

Management Alert



United States Announces Multifaceted Plan To Combat Trade Secret Theft At Home And Abroad

On Wednesday February 20, 2013, the White House *released* a five-point *plan* (“the Plan”) intended to combat trade secret theft of American trade secrets.

The plan is a collaboration between various federal agencies, including the Departments of Commerce, Defense, Homeland Security, Justice, State, Treasury, the Office of the Director of National Intelligence and the Office of the United States Trade Representative. As a part of the Plan, the Obama administration has pledged to increase diplomatic pressure, consider the possibility of additional legislation, and look to prosecute additional criminal cases in order to combat the theft of trade secrets.

“There are only two categories of companies affected by trade-secret theft: those that know they’ve been compromised and those that don’t know it yet,” Attorney General Eric Holder reportedly said at a White House conference Wednesday *according to the Wall Street Journal*. “A hacker in China can acquire source code from a software company in Virginia without leaving his or her desk,” he further explained.

The release of the Plan follows *allegations* of cyber hacking by the Chinese military, and *hopefully represents* the federal government’s effort to “respond to growing complaints by American companies about the theft of corporate trade secrets by other countries and foreign companies.” It also follows last year’s failed attempt to pass cybersecurity legislation, which culminated recently with President Obama issuing an *Executive Order* on “Improving Critical Infrastructure Cybersecurity.”

The Plan

The Plan’s official unveiling took place at the White House on Wednesday, when Obama administration officials from a variety of federal agencies unveiled a government-wide strategy designed to reduce trade secret theft by hackers, employees, and companies. The plan consists of five main points: (1) focusing diplomatic efforts to protect trade secrets overseas, (2) promoting voluntary best practices by private industry to protect trade secrets, (3) enhancing domestic law enforcement operations, (4) improving domestic legislation, and (5) promoting public awareness and stakeholder outreach.

Diplomatic Efforts

Under the terms of the new plan, the State Department will take advantage of diplomatic meetings between countries in order to provide a platform to stress the importance of preventing theft of trade secrets. The Plan *would* “increase international engagement,” especially with countries which pose a significant threat of theft of trade secrets from American companies.

Industry Best Practices

In conjunction with the United States Intellectual Property Enforcement Coordinator (“IPEC”), the Obama administration also plans to assist private companies in developing industry best practices to protect against trade secret theft. According to the Plan, these best practices “should encompass a holistic approach to protect trade secrets from theft via a wide array of vulnerabilities.” Included are a variety of areas for companies to focus on in the development of best practices, such as research and development, human resources, and information and physical security policies. For some informative recorded webinars on best practices for protecting trade secrets and confidential information, please see our webinars on [Trade Secret Protection Best Practices: Hiring Competitors’ Employees and Protecting the Company When Competitors Hire Yours](#) and [The Anatomy of a Trade Secret Audit](#) and our [Trade Secret Audit](#) materials.

Domestic Law Enforcement Opportunities

Another goal of the plan is to enhance domestic law enforcement opportunities. Under the terms of the Plan, both the FBI and the Department of Justice will continue to prioritize the investigation and prosecution of corporate and state sponsored trade secret theft. Furthermore, the FBI will continue to expand its efforts to fight unauthorized computer access involving the theft of trade secrets. The Office of the Director of National Intelligence (ODNI) will also work to inform the private sector regarding prevention of trade secret theft, informing the private sector of industry specific threats, the types of information targeted, and the methods used to conduct such espionage. At the same time, the Department of Justice and the FBI will continue outreach and investigations to prevent and combat the theft of trade secrets. In December 2012, the Department of Justice released a [“Summary of the Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases.”](#) The report includes the major export enforcement, trade secret theft, economic espionage, and embargo-related criminal prosecutions handled by the United States Department of Justice between January 2007 and December 2012.

Potential New Legislation

The Plan also *includes* “a pledge to study whether new legislation is needed to combat trade secret theft.” This past year, President Obama signed two key pieces of legislation, [The Theft of Trade Secrets Clarification Act](#), and the [Foreign and Economic Espionage Penalty Enhancement Act](#), both of which will assist in the prosecution of trade secret theft. The administration will continue to evaluate current legislation, and will discuss the passage of additional legislation, if it is found to be necessary. The Plan may provide momentum for the [Protecting American Trade Secrets and Innovation Act \(“PATSI”\)](#), which was introduced last year in Congress but did not get out of committee. PATSIA would provide a civil cause of action in federal court for certain trade secret cases. If your company is interested in taking a position on this legislative movement, please contact your Seyfarth Shaw LLP attorney.

Promotion of Public Awareness

Finally, the government will promote public awareness of the growing threat of trade secret theft in the United States in order to mitigate losses. The government will conduct education and outreach through resources like the Department of Commerce’s [www.stopfakes.gov](#), which provides useful information regarding trade secret theft, and how to protect trade secrets in priority markets. The United States Patent and Trademark Office will also provide trainings regarding protection of confidential and trade secret information, and the FBI will continue its current outreach programs.

Impact of the Plan

The Obama administration’s Plan takes a strong stance on the protection of American trade secrets. [According to Robert Hormats](#), the Undersecretary of State for Economic Growth, Energy, and the Environment, the Obama administration’s “message is quite clear: The protection of intellectual property and trade secrets is critical to all intellectual property rights holders, whether they be from the United States or whether they be from Chinese companies or other companies around

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the world.” Attorney General Holder expressed his hope that the Plan would help combat the increasing threat of cyber-espionage, stating that the Justice Department would continue to make prosecution of trade secret theft a top priority. According to Holder, the department plans to bring additional economic cyber-espionage cases as a means of deterring foreign governments from hacking into American company’s networks.

The Plan voices the Obama administration’s displeasure with the theft of trade secrets by foreign governments. Furthermore, the Plan shows how the government can help private companies defend themselves against the sharing of trade secret information, and augment the Department of Justice’s law enforcement efforts. *According to Victoria Espinel*, the White House Intellectual Property Enforcement Coordinator, “[t]rade secret theft can cripple a company’s competitive advantage in foreign markets, diminish export prospects around the globe and put American jobs in jeopardy. The strategy that we are releasing today coordinates and improves U.S. government efforts to protect the innovation that drives the American economy.” Some believe that the Plan may lead to *greater cooperation* between the Department of Justice and US companies.

Whether the Plan will successfully reduce trade secret theft remains to be seen. *Critics have noted* that the Plan continues a number of pre-existing policies, and contains limited details regarding the implementation of new policies. It is also unclear how the Plan fits into the latest initiative by *some activists* to reform the Computer Fraud and Abuse Act. However, regardless of how the details of the Plan play out, it clearly signals that the Obama administration is taking a strong public position against the theft of trade secrets, particularly by foreign governments and companies.

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