United States Senate Committee on the Judiciary

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"Protecting Trade Secrets: The Impact of Trade Secret Theft on American Competiveness and Potential Solutions to Remedy this Harm"

Questions for the Record for Karen Cochran

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Questions from Senator Whitehouse

1. In executing a civil seizure order under the Defend Trade Secrets Act ("DTSA"), what degree of force would law enforcement agents be entitled to use? Would law enforcement agents executing the seizure be permitted to knock down doors? Open locked cabinets by force? Should they be authorized to restrain the defendant or sequester staff and employees during the search of a business?

Answer: We see no reason why an execution of a seizure order under the DTSA would require force. As with other statutes enabling private parties to file an application for a seizure, the DTSA orders are carried out by experienced law enforcement officers and cooperation from the subject is routine. In addition, the specificity required by an application under the DTSA ensures that in the rare case of a seizure, an order will be narrowly tailored.

2. Who should be responsible for sorting through the data and electronic devices seized pursuant to a DTSA civil seizure order? Should courts permit the plaintiff who initiated the suit to search through the seized devices to locate stolen trade secret information? Isn't this role best performed by a disinterested third party appointed by the court?

Answer: The DTSA restricts a seizure applicant's ability to view seized material either during or after the seizure. The provisions prohibit copying seized materials. The courts and law enforcement must protect and secure the material from physical and electronic access while it is in the custody of the court. The right approach for reviewing the seized material will vary based on the facts of each case; in some circumstances, this may mean the appointment of a third party or in camera review by the court. Ultimately, we are confident that courts will effectively manage evidence in their custody as they routinely do in cases involving protective orders and other business-sensitive materials.

3. Testimony offered at the hearing indicated that a civil seizure order issued pursuant to the DTSA could not be used to seize data in the cloud because the DTSA requires that the defendant be in possession of the misappropriated trade secret. Do you agree with this assessment? Isn't a civil plaintiff likely to argue that a defendant possesses the data the defendant stores in the cloud? Doesn't the dictionary definition of "possession," which includes ownership or control, support this argument?

4. Are the protections in the DTSA against over-seizure a meaningful constraint? Is a court that has found sufficient evidence to grant a civil seizure order likely to later rule that the seizure was wrongful or excessive? If law enforcement agents executing a civil seizure order over-seize or act wrongfully would the plaintiff be liable for their actions?

Answer for 3 and 4: The DTSA has been drafted with the input of technology companies, cloud service providers, and companies in all industries to address concerns about whether the bill's original language would have permitted seizures of third-party servers. In its present form, we are satisfied that the DTSA does not permit seizures of servers themselves or of data hosted on third-party servers in the cloud.

We are also satisfied the DTSA will neither permit nor lead to over-seizures. First, the DTSA contains a damages provision giving anyone harmed by an excessive or abusive seizure a cause of action with recoverable damages that include lost profits, loss of goodwill, and loss of materials.

Punitive damages and recovery of attorney's fees are available to victims of abusive, bad faith tactics.

Second, the provision's comprehensive requirements and multiple mandatory showings under oath serve to restrict the availability of an order significantly and limit the possibility of reckless or abusive seizures. For example, a person applying for a seizure order must swear under penalty of perjury in written submissions to a federal district court judge to the truth of specific and detailed facts and circumstances. The sworn facts and circumstances first of all must demonstrate to the court's satisfaction that (i) a legitimate trade secret has been misappropriated by a specific person through improper means, (ii) the alleged thief would evade or ignore a traditional restraining order, and in addition, (iii) the thief would move or destroy the trade secret if given notice of the application. The DTSA includes several other mandatory showings, but at a minimum, without these threshold showings, the district court may not issue a seizure order.

The seizure provisions in the DTSA speak not only to potential victims of trade secret theft, but to any parties tempted to use seizure improperly. For that reason, we scrutinized the seizure provisions from two important perspectives—that of a legitimate victim of trade secret theft, and that of a company being victimized by an abusive party. We concluded that the provisions' very strict, rigorous prerequisites and judicial safeguards ensure that civil seizures will likely occur only in rare and entirely justified circumstances. As a result, we are confident that the DTSA is drafted in a way that minimizes that risk by eliminating incentives for abuse; it would be a risky and simply ineffective way for a competitor to attempt to gain an advantage.

5. Should civil seizure under the DTSA be limited to those instances where a defendant is likely to flee the United States? Should more be done to carve out routine employer-employee disputes from the civil seizure provisions of the DTSA?

