

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 1378

INTRODUCER: Senator Bradley

SUBJECT: Corporate Espionage

DATE: March 12, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Jones</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 1378 creates the “Eliminating Corporate Espionage in Florida Act” within s. 812.081, F.S.

The bill creates, amends, and reorganizes current definitions in s. 812.081,(1), F.S. The bill amends the current third degree felony related to trade secrets to simplify it and incorporate the definition of “obtains or uses.” The bill specifies that a person who willfully and without authorization, obtains or uses an article representing a trade secret or makes or causes to be made a copy of an article representing a trade secret commits a third degree felony.

The bill also creates a new third degree felony for a person who intentionally receives, buys, or possesses an article representing a trade secret, knowing such trade secret to be obtained or used or copied was without authorization. The bill amends the Criminal Punishment Code (Code) offense severity ranking chart to rank this new crime as a Level 1.

If a person commits the third degree felony offenses described above, the bill reclassifies these crimes to a second degree felony whenever he or she commits the offense with the intent to benefit a foreign government, foreign agent, or other foreign entity against the interest of the state. The bill also specifies that the reclassified offense is ranked one level above the ranking of the offense committed.

It is not a defense to the trade secret offenses that the person returned or intended to return the unlawfully obtained, used, stolen, embezzled, or copied article. The bill amends this provision to include the newly defined term unlawfully “obtained, used.”

A court must order restitution if a person is convicted of violating s. 812.081, F.S., and it must include the value of the benefit derived from the offense. The value of the benefit derived from the offense includes any expenses for research and design and other costs of reproducing the trade secret that the person has avoided by committing the offense.

The bill may have a positive indeterminate (i.e. unquantifiable increase) prison bed impact on the Department of Corrections. See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2021.

## II. Present Situation:

### Trade Secrets

Section 812.081, F.S., defines a “trade secret” as information<sup>1</sup> used in the operation of a business, which provides the business an advantage or an opportunity to obtain an advantage, over those who do not know or use it. The test provided in statute, and adopted by Florida courts,<sup>2</sup> requires that a trade secret be actively protected from loss or public availability to any person not selected by the secret’s owner to have access thereto, and be:

- Secret;
- Of value;
- For use or in use by the business; and
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.<sup>3</sup>

Section 812.081(2), F.S., makes it a third degree felony<sup>4</sup> for a person to deprive or withhold from the owner the control of a trade secret or to intentionally misappropriate a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. It is not a defense, if a person returned or intended to return the article stolen, embezzled, or copied.<sup>5</sup>

### What is Corporate (or Economic) Espionage?

According to the Federal Bureau of Investigation (FBI), historically, economic espionage has targeted defense-related and high-tech industries. But recent FBI cases have shown that no industry, large or small, is immune to the threat. Any company with a proprietary product, process, or idea can be a target; any unprotected trade secret is vulnerable to theft by those who wish to illegally obtain innovations to increase their market share at a victim company’s expense.<sup>6</sup>

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<sup>1</sup> A trade secret may manifest as “any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof” pursuant to s. 812.081(1)(c), F.S.

<sup>2</sup> See, e.g., *Sepro Corp. v. Dep’t. of Env’tl. Prot.*, 839 So. 2d 781 (Fla. 1st DCA 2003).

<sup>3</sup> Section 812.081(1)(c), F.S.

<sup>4</sup> A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>5</sup> Section 812.081(3), F.S.

<sup>6</sup> FBI, What We Investigate, *Counterintelligence, Economic Espionage*, available at <https://www.fbi.gov/investigate/counterintelligence> (last visited March 5, 2021). See also FBI, What We Investigate, *Counterintelligence, Economic Espionage, News, Stories, Trade Secret Theft, Investigation into Theft of Intellectual Property from GE Leads to Two Guilty Pleas*, July 29, 2020, available at <https://www.fbi.gov/news/stories/two-guilty-in-theft-of-trade-secrets-from-ge-072920> (last visited March 5, 2021).

Examples of corporate espionage include:

- A person acting on behalf of himself or herself such as where a dissatisfied employee breaks into company records of his or her employer in order to cause damage to the company; or
- A person acting on behalf of a competitor company, such as where a company hires an employee (or an outside party) to illegally investigate a competitor's business.<sup>7</sup>

Technology-based companies are prone to industrial espionage issues, especially with regards to novel ideas or technology products. For instance, biotechnology companies, software firms, and automobile companies tend to be the target of corporate espionage. Transferring stolen company property or stolen trade secrets can also be considered espionage.<sup>8</sup>

The FBI reports that economic espionage is a problem that costs the American economy hundreds of billions of dollars per year. While it is not a new threat, it is a growing one, and theft attempts by foreign competitors and adversaries are becoming more brazen and varied. These foreign competitors deliberately target economic intelligence in advanced technologies and flourishing U.S. industries.<sup>9</sup>

