

# Trade Secrets Going Federal

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Yesterday, in an overwhelming 410-2 bipartisan vote, the US House of Representatives passed the [Hatch-Coons Defend Trade Secrets Act](#) (DTSA), which would for the first time federalize trade secrets law and provide uniformity (and hopefully predictability) to what has, until this point, been a patchwork area of law applied disparately among the states. The legislation already passed unanimously in the Senate earlier this month, and President Obama has promised to sign the bill into law.

Many scholars have described the DTSA as the most significant expansion of federal intellectual property law since the 1946 Lanham Act. Trade secrets (think: as its most basic level, Coca-Cola's secret formula) will now become the fourth member of the family of federally-protected intellectual property law, joining patents, copyrights and trademarks.

Up until now, companies typically had to sue in state court under state law to protect their trade secrets. Though most states have adopted some form of the Uniform Trade Secrets Act (New York and Massachusetts are notable exceptions), application of that body of law has been rather inconsistent. The federal DTSA would allow companies to file civil trade secret theft lawsuits and pursue damages in federal courts, which can more ably handle multi-jurisdictional and international cases (e.g., sweeping discovery instruments such as nationwide subpoena power) and complex litigation often involving highly technical facts.

In a statement, Congressman Jerrold Nadler (NY), the lead Democratic cosponsor of the House's companion bill, said:

I was pleased by today's passage of the bipartisan Defend Trade Secrets Act of 2016 by the House of Representatives. In today's digital environment, it has never been easier to transfer trade secrets across the globe with the click of a cell phone, tablet, or computer key. ... Trade secrets are proprietary business information that derive their value from being and remaining secret. This includes secret recipes, software codes and manufacturing processes – information that, if disclosed, could prove ruinous to a company. As the United States economy becomes more and more knowledge- and service-based, trade secrets are increasingly becoming the foundation of businesses across the country, with one estimate placing the value of trade secrets in the U.S. at \$5 trillion.

The Senate's co-sponsors also weighed in on yesterday's House vote. Senator Orrin Hatch (R-Utah) stated: "I'm pleased the House has followed the Senate's lead and passed the Hatch-Coons Defend Trade Secrets Act. Enacting this bill into law will help address the critical problem of trade secret theft, which stifles innovation and costs American companies billions of dollars annually." Senator Chris Coons (D-Del.) stated: "Today's passage of the Defend Trade Secrets Act in the House means that this bill can soon become law and finally provide the critical federal legal protection for trade secrets that U.S. companies deserve in Delaware and across the country."

The DTSA's most noteworthy (though controversial) tool is a provision allowing for *ex parte* seizure orders. In other words, a company can seek to have federal marshals, without notice, seize "property necessary to prevent the propagation or dissemination" of a stolen trade secret. One of the compromises in the final version of the bill, however, was that *ex parte* seizures would only be available in "extraordinary circumstances," such as when a trade secret could be destroyed if the perpetrator had advance notice.

Barring any major White House surprises, the impending enactment of the DTSA provides a great opportunity for companies to create or button up their agreements containing confidentiality, non-disclosure and intellectual property ownership provisions, given the new tools at their disposal aimed at protecting what is often companies' lifeblood: their trade secrets.

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