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Criminal Prosecution of Trade Secret Theft: The Economic Espionage Act

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THE ECONOMIC ESPIONAGE ACT

- *Economic Espionage Act of 1996*, 18 U.S.C. §§ 1831-1839
- *Theft of Trade Secrets Clarification Act of 2012*, removes limitation in § 1832 prosecutions requiring trade secret incorporation in products produced/placed in commerce to address *U.S. v. Aleynikov*, 676 F. 3d 71 (2d Cir. 2012)
- *Foreign and Economic Espionage Penalty Enhancement Act of 2013* increased fines under § 1831 – up to \$5 million for individuals; up to \$10 million or three times the value of the stolen trade secret for organizations

THE ECONOMIC ESPIONAGE ACT

- 18 U.S.C. § 1831: Economic espionage – trade secret theft to benefit foreign government, or its instrumentality, or agent.
- 18 U.S.C. § 1832: Trade secret theft for economic advantage, whether or not to benefit foreign government, or its instrumentality, or agent.

THE ECONOMIC ESPIONAGE ACT

- 18 U.S.C. § 1839(3) broadly defines trade secret as
 - “all forms and types of financial, business, scientific, technical, economic, or engineering information ... if
 - (A) the owner has taken reasonable measures to keep such information secret, and
 - (B) the information derives independent economic value actual or potential, from not being generally known to, and not being readily ascertainable through proper means by the public.”

THE ECONOMIC ESPIONAGE ACT

- Elements of § 1831 offense:
 - Knowing theft (or conspired or attempted to do so) of information with knowledge that it is proprietary
 - Proprietary information is trade secret
 - Knowledge/intent offense would benefit foreign government, foreign government instrumentality or foreign government agent.

THE ECONOMIC ESPIONAGE ACT

- Elements of § 1832 offense:
 - Knowing theft (or conspired or attempted to do so) of information with knowledge that it is proprietary
 - Proprietary information is trade secret
 - Intent to convert trade secret to economic benefit of anyone other than owner
 - Knowledge or intent to injure owner of trade secret
 - Trade secret relates to product/service for used/intended for use in interstate or foreign commerce

THE ECONOMIC ESPIONAGE ACT

- Provisions to Protect Trade Secrets During Investigation/Prosecution:
 - Court shall enter orders necessary and appropriate to preserve confidentiality of trade secrets during case. 18 U.S.C. § 1835
 - Government may file related civil action for injunctive relief in connection with EEA investigation or case – *e.g.*, to prevent further disclosures of trade secrets during a criminal investigation. 18 U.S.C. § 1836(a)

PENALTIES UNDER THE EEA

- Imprisonment and Fines
 - § 1831 – 15 years and up to \$5 million for an individual and a fine up to greater of \$10 million or three times value of stolen trade secret for an organization
 - § 1832 – 10 years and \$250,000 for individuals, and a fine up to \$5 million for an organization

PENALTIES UNDER THE EEA

- Criminal Forfeiture – Section 1834 – sentencing court:
 - shall order forfeiture of any proceeds or property derived from violations of the EEA, and
 - may order forfeiture of any property used to commit or to facilitate the commission of the crime

PENALTIES UNDER THE EEA

- Restitution – Mandatory restitution “in the full amount of each victim’s losses ...” 18 U.S.C. 3664(f)(1)(A)

EXTRATERRITORIALITY OF THE EEA

- 18 U.S.C. § 1837 provides for extraterritorial application if either
 - The offender is a citizen or permanent resident alien of the U.S., or an organization organized under the laws of the U.S. or a State or political subdivision thereof, or
 - An act in furtherance of the offense was committed in the U.S.

RESOURCES DEDICATED TO EEA ENFORCEMENT

- The FBI has investigative responsibility for complaints under §§ 1831 and 1832.
- 112 Special Agents Assigned to Investigate EEA violations as of September 2014.
- 102 Active FBI Investigations of Trade Secret Theft as of September 2014.
- Approximately 60% increase in investigations 2009-13.

RESOURCES DEDICATED TO EEA ENFORCEMENT

- 30% increase in EEA prosecutions 2012 to 2013.
- 33% increase in EEA prosecutions 2013 to first 9 months of 2014.
- More than half of prosecutions since 2013 have “China” link.

Initiating a Government Investigation

- First, decide whether to go criminal
- - Pros include the gov't does most of the work, has additional tools
- - Cons including loss of control because the gov't doesn't work for the victim

Initiating a Government Investigation

- Second, convince the gov't to investigate
 - - Present as “fully baked” a case as possible
 - - Emphasize key factors such as magnitude, economic sector of interest, foreign beneficiaries

Initiating a Government Investigation

- Third, proactively manage the process
 - - But be careful about tone and approach (see above – gov't doesn't work for the victim)
 - - Consider strategic interplay with civil proceedings
 - - Try to shape the criminal remedies (restitution, forfeiture, asset freezes)

DEPARTMENT OF JUSTICE OVERSIGHT

- 1996 to 2001 – For five years from its enactment, all EEA prosecutions required prior approval from Attorney General, Deputy Attorney General, or Asst. Attorney General of the Criminal Division.
- 2001 to present – prior approval required from Assistant Attorney General, National Security Division, Counterespionage Section to initiate § 1831 prosecutions.
- 2001 to present – no prior approval required to initiate § 1832 prosecution but consultation with DOJ’s Computer Crime and Intellectual Property Section recommended.

Case Study: *DuPont v. Kolon*

- Kevlar® trade secrets
- Competitor Kolon hired former DuPont employees to consult
 - 2009 FBI investigation begins concerning ex-employee Mitchell
 - Expands to include other employees, including Dr. Shultz
- Parallel Civil Trade Secret Case filed in 2009
 - \$919 million verdict in 2011, later vacated and remanded
- Mitchell plead in 2009, Schultz plead in 2014, Kolon plead in 2015
 - \$360 million -- \$275 in restitution; \$85 million criminal fines
- Civil case confidentially settled

Other Recent Economic Espionage Act Cases

- *U.S. v. Liew* – 2014 conviction in N.D. Cal. of selling recipe for DuPont’s titanium dioxide to Chinese state owned entities. 15 year sentence.
- *U.S. v. Wang Dong* – 2014 indictment in W. D. of Pa. against five Chinese army computer hackers who accessed confidential emails and documents of Westinghouse, SolarWorld, U.S. Steel, Alcoa and other companies.
- *U.S. v. Mo Hailong* – 2016 plea in Southern District of Iowa to conspiracy to steal DuPont Pioneer and Monsanto genetically modified seed for Chinese conglomerate.

Other Recent Economic Espionage Act Cases

- *U.S. v. Xu and Xi* – 2016 indictment in the Eastern District of Pa of GlaxoSmithKline scientists for transmitting data on new cancer drug to co-conspirators at Chinese firm.
- *U.S. v. Xi*, – 2015 indictment in Eastern District of Pa of Chair of Temple University physics department for providing superconducting technology to Chinese individuals – charges dropped before trial based on showing that transfers were explained as standard collaborations among scientists at different universities.
- *U.S. v. Chen* – 2014 indictment in Southern District of Ohio of National Weather Service hydrologist and naturalized citizen, case dismissed before trial in 2015.