### **Foreign Influence Uncovered in University Research Programs**

According to a National Institutes of Health (NIH) Advisory Committee report, some foreign governments have initiated systematic programs to unduly influence and capitalize on U.S.-conducted research. Small numbers of scientists have committed serious violations of policies and systems by not disclosing foreign support (i.e., grants), laboratories, or funded faculty positions in other countries. These efforts by foreign governments to obtain a competitive advantage in critical areas of research and innovation at the cost of the research enterprises and those that fund them are few, but serious.<sup>10</sup>

For example, in 2019, four faculty members left the University of Florida (UF) after the university and the National Institutes of Health found possible ties to foreign institutions that may have violated funding and research rules.<sup>11</sup> The NIH first reached out to universities across the nation in August 2018 with a letter that expressed concerns about foreign entities trying to influence U.S. research. The NIH later identified two UF faculty members who may have been connected to foreign entities. Through the university's own assessments, two additional faculty members raised concerns.<sup>12</sup> For example:

- One faculty member ("Faculty 1") had been employed by UF since 1995. In addition to serving as the vice president at a China university since at least 2017, Faculty 1 was the

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<sup>7</sup> LegalMatch, *What is Industrial Espionage?*, available at <https://www.legalmatch.com/law-library/article/industrial-espionage-lawyers.html> (last visited March 5, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> FBI, *What We Investigate, Counterintelligence, Economic Espionage*, available at <https://www.fbi.gov/investigate/counterintelligence> (last visited March 5, 2021).

<sup>10</sup> NIH Advisory Committee to the Director (ACD), *ACD Working Group for Foreign Influences on Research Integrity*, December 2018 Report, p. 5, available at [https://acd.od.nih.gov/documents/presentations/12132018ForeignInfluences\\_report.pdf](https://acd.od.nih.gov/documents/presentations/12132018ForeignInfluences_report.pdf) (last visited March 4, 2021).

<sup>11</sup> Emily Mavrakis, *UF: Former faculty did not disclose China affiliations*, Gainesville.com, January 22, 2020, available at <https://www.gainesville.com/news/20200122/uf-former-faculty-did-not-disclose-china-affiliations> (last visited March 4, 2021).

<sup>12</sup> *Id.* The NIH provided UF with more than \$208 million in research grant money in 2019.

director of an institute at a different Chinese university. While conducting research at UF, Faculty 1 served as the principal investigator for one NIH-funded project. None of Faculty 1's foreign affiliations was reported to UF nor the NIH.

- “Faculty 3” joined UF as a postdoctoral associate in the College of Medicine, and was appointed as a part-time research associate professor in 2012. The researcher focused on virology, gene therapy and traditional Chinese medicine. Faculty 3 was the principal investigator on one NIH-funded project and co-principal investigator for a second project prior to termination. That faculty member received an undisclosed grant from China, had an appointment at a Chinese university since 2017 and received a Chinese Thousand Talents award.<sup>13</sup>

During a meeting of the Florida House Select Committee on the Integrity of Research Institutions, a national security spokesman for the U.S. Department of Justice said in a prepared statement that China is implicated in more than 80 percent of all economic espionage charges brought by the department since 2012.<sup>14</sup>

## Federal Law

### *The Economic Espionage Act of 1996*

The Economic Espionage Act of 1996 (EEA) was the first federal law to define<sup>15</sup> and punish the theft or misappropriation of trade secrets. The EEA criminalizes theft of trade secrets and economic espionage, as follows:

- *Theft of trade secrets* means the intentional conversion of a trade secret to the economic benefit of someone other than the owner of the trade secret, with intent or knowledge that the offense will injure the owner.<sup>16</sup> Theft of trade secrets is punishable by up to 10 years in federal prison and specified fines for an individual or a corporation.<sup>17</sup>
- *Economic espionage* refers to theft of a trade secret with the intent or knowledge that such theft will benefit a foreign government, foreign instrumentality, or foreign agent.<sup>18</sup> Economic

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See also, Bill Gertz, ‘Economic Espionage’: Special DOJ unit cracks down on China’s illicit activities, The Washington Times, January 8, 2020, available at <https://www.washingtontimes.com/news/2020/jan/8/justice-department-special-china-unit-targets-beij> (last visited March 4, 2021).

<sup>15</sup> Under the EEA, a trade secret means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if: the owner thereof has taken reasonable measures to keep such information secret; and the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public. 18 U.S.C. 1839.

<sup>16</sup> 18 U.S.C. 1832.

<sup>17</sup> An individual may be fined up to \$250,000 or twice the value of the loss or gain associated with the offense, and a corporation may be fined up to \$5 million, twice the value of the loss or gain associated with the offense, or three times the value of the stolen trade secret. 18 U.S.C. 1832(a), 3571(c). Here and elsewhere, 18 U.S.C. 3571(d) provides as a general matter that the maximum for a criminal fine of any federal criminal offense is the greater of the standard amount set for the particular offense (e.g., \$250,000 for individuals convicted of a felony) or twice the gain or loss resulting from the offense.

