

**National Association of Manufacturers
Submission to the European Commission
Directorate General for Internal Market and Services
For Public Consultation on the Protection of
Business and Research Know-How**

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The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing 12,000 small and large manufacturers in every industrial sector and in all 50 states. The NAM has long been a strong supporter of a proactive and aggressive U.S. Government approach to international intellectual property (IP) rights protection and enforcement given the importance that IP has to the development and growth of manufacturing industries throughout the United States and the competitiveness of manufacturers in the global economy.

Manufacturers continue to face a number of substantial challenges in the global market, including persistently weak economies, and a growing number of trade barriers across the globe – both in the form of tariff and non-tariff barriers. One of the most concerning challenges facing manufacturers in the United States is insufficient protection and enforcement of intellectual property (IP) rights – including trade secrets – across the globe.

The NAM welcomes the opportunity to provide these comments to the European Commission as it analyzes current trade secret protections in the European Union.

The Importance of Trade Secret Protection and Enforcement to Manufacturing

IP rights are critical to manufacturing industries, and the protection of those rights assures manufacturers that their inventions will be secure as they create jobs and build industries around them. In the United States, for example, manufacturers rely on a vast array of IP rights – such as trade secrets, patents, copyrights, trademarks, and test data – as an integral part of business both domestically and globally. As the U.S. Department of Commerce found in its April 2012 report, IP-intensive industries accounted for \$775 billion, or 60.7 percent, of total U.S. merchandise exports in 2010.ⁱ

Trade secrets, or confidential business information (CBI), are a key form of IP protection and are vital to the well-being and competitiveness of the manufacturing community. One recent estimate placed the value of trade secrets owned by U.S. publicly traded companies at five trillion dollars.ⁱⁱ Some believe that trade secrets are “arguably the most important and most heavily litigated intellectual property right.”ⁱⁱⁱ

Trade secrets encompass a broad array of valuable assets, including manufacturing processes that are not considered sufficiently inventive to meet the patentability criteria or can consist of specific combinations of innovations, characteristics, and components, each of which by itself is in the public

domain, but where combined in a particular process or design provides a competitive advantage. The strength and competitiveness of firms increasingly depends on their expertise and intangible assets.

Under U.S. law, theft of trade secrets is punishable by fine or imprisonment.^{iv} In the 112th Congress, legislation was enacted to further enhance protections of trade secrets,^v and most recently, in February 2013, the Obama Administration released its [Strategy on Mitigating the Theft of U.S. Trade Secrets](#), which emphasizes the importance of trade secret theft investigations as well as a continued focus on law enforcement efforts combating trade secret theft. While the United States has relatively strong protections domestically, manufacturers are facing new and increasing challenges globally, such as limited protections or inadequate enforcement, theft, and government regulations and government practices requiring unnecessary disclosure of CBI for licensing or marketing approval.

Trade Secret Protections under International Agreements

At the international level, trade secrets are protected generally under Trade Related Aspects of Intellectual Property Rights (TRIPs) in the World Trade Organization (WTO). TRIPs Article 29.2 provides that natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent “in a manner contrary to honest commercial practices”.

In addition, the United States, Canada and Mexico have agreed to strong trade secret protection pursuant to the North American Free Trade Agreement (NAFTA). NAFTA Article 1711(1) requires each country to provide for legal means to prevent trade secrets from being disclosed if the information is secret; has actual or potential value because it is secret; and, the rightholder has taken reasonable steps to keep it secret.

Importance of Developing Stronger Domestic and International Regimes for Trade Secret Protection

The failure of governments around the world to prevent or deter theft of trade secrets, as well as their failure to enforce trade secret protections, pose huge challenges to manufacturers who rely on valuable trade secrets in order to continue innovating and growing in the global market. Many of these government practices are replicated in broader regulatory schemes and may come in the form of indigenous innovation or other localization barriers to trade, non-transparent and discriminatory standards development, non-scientific sanitary and phytosanitary measures, time-consuming and cumbersome government approval processes, and duplicative and unnecessary conformity assessment procedures. NAM members are very concerned as well about increasing foreign government actions to require the disclosure of trade secrets or CBI as a prerequisite for licensing or marketing approval.

As well, NAM members are concerned that some international organizations are supporting the lack of strong protections for trade secrets and other IP rights, with statements and activities that support the disclosure and transfer of trade secrets.

Given these serious challenges to trade secret protection and enforcement, the NAM strongly supports efforts by foreign countries to develop stronger IP regimes domestically and through international agreements. The NAM strongly supports efforts in the Trans-Pacific Partnership (TPP) negotiations to include strong trade secret protections and also believes that such protections should be

a key part of the intellectual property work that the United States and EU will achieve through the Transatlantic Trade and Investment Partnership negotiations that were recently announced.

Conclusion

The protection of trade secrets, like other forms of IP, through strong domestic and international regimes is vital to the spur innovation and manufacturing competitiveness in the United States and beyond. The NAM appreciates the opportunity to submit these comments and looks forward to the working with the EU on trade secret protections both through the U.S.-EU trade negotiations and more broadly.

Endnotes

ⁱ U.S. Department of Commerce, **Intellectual Property and the U.S. Economy: Industries in Focus** (April 2012).

ⁱⁱ See Elizabeth A. Rowe, “Contributory Negligence, Technology, and Trade Secrets,” 17 *George Mason Law Review* (2009), 1.

ⁱⁱⁱ Michael Risch, “Why Do We Have Trade Secrets?,” 11 *Marquette Intellectual Property Law Review* (2007), 1.

^{iv} 18 USC 1832.

^v S. 2642, The Theft of Trade Secrets Clarification Act of 2012, P.L. 112-236 and H.R.6059/S. 678, The Foreign and Economic Espionage Penalty Enhancement Act of 2012, P.L. 112-269.