

## Obama Administration Trade Secret Report Raises Important IP, Business, and Securities Issues

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The Obama Administration's recent "Strategy on Mitigating the Theft of U.S. Trade Secrets" makes clear the importance for businesses to be aware of and understand the international threats to their intellectual property, the sources of such threats, and the reinvigorated federal means with which to protect trade secrets. As set forth in the report, the Administration's strategy is geared toward maintaining a strong economy and enhancing national security. Still, some of the Administration's recommendations could have unintended consequences that affect the standard of reasonableness for trade secret protection, and may raise questions about adequate disclosure of trade secret issues in public and private securities documents.

The Administration's strategy to protect American trade secrets is five-fold:

- Use diplomacy to encourage protection of intellectual property abroad;
- Work with private domestic industries to develop best practices for protecting trade secrets;
- Enhance domestic law enforcement in connection with intellectual property theft;
- Improve domestic intellectual property legislation, and;
- Educate the public on the importance of protecting intellectual property.

**Diplomatic Focus on Intellectual Property Protection Abroad.** The Administration's first step in implementing its strategy is to coordinate federal agencies in their engagement of the United States' trading partners. These agencies include the Departments of Commerce, Defense, Justice, Homeland Security, State, Treasury, and the Office of the U.S. Trade Representative. Each agency will make it a priority to address with the highest levels of foreign governments the Administration's focus on intellectual property protection.

The Administration also plans to employ a number of "trade policy tools" to increase international enforcement against trade secret theft, including deeper cooperation with trading partners, targeting weaknesses in trade secret protection through special interagency processes, seeking provisions on intellectual property protection in trade negotiations such as the Trans-Pacific Partnership, and raising trade secret protection as a priority in all appropriate trade discussions.

Finally, the Administration will work with international law enforcement through formal cooperative agreements and encourage and train foreign law enforcement to strengthen international enforcement efforts.

**Best Practices for Protecting Intellectual Property at Home.** Because of advancing technology, increased mobility, globalization and the internet, trade secret theft has become both easier and more difficult to detect. Thus, the Administration will encourage companies to consider sharing with each other their best practices for avoiding trade secret theft from a host of vulnerabilities.

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The Administration urges a holistic approach, and will assist companies in the development of best practices in research and development compartmentalization, information security policies, physical security policies, and human resources policies, among others. Though the Administration emphasized that its promotion of best practices should not be construed to raise the bar for what constitutes reasonable measures to protect trade secrets, this may not be the case in practice.

Consequently, it is critical for businesses to pay close attention to any relevant government or industry approved best practices in order to ensure that whatever measures are in place to maintain the secrecy of trade secrets are reasonable.

**Enhanced Law Enforcement Efforts to Protect Intellectual Property.** Since 2010, federal investigations into intellectual property theft have markedly increased. As such, the Administration, through the Department of Justice and the FBI, will continue to prioritize investigations and prosecutions for intellectual property theft, including efforts to fight computer hacking and cyber-attacks.

To enhance these efforts, the Office of the Director of National Intelligence will work with the private sector to identify and prevent theft of trade secrets and to educate private industry on the main threats of economic espionage. In particular, the Administration has identified the following sectors as especially important: defense contractors, universities, hospitals, high science companies, and emerging technology firms.

Accordingly, businesses in these sectors should be attuned to the threat of intellectual property theft and the federal resources available to curb the threat. Though not addressed in the Administration's strategy, law enforcement efforts may not necessarily be restricted to those that are responsible for misappropriating U.S. trade secrets.

The Securities and Exchange Commission has taken a firm position on the importance of cybersecurity and has used its enforcement powers to pressure public companies to disclose both the risk of cybersecurity breaches and actual instances of cybersecurity breaches. Even when not disclosed directly, such breaches, according to the SEC, may require recognition of impaired assets and reductions in future cash flows, and could have a broad impact on a company's bottom line and financial statements. Thus, public companies must be aware of the risk that trade secret misappropriation has on their public disclosures and the ever-present possibility of an SEC enforcement action or investigation.

**Improving Intellectual Property Protection through Legislation.** In response to a 2011 review of existing federal intellectual property laws, the Administration took action to increase criminal penalties for economic espionage and trade secret theft, and closed loopholes relating to computer source code.

The Administration said it plans to continue its review of existing laws to ensure maximum protection for U.S. intellectual property. This review will be coordinated through the U.S. Intellectual Property Enforcement Coordinator, which will make legislative recommendations by mid-2013.

Stay tuned for further updates in intellectual property legislation, particularly the possible federalization of trade secret law.

**Increasing Public Awareness of Intellectual Property Theft.** Based on its belief that public awareness militates against intellectual property theft, the Administration, through the Department of Commerce, the PTO, and the FBI, will continue education and outreach efforts to encourage the public and other stakeholders to be aware of the harmful

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effects of trade secret misappropriation on the economy and national security.

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