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# Insights

## Defend Trade Secrets Act ("DTSA")

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On January 28, 2016, the Senate Judiciary Committee passed out the DTSA; however, Congress will still have to enact the DTSA to make it law. The primary purpose of the DTSA is to provide trade secret owners the option of filing a civil claim for misappropriation in federal court without having to rely on diversity jurisdiction. The DTSA represents an effort to track remedies now available under the Uniform Trade Secret Act ("UTSA"), which 48 states have enacted in one form or another. At the federal level, the DTSA comprises an amendment to the Economic Espionage Act ("EEA").

The DTSA contains several provisions not found in the UTSA. It provides a process for preventative seizure of secrets under extraordinary circumstances. The seizure provisions contain limitations to ensure they are not used indiscriminately. It adopts the definition of a trade secret used in the UTSA; the EEA had used slightly different language to define a trade secret. The DTSA includes provisions designed to protect against use of the doctrine of "inevitable disclosure" to secure an injunction. This doctrine has not been uniformly adopted by states interpreting the UTSA. In its current form, the DTSA allows orders prohibiting threatened misappropriation so long as the order does not prevent an individual from entering an employment relationship. Such orders will need to be conditioned on evidence of threatened misappropriation and not just on the information the individual knows. Last, the DTSA provides immunity against claims arising under nondisclosure obligations for disclosures made in confidence to a government official for reporting a violation of the law or a sealed filing in a lawsuit, e.g. a qui tam proceeding. Notably, the DTSA would require employers to include appropriate notice of such rights in non-disclosure agreements. However, this protection would not provide protection against the employee's improper acts such as cyber crime.

Assuming the DTSA will become law, businesses should remember several things. First, all non-disclosure agreements will have to be amended to include terms complying with the DTSA. Second, for several years, fair consideration will have to go into deciding whether to file a misappropriation claim under the UTSA in state court or the DTSA in federal court. Factors would include the need for seizure rights and/or preliminary injunctions and the need to rely on inevitable disclosure. Consideration should also be given to harmonizing nondisclosure provisions with non-compete provisions in employee agreements and corporate policies.

The looming advent of the DTSA comes in the aftermath of the Supreme Court's Alice Corp. decision greatly restricting the scope of patent eligible subject matter. Now the scope of patent eligible subject matter has been reduced, reliance on trade secrecy to protect unique ways of conducting business should necessarily increase. If so,

prospective reliance on the UTSA and DTSA should also increase. Assuming greater reliance on trade secrecy, it is becoming much more important for organizations to put structure around their "reasonable measures" to protect that secrecy. It seems like an opportune time to review the measures used to protect trade secrets to confirm they remain reasonable under the circumstances.