

## Summary of the Defend Trade Secrets Act of 2016

- The Defend Trade Secrets Act of 2016 (S. 1890, H.R. 3326) amends the Economic Espionage Act of 1996 to create a federal civil remedy for trade secret misappropriation.
- The Act's definition of misappropriation is modeled on the Uniform Trade Secret Act and includes:
  - Acquisition of a trade secret by improper means; and
  - Disclosure or use of a trade secret by a person who (1) had reason to know the trade secret was acquired by improper means or under circumstances giving rise to a duty of secrecy, or (2) before a material change in position, had reason to know that the trade secret was disclosed by accident or mistake.
- The Act provides, in extraordinary circumstances, for expedited relief on an ex parte basis in the form of a seizure of property from the party accused of misappropriation if necessary to prevent destruction of evidence or the propagation or dissemination of the trade secret.
- A seizure order may issue if the applicant can show, among other things:
  - a likelihood of success in showing that the information is a trade secret and the subject misappropriated (or conspired to misappropriate) the trade secret by improper means;
  - the subject would not comply with an injunction;
  - immediate and irreparable injury will occur if a seizure order is not issued;
  - the subject has actual possession of the trade secret and any other property to be seized, and would destroy or make inaccessible those materials if provided notice;
  - the potential harm to the applicant outweighs the legitimate interests of the subject and any harm to third parties; and
  - the applicant has not publicized the requested seizure.
- A seizure order issued by the court must:
  - provide for the narrowest seizure necessary, minimizing interruption to the business operations of third parties and, to the extent possible, the legitimate business operations of the party accused of misappropriating the trade secret;
  - provide guidance to law enforcement regarding the hours during which the seizure may be executed, and whether force may be used to access locked areas;
  - set a hearing at the earliest possible time within seven days after the order is issued, and permit any affected party to move to modify or dissolve the order at any time;
  - protect seized property from disclosure by prohibiting the applicant's access, prohibiting copies, ensuring that any storage media is not connected to a network or the Internet without the parties' consent, and, upon either party's motion, encrypting any seized material; and
  - require the applicant to post a security for the payment of damages to an aggrieved party in case of a wrongful or excessive seizure.
- The court may appoint a neutral technical expert to participate in the seizure if the court finds that it would minimize the burden of the seizure, and may also appoint a special master to locate and isolate trade secret information and to facilitate the return of unrelated property to its owner.

- The Act authorizes equitable remedies and the award of damages consistent with the Uniform Trade Secrets Act, including enhanced damages for willful and malicious misappropriation.
  - Injunctive relief must comply with applicable state laws prohibiting restraints on trade. Courts may not bar a person from entering into an employment relationship, and any conditions on employment must derive from actual evidence of threatened misappropriation.
  - The Act provides immunity for confidential disclosure of a trade secret (1) to a government official or attorney for the purpose of reporting a suspected violation of the law, or as part of a subsequent retaliation claim, and (2) in a complaint or other document filed under seal in a judicial proceeding.
  - The Act includes a cause of action for any party damaged by a wrongful or excessive seizure.
- The Act provides a three-year statute of limitations and original jurisdiction in federal district court, but it does not preempt state law and is not construed as a law pertaining to IP for other purposes.
- The Act requires the Attorney General to submit a biannual report to Congress on the theft of U.S. companies' trade secrets occurring outside the United States, requires the Federal Judicial Center to develop a set of "best practices" for the seizure and storage of information under the Act, and includes a "Sense of Congress" regarding the impact of trade secret theft on the American economy.