<sup>18</sup> 18 U.S.C. 1831(a).

espionage is punishable by up to 15 years in federal prison and specified fines for an individual or corporation.<sup>19</sup>

The EEA requires a sentencing court to order restitution, provides that property derived from, or used to facilitate, commission of the offense may be subject to confiscation under either civil or criminal forfeiture procedures, and the court may issue an order to protect the confidentiality of a trade secret during prosecution and the government may appeal its failure to do so.

### *Defend Trade Secrets Act*

The Defend Trade Secrets Act of 2016<sup>20</sup> (DTSA) amended the remedies available under the EEA by establishing additional remedies for theft of a trade secret or corporate espionage, including, but not limited to, the following:

- The Attorney General may sue for injunctive relief.
- A trade secret's owner may bring a private civil action for damages, equitable and injunctive, court costs, and attorney fees.
- A civil seizure mechanism is available as a preventative measure prior to a formal finding that a trade secret has been misappropriated.
- The court may require affirmative actions be taken to protect the trade secret.
- In exceptional circumstances rendering an injunction inequitable, the court may condition future use of a trade secret on payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited.<sup>21</sup>

Because the DTSA does not preempt existing state trade secret law, a trade secret owner may choose to pursue a civil action for an offense in state or federal court.

### **III. Effect of Proposed Changes:**

The bill creates the “Eliminating Corporate Espionage in Florida Act” in s. 812.081, F.S.

The bill amends the definition of the term “copy” in s. 812.081, F.S., by including “duplicate,” so that the definition of “copy” becomes any *duplicate*, facsimile, replica, photograph, or other reproduction in whole or in part of an article and any note, drawing, or sketch made of or from an article or part or portion thereof.

The bill creates the following new definitions in s. 812.081(1), F.S.:

- “Obtains or uses” has the same meaning as provided in s. 812.012(3), F.S.; and
- “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

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<sup>19</sup> An individual may be fined up to \$5 million or twice the value of the loss or gain associated with the offense, and a corporation may be fined up to \$10 million, twice the value of the loss or gain associated with the offense, or three times the value of the stolen trade secret. 18 U.S.C. 1831(a).

<sup>20</sup> 18 U.S.C. 1836.

<sup>21</sup> *Id.*

Section. 812.012(3), F.S., defines the term “obtains or uses” to mean any manner of:

- Taking or exercising control over property.
- Making any unauthorized use, disposition, or transfer of property.
- Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
- Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or other conduct similar in nature.

The bill amends the current third degree felony related to trade secrets to simplify it and incorporate the definition of “obtains or uses.” The bill specifies that a person who willfully and without authorization, obtains or uses an article<sup>22</sup> representing a trade secret or makes or causes to be made a copy of an article representing a trade secret commits a third degree felony.

The bill creates a new third degree felony offense for a person who intentionally receives, buys, or possesses an article representing a trade secret, knowing such trade secret to be obtained or used or copied without authorization. The bill also amends the Criminal Punishment Code (Code) offense severity ranking chart<sup>23</sup> to rank this new offense as a Level 1.

If a person commits the third degree felony offenses described above, the bill reclassifies these crimes to a second degree felony<sup>24</sup> whenever he or she commits the offense with the intent to benefit a foreign government, foreign agent, or other foreign entity against the interest of the state. The bill also specifies that the reclassified offense is ranked one level above the ranking of the offense committed. The offenses related to trade secrets are ranked at a Level 1 thus this would re-rank these offenses as a Level 2 increasing the points on the Code scoresheet by 6 points.<sup>25</sup>

It is not a defense to the trade secret offenses that the person returned or intended to return the unlawfully obtained, used, stolen, embezzled, or copied article. The bill amends this provision to include the newly defined term unlawfully “obtained, used.”

A court must order restitution if a person is convicted of violating s. 812.081, F.S., and it must include the value of the benefit derived from the offense. The value of the benefit derived from the offense includes any expenses for research and design and other costs of reproducing the trade secret that the person has avoided by committing the offense.

The bill is effective October 1, 2021.

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<sup>22</sup> “Article” means any object, device, machine, material, substance, or composition of matter, or any mixture or copy thereof, whether in whole or in part, including any complete or partial writing, record, recording, drawing, sample, specimen, prototype model, photograph, microorganism, blueprint, map, or copy thereof. Section 812.081, F.S.

<sup>23</sup> The Criminal Punishment Code (Code) is Florida’s primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10). Points are assigned and accrue based upon the offense severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates. Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, Laws of Fla. The Code is effective for offenses committed on or after October 1, 1998.

<sup>24</sup> A second degree felony is punishable by up to 15 years in prison and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>25</sup> Section 921.0024(1)(a), F.S.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

This bill appears to be exempt from the requirements of Art. VII, s. 18(d) of the Florida Constitution, relating to unfunded mandates.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. However, since the bill creates a new third degree felony and provides for the reclassification of certain offenses in specified instances, it will likely have a positive indeterminate (i.e., unquantifiable increase) in prison bed impact on the Department of Corrections.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 812.081, and 921.0022.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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