

## Private Sector's Role In White House Trade Secrets Plan

*Law360, New York (February 21, 2013, 5:53 PM ET)* -- On Feb. 20, the White House announced an administration "Strategy on Mitigating the Theft of U.S. Trade Secrets." The strategy recognizes that economic espionage against the U.S. private sector is "accelerating" and that trade secret theft "threatens American businesses, undermines national security, and places the security of the U.S. economy in jeopardy." The rollout of the strategy, which was accompanied by statements from senior administration officials covering six agencies with economic and security responsibilities, provided a strong signal of the multifaceted nature of the threat and the policy interest across the government in combating the threat.

There are several notable aspects of the strategy's multipronged approach to addressing external and internal threats to trade secret theft. First, the strategy appropriately focuses on the international dimensions of the threat and response. The strategy commits the government to diplomatic efforts, including applying pressure on foreign governments that encourage or condone trade secret theft, building coalitions with like-minded countries, utilizing trade policy tools, and strengthening international law enforcement cooperation and training programs.

The focus on utilizing trade remedies to advance this issue — and in particular the increased focus on trade secret protection in our bilateral and multilateral trade agreements — is a particularly notable and important step in support of U.S. businesses. Much of the rest of the world may prefer to turn the other cheek to industrial espionage, often supported tacitly if not explicitly by government policy; in response, the U.S. government should insist on formalizing the protection of trade secrets in our trade agreements to get our trading partners to adhere to fair and competitive standards for protecting innovation.

Second, the strategy recognizes the government's own limitations and places considerable emphasis on the private sector's role in protecting trade secrets. The administration has implored leading private sector companies to develop and share their best practices, consistent with antitrust laws, to protect their systems and vital assets, including trade secrets. The strategy also commits government agencies, and particularly the U.S. Intellectual Property Enforcement Coordinator, to facilitate private sector efforts to develop and share such voluntary best practices. The administration also has pledged to pursue public awareness and education efforts to attune the private sector to the risks, including by state-sponsored trade secret theft.

The proposals for voluntary industry best practices and information-sharing from the government to the private sector demonstrate the government's expectation that industry has an important role to play in protecting itself from both external and internal threats. The strategy casts the government in the role of helping industry help itself as a complement to government-to-government policy efforts, such as pressuring governments that sponsor or tolerate theft and using trade remedies to protest and deter such government sponsorship.

Third, the strategy sets trade secret theft as a “top priority” for law enforcement, and directs the U.S. Department of Defense and the broader intelligence community to share “threat warning and awareness information” with the private sector (subject to appropriate security clearance requirements).

Fourth, the administration will review existing U.S. laws to determine if legislative changes are necessary to protect against trade secret theft.

The administration’s efforts to combat trade secret theft also are deeply intertwined with efforts to address cybersecurity risk, particularly from state-sponsored actors. Cybersecurity vulnerabilities provide the entry point for hackers operating abroad — acting independently or at the direction of nation-states — to access corporate systems and siphon off valuable intellectual property. Efforts to harden the private sector targets of trade secret theft by improving cybersecurity may help to stem the flow of intellectual property out of the United States. To that end, the best practices and information-sharing the strategy envisions may also overlap with, or at least support, similar measures contemplated in the administration’s Feb. 12 executive order, “Improving Critical Infrastructure Cybersecurity.”

The information-sharing envisioned by the strategy also points to particular areas of opportunities for the private sector in contributing to the government’s response. In addition to sharing best practices between and among private sector partners, the strategy notes several avenues for private sector input, including providing information to the Office of the U.S. Trade Representative about trading partners, participating in discussions with the intelligence community and the FBI about threats that the private sector faces, and participating in public awareness and stakeholder outreach events. Such industry input can assist the government in better understanding the nature and source of threats and in focusing its energies on the most relevant issues, while also sensitizing government officials to private sector concerns about, for example, maintaining the freedom to innovate and receiving efficient assistance when necessary.

The White House has launched an important effort to address a growing economic and national security issue. In doing so, it has made clear to foreign governments, both allies and those that may support trade secret theft, and to individual would-be thieves that the United States is prepared to take strong action to combat exfiltration of intellectual property from within its borders. It is now incumbent upon the government, in partnership with the private sector, to follow through on the initiatives announced on Wednesday and make meaningful progress in protecting the trade secrets of U.S. businesses.

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