

Whitehouse-Graham Discussion Draft – July 29, 2013
Summary of Proposals for Discussion

- (1) *Cover government sponsored hacking* – This proposal would clarify that the statute covers instances in which (a) a foreign government agent steals and relays a trade secret to a private company; or (b) a private thief steals a trade secret at the request of a foreign government and relays the stolen trade secret to a private company.

Proposal: Amend § 1831(a) by adding after “agent,” “or intending or knowing that the offense is committed at the request, under the direction, or on behalf of any foreign government, foreign instrumentality, or foreign agent.”.

- (2) *Enhance intervention of interested parties* – This proposal would enhance the opportunity of owners of trade secrets to weigh in on any assessment of the importance of keeping trade secrets confidential.

Proposal: Create a new 18 U.S.C. § 1835(b) “Interested Owners.—The court shall allow an owner of a trade secret at issue in a prosecution under this chapter to file a submission under seal that describes the interest of the owner in a trade secret remaining confidential, and shall consider such submission before issuing an order under subsection (a). The record for an interlocutory appeal brought by the Government shall include the submission made under seal to the court by the owner of the trade secret, and may be supplemented on appeal by a further submission under seal by the owner of the trade secret. No submission under seal made pursuant to this subsection may be entered into evidence in a prosecution.”

- (3) *Clarify that the statute covers trade secret theft accomplished through the use of means or facilities within the United States* – This proposal would ensure that the statute would apply to a hacker whose code passes through American computers but who is never physically present in the United States.

Proposal: Amend 18 U.S.C. § 1837 by adding “(3) an act in furtherance of the offense was committed through means or facilities located in the United States and the offense resulted in an injury to an individual or entity located in the United States.”

- (4) *Clarify definition of “foreign instrumentality”* – This proposal would ensure that companies that are substantially subsidized by foreign government entities fall within the definition of “foreign instrumentality,” and that a foreign entity led by a foreign agent can meet the definition of “foreign instrumentality.”

Proposal: Amend 18 U.S.C. § 1839(1) by adding “subsidized,” after “sponsored,” and adding “or foreign agent” after “government”.

(5) *Cover theft of negotiating positions or strategies* – This proposal would ensure that stealing negotiating positions or strategies (e.g. from a company or its law firm) is covered by the statute.

Proposal: Amend 18 U.S.C. § 1839(3) by adding “strategies, negotiating positions,” after “plans,”.

(6) *Clarify definition of “benefit” to include any conveyance of a trade secret to a foreign government* – This proposal would ensure criminal liability for all the trade secrets the thief knowingly conveys to a foreign government, not just the ones the thief knows will benefit a foreign government.

Proposal: Amend 18 U.S.C. § 1839 by adding “(5) the term ‘benefit any foreign government, foreign instrumentality, or foreign agent,’ shall include the conveyance of any trade secret to any foreign government, foreign instrumentality, or foreign agent.”

(7) *Make Trade Secret Theft a RICO predicate* – This proposal would ensure that RICO tools are available in trade secret and economic espionage investigations.

Proposal: Amend Section 18 U.S.C. § 1961(1) by inserting “sections 1831 and 1832 (relating to economic espionage and theft of trade secrets),” before “section 1951”.