.

Finally, prosecutions involving trade secrets stolen from U.S. defense contractors, as well as other companies whose products had military applications, were on the rise.

Where We Are

During the 2016 presidential campaign, the Trump team issued a policy paper declaring that under (soon-to-be) President Trump's U.S.–China trade plan, the United States would "adopt a zero tolerance policy on intellectual property theft," and "[i]f China wants to trade with America, they must agree to stop stealing and to play by the rules."

Publicly available information indicates that, during the first year of the Trump administration, the DOJ continued the Obama administration's increased levels of trade secret prosecutions, charging approximately nine new EEA cases. These prosecutions—against individuals as opposed to corporate defendants—reflected a continued pattern of prosecuting trade secret cases involving foreign nationals and interests, as well as national security concerns.

A Foreign Focus. A significant number of criminal trade secret prosecutions brought during the Trump administration's first year reflected a focus on preventing foreign interference in U.S. intellectual property rights. In six of the nine cases, either the defendants were foreign nationals, or the intended beneficiary of the theft was purported to be a foreign entity or individual, or both. For example, in *United States v. Yingzhuo,* CR:17-247 (W.D. Pa.), three Chinese nationals were indicted for computer hacking, theft of trade secrets, conspiracy and identity theft. Their scheme allegedly was directed toward victimizing and exploiting the employees and computers of U.S. and foreign companies involved in the financial, engineering and technology industries, and it resulted in the theft of hundreds of gigabytes of data regarding the housing finance, energy, technology, transportation, construction, land survey and agricultural sectors.

Other prosecutions involved individuals allegedly attempting to aid Chinese entities. For example, in *United States v. Chen,* CR:17-603 (N.D. Cal.), four defendants were charged with conspiring to steal technology used to support the high-volume manufacturing of semiconductor wafers to be used in lighting and electronic devices. The technology was stolen for use by a competing company based in both the United States and China. Similarly, in *United States v. O'Rourke,* CR:17-495 (N.D. Ill.), the defendant, who worked as a metallurgist and quality assurance manager at a manufacturer of cast iron products, was charged with stealing proprietary data from his former employer after accepting a position with a rival firm in China.

National Security Interests. During the first year of the Trump administration, the DOJ continued to bring prosecutions involving efforts to misappropriate trade secrets related to national security. For example, in *United States v. Shi,* CR:17-110 (D.D.C.), seven defendants were charged with conspiring to steal trade secrets from a U.S. company to benefit a company in China engaged in the manufacture of a high-performance product for dual military and civilian uses. The Chinese company allegedly intended to sell the product, a syntactic foam, to military and civilian state-owned enterprises in China to advance China's national goal of developing its marine engineering industry.

Where We Are Going

Although the DOJ kept pace with the Obama administration's annual EEA prosecution rates during the first 12 months of the Trump administration, there is reason to suspect that the foreseeable future may reflect a less vigorous approach. First, given the complexity and length of time frequently necessary to investigate trade secret thefts, it is likely that many of the prosecutions brought during the Trump administration's first year resulted from investigations well underway during the prior administration. As such, the first year's numbers may not accurately reflect the DOJ's present ability and commitment to prosecute EEA violations. This concern is bolstered in part by the DOJ's apparent charging of only one EEA case in the first four months of the Trump administration's second year. As described below, there are several factors that may have an impact (positively and negatively) on the government's ability to prosecute EEA cases, at least for the near term.

Ongoing Transition Period. More than a year into the Trump administration, there are still numerous vacancies in senior leadership positions within the DOJ and USAOs. There a number of "acting" section chiefs at the DOJ, as permanent chiefs have not yet been selected for crucial roles. For example, the DOJ has yet to fill the position of Chief of the Criminal Fraud Section, a seat formerly held by Andrew Weissmann until his departure to join Robert Mueller's Special Counsel team. That vacancy, for one, can be expected to remain open until an Assistant Attorney General in charge of the Criminal Division has been installed. There has been a similar sluggishness regarding the confirmation of U.S. Attorneys, as almost one-third of USAOs are currently led by acting or interim U.S. Attorneys. This lack of permanent senior leadership may hinder the government's ability to focus and coordinate resources toward the protection of U.S. intellectual property against theft.

New Priorities. Similarly, criminal trade secret prosecutions may decrease as a result of the DOJ's apparent deprioritizing of white-collar criminal cases in general. Statistics indicate that federal prosecutions of white-collar crime, such as violations of the EEA, have declined steadily since April 2011. Moreover, in April 2017, in his remarks at the Ethics and Compliance Initiative Annual Conference, Attorney General Jeff Sessions focused a significant portion of his speech on the need to both "restore a lawful system of immigration" and "disrupt the transnational cartels, gangs and human traffickers that are bringing drugs and violence into our communities." Sessions also called for the DOJ to "re-double [its] efforts to combat violent crime."

