CLIENT ALERT:

Congress Fixes Loophole In The Economic Espionage Act

To Our Clients and Friends:

On December 28, 2012, President Obama signed the Theft of Trade Secrets Clarification Act of 2012 ("the Act") into law. The Act makes clear that the Economic Espionage Act ("EEA") applies to trade secrets related to products and services developed for a company's own internal use.

This action by Congress is a direct response to the recent decision of the United States Court of Appeals for the Second Circuit in *United States v. Sergei Aleynikov*. Aleynikov was a programmer of high-frequency trading ("HFT") software for Goldman Sachs ("Goldman"). In June, 2009, Aleynikov was preparing to leave his position at Goldman for higher paying work at a competing firm that intended to develop its own HFT platform. On his last day at Goldman, Aleynikov uploaded 500,000 lines of HFT source code from Goldman computers onto a computer server located overseas. Approximately one month later, Aleynikov flew to Chicago to meet with the competitor, carrying with him a laptop and flash drive containing Goldman's source code. He was arrested by the FBI upon his return. Aleynikov was subsequently convicted of violating the EEA and other federal criminal laws in the Southern District of New York. On appeal, however, Aleynikov argued that while the source code was used for trading in markets (and thus were related to interstate commerce), it was nonetheless unrelated to any "product" that was "produced for" or "placed in" commerce as required by the EEA. In a ruling that surprised many observers, the Second Circuit agreed and overturned Aleynikov's conviction, holding, among other things, that for the EEA to apply, the stolen trade secret must be linked to a product or process that is actually available (or being developed) for sale to customers, not merely the company's own internal use. The Goldman HFT platform, on the other hand, was developed exclusively for internal use and therefore unprotected by the EEA.

The *Aleynikov* ruling sent shock waves through the intellectual property community since the most valuable assets of a company exist solely and exclusively in the digital world with increasing frequency. The ruling also casts doubt on the federal government's authority to robustly prosecute the theft of extraordinarily valuable trade secrets. These amendments are a welcome correction to a decision that raised serious questions about the reach of the EEA. The amendments confirm the federal government's vigorous approach to enforcement of intellectual property rights and reinforce the need for companies to evaluate their rights and remedies in cases of past or prospective intellectual property theft. There is still no federal civil cause of action for violations of the EEA. It therefore remains imperative for companies to understand their right to use the criminal justice system to recover their intellectual property where it has been stolen and seek redress from the wrongdoer.

* Please note that this article is for general informational purposes only and should not be construed as legal advice. If you would like more information about the matters discussed in this client alert, please contact DeVore & DeMarco LLP.

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