Answer: Trade secret theft is a serious threat to DuPont and other innovative companies regardless of whether it comes from an employee seeking to take our know-how to a competitor, or a foreign entity seeking to sell our intellectual property to the highest bidder. In both situations, the seizure provision facilitates the immediate action necessary to prevent the value of

our trade secrets from being destroyed. Because the DTSA is focused on intentional misappropriation, seizures may only issue when a court finds that the secret will be imminently moved, hidden, or destroyed if notice is given, and that the subject would not comply with a court order. The legislation is therefore drafted in a way that will not capture ordinary employment matters. But it will provide a critical tool for trade secret owners who face the possibility of losing the value of years of hard work and innovation.

Questions from Senator Klobuchar

1. The Defend Trade Secrets Act allows a party to seek an ex parte order to seize misappropriated trade secrets. Some have expressed concerns that some companies may try to abuse this provision to gain a competitive advantage against their competitors.

- **What provisions in the bill protect against this type of the abuse?**
- **How effective will these provisions be in preventing attempts to misuse this seizure provision?**

Answer: Increasingly, today's trade secret information is created, stored and transferred in portable, electronic forms. Time is of the essence once a trade secret theft has been discovered. To reduce the risk of further trade secret dissemination or the destruction of evidence, a victim of trade secret theft needs assured, direct access to a federal court and the court's power to impose temporary orders that preserve the status quo in special circumstances. In a very small set of circumstances where a traditional *ex parte* temporary restraining order will not suffice, trade secret victims need proactive capabilities to stop or contain a theft in progress. DuPont is satisfied that the civil seizure provisions in the DTSA give victims the tools needed for such extraordinary, rare circumstances.

One would be ill-advised to abuse the DTSA for competitive advantage. For one, it contains a damages provision that provides a cause of action to anyone harmed by an excessive or abusive seizure. The recoverable damages include lost profits, loss of goodwill, and loss of materials.

Punitive damages and recovery of attorney's fees are available to victims of abusive, bad faith tactics.

Second, the provisions' comprehensive requirements and multiple mandatory showings under oath serve to restrict the availability of an order significantly and limit the possibility of reckless or abusive seizures. For example, a person applying for a seizure order must swear under penalty of perjury in written submissions to a federal district court judge to the truth of specific and detailed facts and circumstances. The sworn facts and circumstances must demonstrate to the court's satisfaction that (i) a legitimate trade secret has been misappropriated by a specific person through improper means, (ii) the alleged thief would evade or ignore a traditional restraining order, and in addition, (iii) the thief would move or destroy the trade secret if given notice of the application. These very rigorous pre-requisite showings are just some of several mandatory showings required for judicial findings; but at a minimum, without sufficient evidence to support these mandatory threshold findings, a district court may not issue a seizure order.

The seizure provisions in the DTSA speak not only to potential victims of trade secret theft, but to any parties tempted to use seizure improperly. We scrutinized the seizure provisions from two important perspectives—that of a legitimate victim of local and international trade secret theft, and that of a company being victimized by an abusive party or competitor. We conclude that the provisions' very strict, rigorous prerequisites, judicial safeguards, and damages provision ensure that civil seizures will likely occur only in rare and entirely justified circumstances. As a result, we are confident that the DTSA is drafted in a way that minimizes any risk of abuse by eliminating its very incentives. An abusive applicant's misconduct in seeking a competitive advantage would in all likelihood require perjury, false or deceptive testimony, bad faith, sanction-worthy legal representation, misrepresentations to a federal court, and probable awards of expansive damages, punitive damages, and legal expenses.

2. The focus of most of this hearing is on remedying the harm suffered by companies who are victims of trade secret disclosures.

- **Do you see this legislation as providing benefits to companies even before they lose trade secrets, based on increased certainty that if something goes wrong they can recover?**

- **What are those benefits?**

Answer: Successful innovation requires collaboration and information-sharing among colleagues, co-workers, and in many instances, other companies. More and more, collaborators are interacting from great distances through electronic and digital means. Although some critics argue that stronger trade secret laws promote secrecy, the opposite is true. When we have confidence that our proprietary and trade secret information, which today can be captured *in toto* and carried on portable media in digital form, is protected by reliable and readily available laws and judicial procedures, we can more efficiently and effectively share information both within our company and with partners worldwide. DuPont is proud to invest heavily in research and development to create the next generation of innovative processes, materials, and products. Effective and reliable trade secrets protection allows us to continue this investment with confidence.

With the existing patchwork of state trade secrets laws and jurisdictional hurdles, our abilities to share and collaborate are hampered, both domestically and internationally. At home, the uniformity provided by the DTSA would streamline our compliance efforts and make interstate and global collaboration less risky and more efficient. And for companies like DuPont that do business globally, the DTSA would also provide a model for the rest of the world and enhance our ability to protect our investments in foreign jurisdictions. The DTSA will do more than provide a remedy for victims of misappropriation; it will have an immediate, positive impact on all American companies that create jobs and invest in research and development in the United States.