The focus on immigration and violent crime in Attorney General Sessions' remarks was far from puffery: according to Immigration and Customs Enforcement (ICE) statistics, ICE made more than 143,000 administrative arrests in 2017. Of the more than 226,000 people removed from the United States that year, 36% of the removals resulted from or involved ICE arrests, an increase of roughly 9% from 2016.

New Approach. In addition to deprioritizing the prosecution of white-collar crime, the DOJ appears to have taken a more pro-business approach to law enforcement. For example, in his April 2017 conference remarks, Attorney General Sessions emphasized that the DOJ needed to strike a new balance between the prosecution of individuals and corporations for misconduct: "A company cannot be a guarantor that any of its perhaps thousands of employees never do something wrong." Further, Sessions stated, "we do not need to have good companies trying to run a good ship be subjected often to millions of dollars of lawsuits or criminal penalties beyond a rational basis because one person went awry or one division chief went awry."

Similarly, in May of this year, during his remarks at the New York City Bar White Collar Crime Institute, Deputy Attorney General Rod Rosenstein expressed concerns over the lack of coordination among law enforcement agencies, which had resulted in "piling on" against corporate defendants in regulated industries. Rosenstein noted that defendants in such industries are often assessed multiple large fines for the same conduct, and that such an approach "can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement." Thus, even when prosecuting criminal trade secret theft cases, it is likely that the DOJ will seek to create an environment where businesses are not unduly punished and "piled on" for the misdeeds of their employees. Whether this will result in fewer prosecutions or lower fines under the EEA remains to be seen, however.

Collective Knowledge. While several factors may negatively impact the DOJ's continued vigor in pursuing indictments under the EEA, the growing collective knowledge of prosecutors and companies in preparing for and responding to trade secret thefts may serve as a counterbalance. The DOJ has undertaken extensive efforts to train federal prosecutors and agents on the identification, investigation and prosecution of trade secret cases. This has enabled the government to pursue cases based on EEA violations more efficiently. In addition, as more trade secret cases have been prosecuted, federal prosecutors have become more comfortable investigating and prosecuting such offenses, which can be complex, highly technical and unwieldy to the uninitiated.

Likewise, through targeted outreach, experience, and successful prosecutions, U.S. companies are becoming increasingly aware that they can and should report being victims of intellectual property theft to law enforcement authorities. U.S. companies are also increasingly realizing that prosecutors and agents are sensitive to the importance of protecting the identities of the victims of trade secret theft and maintaining the secrecy of proprietary information throughout the investigation and litigation of cases. Furthermore, greater experience and new technologies have helped companies identify and respond to trade secret thefts (e.g., employing behavioral analytics, network access and monitoring protocols, along with prompt retention of experienced outside counsel).

Other Tools to Prosecute Trade Secret Theft. In addition to relying on the EEA to prosecute trade secret thefts, the DOJ has shown increasing creativity in employing other federal statutes to charge defendants involved in intellectual property theft. For example, in February 2018, in *United States v. Rafatnejad*, CR:18-94 (S.D.N.Y.), eight Iranian nationals were charged with multiple counts of wire and computer fraud and aggravated identity theft for their purported role in massive cyber intrusions into the computer systems of approximately 144 U.S. universities, as well as at least 176 universities located in 21 foreign countries.

Similarly, the DOJ relied on a non-EEA offense as the means for prosecution in *United States v. Mandil*, CR:17-375 (D.N.J.). In *Mandil*, the defendant was charged with wire fraud for purportedly selling proprietary information to a competitor that he had stolen from his employer. The defendant allegedly claimed he could provide, for a fee, access to a password-protected cloud-based computing account in which his employer's information was stored. These cases are anecdotal examples of the DOJ's capability to prosecute the theft of proprietary information through avenues other than the EEA and that evasion of EEA charges does not provide potential defendants with a safe harbor.

In sum, during the first year of the Trump administration, the DOJ continued the Obama administration's focus on protecting U.S. intellectual property interests by investigating and prosecuting trade secret cases, especially those involving foreign interference and national security concerns. However, changing priorities, including a focus on violent crime and immigration matters, may negatively impact the DOJ's resources for and commitment to future trade secret prosecutions in the foreseeable future. That said, federal prosecutors' growing experience with EEA cases, as well as greater cooperation from the victims of trade secret theft, may serve to counteract shifting priorities, limited resources and leadership vacuums within the DOJ. As shown above, many factors, ranging from high-level policy concerns to granular influences such as prosecutorial expertise, may affect the number of criminal cases brought by the DOJ under the EEA. This complexity makes it difficult to predict future DOJ activity with exactness, but both victims and perpetrators of trade secret theft should expect, at a minimum, continued government interest in protecting U.S. intellectual property interests through the EEA and related prosecutions, and they should prepare themselves accordingly.

A version of this update was originally published in *Law360* on May 31, 2018, as "Criminal Trade Secret Prosecutions Under Trump So Far."

Authors

Barak Cohen

Partner
BCohen@perkinscoie.com 202.654.6337

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