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***Testimony of Assistant U.S. Trade Representative Stanford K. McCoy
before the United States Sentencing Commission on Foreign and Economic Espionage
Penalty Enhancement Act of 2012 Guidelines***

Madam Chair and members of the Sentencing Commission:

Thank you for the opportunity to speak about the perspective of the Office of the United States Trade Representative (USTR) on trade secret theft in the international context. USTR is responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations on these issues with other countries. The head of USTR is the U.S. Trade Representative, a Cabinet member who serves as the president's principal trade advisor, negotiator, and spokesperson on trade issues. USTR is part of the Executive Office of the President, and provides trade policy leadership and interagency coordination in its major areas of responsibility, including, among many others, trade-related intellectual property issues.

As Assistant U.S. Trade Representative for Intellectual Property and Innovation, much of my job involves encouraging other governments to take protection of intellectual property rights seriously and to enforce intellectual property rights, including those of U.S. companies, creators, and innovators, with the same vigor and effectiveness with which the United States protects the intellectual property assets of both domestic and foreign companies, creators, and innovators in our market. It is often the case in these discussions that our own actions are our best argument.

All sectors of our economy rely on intellectual property, including trade secrets. As you have heard (or will hear) from others, criminals, competitors and even governments are deliberately targeting the trade secrets and other confidential information of U.S. companies.

This hearing is intended to assist the Commission in its consideration of guidelines that reflect the seriousness of trade secret theft, take into account potential and actual harms, and provide adequate deterrence. In USTR's experience, it has been difficult for U.S. companies to obtain relief against those who have benefitted from misappropriation or theft of trade secrets, despite compelling evidence demonstrating such actions. Many cases involving U.S. companies and foreign competitors go unreported because U.S. firms fear the cost and likelihood of failure of pursuing these cases through legal channels, as well as the possible commercial repercussions for bringing such cases to light. There are many barriers or potential barriers to prosecution of intellectual property crimes, including, among others, local protectionism and corruption.

When intellectual property theft is actually prosecuted, one of our most persistent concerns is that judges, prosecutors, and other actors in foreign criminal justice systems underestimate the gravity of these offenses, resulting in punishments that are minimal, and

therefore fail to provide effective deterrence. As we work to respond to that concern, the U.S. domestic sentencing guidelines that you develop through this rigorous process can provide an important and well-respected example for our trading partners abroad.

There is no question that trade secret theft poses a serious threat to U.S. industries engaged in international trade. Trade secrets are often among a company's core business assets, and a company's international competitiveness often depends on both its capacity to protect such assets and to prevent trade in goods and services by others that embody the company's stolen or misappropriated trade secrets. Important trade secrets of U.S. firms have been stolen by, or for the benefit of, foreign companies and governments. The theft of proprietary information by unscrupulous foreign actors has in some cases left U.S. exporters scrambling to salvage major portions of their international business.

Of course the need for trade secret protection and the threat of economic espionage are not new issues. But new circumstances have arisen: Demand for information is growing as overseas industries climb the value chain and enter new and more advanced fields of technology. Unscrupulous actors seeking to meet that demand have new tools at their disposal, including cyber intrusions. Consequently intellectual property theft is also climbing the value chain, bringing to the forefront concerns about the protection of high-value proprietary information held as trade secrets.

Our Office has been active in responding to these concerns on many fronts. In the Trans-Pacific Partnership negotiations, our negotiators are working to address this issue decisively and raise the standards of protection of trade secrets, and thus serve as a model that is responsive to this bolder and more subtle form of theft that can destroy entire enterprises.

Trade secret theft is one of the focal points in our ongoing work with China, including through U.S.-China Joint Commission on Commerce and Trade (JCCT) IPR Working Group, as well through senior level government engagements. During the 2012 Strategic and Economic Dialogue, as a result of U.S. efforts, China affirmed that "the protection of trade secrets is an important part of the protection of intellectual property rights" and that it would "intensify enforcement against trade secret misappropriation." We are urging China to proceed as quickly as possible with its plan to revise the Anti-Unfair Competition Law, which governs the protection of trade secrets to provide several specific and stronger protections. The 2012 revised model bilateral investment treaty (BIT) text contains binding treaty obligations to prohibit the forced transfer of technology as well as the forced use of domestic technology. USTR and the Department of State will work on the basis of this text in conducting BIT negotiations with China.

As part of the Administration's recently-announced trade secret strategy, USTR's Special 301 Report, which is an annual review of the state of intellectual property rights protection and enforcement in trading partners around the world, will be devoting even more attention to this

important issue. As part of this Administration initiative, we will be increasing our work on action plans, out-of-cycle reviews, and other tools to gather and, where appropriate, act upon information about trade secret protection and enforcement by U.S. trading partners. We hope that our bilateral work will, among other things, encourage our trading partners to strengthen available remedies for trade secret theft, as Taiwan did with recent amendments to its Trade Secrets Act. Taiwan's amendments provide for longer prison terms and higher fines for domestic violations, and still-higher penalties if the trade secret is misappropriated with the intention of using it outside of Taiwan.

In addition to the work that I previously noted, we also seek through our trade and investment agreements to prohibit governments from requiring investors to transfer proprietary knowledge, such as trade secrets, as a condition of doing business in the market, and we seek to constrain excessive requirements for technology transfer, localization, or other measures that may make it difficult for a U.S. company to maintain control over a trade secret investment.

By pursuing heightened standards through trade negotiations, our Special 301 Report and our constant bilateral engagement on this issue, this Administration shows our trading partners that the United States expects strong protection of trade secrets and deterrent punishments for those who would steal the innovation of others to secure unfair commercial and national advantages.

Our trading partners need to know that permitting or promoting misappropriation of trade secrets is unacceptable. The United States protects the trade secrets of foreign countries in our markets, and we insist that our trading partners protect trade secrets in their markets. American ingenuity is our competitive advantage, and the more we develop and promote the best practices to secure intellectual property assets in the United States, the more persuasive we can be to other countries. In that regard, my office is grateful for your engagement on this subject, and for your interest in the international trade policy perspective.