

Congress, President Align on Powerful New U.S. Intellectual Property Protection Law

by Lawrence Ward, Justin T. Huff, Dave Townsend, and T. Augustine Lo

On January 5, 2023, President Biden ushered in the new year by signing into law the Protecting American Intellectual Property Act of 2022 (“PAIPA”), Pub. Law 117-336.¹ PAIPA was passed with considerable bipartisan support in both houses of Congress. The new law mandates the collection of certain data on international trade secret theft so the U.S. Government can issue annual unclassified public reports listing foreign individuals and entities who knowingly take or abuse U.S. trade secrets. PAIPA also requires the President to impose harsh legal sanctions against such named offenders, including on any entity owned or controlled by such a listed person.

PAIPA reports will name foreign individuals and entities who have knowingly engaged in, benefited from, or materially assisted in the theft of U.S. trade secrets that pose “a significant threat to U.S. national security, foreign policy, or economic health.” The public PAIPA reports must also list the names of the foreign individuals who serve as the chief executive officers or board members of any listed foreign entity and of any entity that is owned or controlled by such a listed entity. Moreover, the Government’s published list must also explain the “nature, objective, and outcome of the theft of trade secrets” for each listed individual or entity. PAIPA also prescribes that any such public listing of an entity or individual as having engaged in such trade secret theft is to be an executive determination by the President and not an administrative finding of fact. However, the new law does not set forth any specific legal process or threshold of evidence to be found by the President before making such a determination.

PAIPA requires the President to impose at least five different kinds of sanctions on a listed person but gives the President discretion to select from among those sanctions.² More specifically, PAIPA allows the President to:

- block a listed person’s property-related transactions through economic sanctions enforced by the Office of Foreign Assets Control (“OFAC”) in the U.S. Department of the Treasury;
- place a listed person on the Entity List enforced by the Bureau of Industry and Security (“BIS”) in the U.S. Department of Commerce and thereby block such

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person's access to any goods, software or technology that would be subject to the Export Administration Regulations ("EAR");

- bar a listed person from access to any Export-Import Bank assistance;
- urge denial of loans to a listed person by any international financial institution of which the United States is a member;
- block any U.S. financial institution from lending to a listed person;
- if a listed person is a foreign financial institution, bar such listed person from being named as a primary dealer in U.S. government debt instruments or acting as a repository for any U.S. government funds;
- debar a listed person from being a federal contractor or a supplier of goods or services to the U.S. Government;
- block any listed person's banking or foreign exchange transaction that is subject to U.S. jurisdiction;
- bar any U.S. person from investing in any equity or debt securities of a listed person;
- deny an entry visa to a listed individual or a corporate officer, principal, or shareholder who holds a controlling interest in a listed entity; or
- apply any of the above sanctions to the executive officers of a listed entity.

PAIPA also states that it does not authorize or require the President to impose any sanctions on a listed person with respect to the importation of goods into the United States. Additionally, PAIPA provides the President with the power to waive the imposition of sanctions that would otherwise be required under the law if the President determines that the "national interest" would be served by such a waiver and notifies the relevant committees of Congress. Congress also inserted a "sunset" provision into PAIPA and so, unless reauthorized by Congress, this new law would expire in seven years.

PAIPA contains a civil penalty provision applicable to any person who violates, attempts to violate, conspires to violate, or causes a violation of PAIPA or regulations issued under PAIPA. The amount of the PAIPA civil penalty is linked directly to the penalty prescribed under § 206 of the International Emergency Economic Powers Act ("IEEPA"),³ the amount of which was updated for inflation as of January 2023 to \$356,579 per violation.⁴

Plainly, application of OFAC's broad blocking powers against a PAIPA-listed person would then have immediate and profound implications for the international banking community in regard to international funds transfers by such a listed person, especially those involving U.S. dollar assets or payments made in U.S. dollars. Such banking effects would also potentially impact the payments or bank deposits of any other entities around the world that are owned or controlled by such a listed person.

This new legislation thus continues a growing trend to expand the application of U.S. export control beyond the traditional and relatively circumscribed protection of export-controlled technologies for military or "dual-use" applications. As one other recent example, in October 2019⁵ as we described [here](#), BIS invoked its Entity List designation authority on 28 Chinese entities, including Dahua, Hikvision and several other leading electronics manufacturers for their roles in the suppression of human rights and in promoting electronic surveillance among Uyghurs and other minority Muslim populations

in the Xinjiang Uyghur Autonomous Region (“XUAR”) of China. PAIPA also appears to continue another trend in which Congress requires Presidential action in certain prescribed circumstances rather than deferring to traditional Executive Branch discretion in the enforcement of laws enacted by Congress.

Given the potentially dire consequences for a foreign entity or individual that could result from such a PAIPA listing, the new law may well provide a stronger deterrent to international trade secret theft committed against U.S. companies. However, it might also conceivably spur more legal disputes about whether the property allegedly stolen by a foreign person truly constitutes a “trade secret” of a U.S. company that can be subject to this law as a way to invalidate and reverse such a PAIPA listing. These new and severe consequences, along with the required publication of the details and effects of the underlying trade secret thefts, may also give U.S. companies some pause about exactly when, how and possibly even whether to report any suspected or known international trade secret theft to the U.S. Government.

These annual public PAIPA listings will certainly fuel more corporate due diligence in the conduct of significant international business transactions and add to the growing family of such U.S. Government lists to be examined, such as OFAC’s Specially Designated Nationals List (“SDN List”) and Non-SDN Chinese Military-Industrial Companies List (“Non-SDN CMIC List”), the Department of Defense Section 1237 List, and the BIS Entity List. Finally, it seems virtually certain that some PAIPA-listed foreign entity or individual will eventually challenge its designation under this new law and raise due process concerns about the sufficiency of evidence considered by the President, which could lead to adoption of formal processes by which a listed individual or entity could raise a reasonable administrative challenge and seek its removal from the PAIPA listing.

More may be known about the future implementation of PAIPA when and if President Biden issues a new Executive Order to delegate the duties and powers under PAIPA to other U.S. Government officials. One possibility in such an Executive Order might be to place the locus of PAIPA’s enforcement under the Secretary of Commerce (with input from other relevant senior officials such as the Attorney General and the Director of the Federal Bureau of Investigation). Historically, the Commerce Department has led in the field of intellectual property protection and has generally advocated on behalf of U.S. industries that rely on trade secrets in their intellectual property portfolios, and it is also the Cabinet department that includes the U.S. Patent and Trademark Office.

¹ <https://www.congress.gov/bill/117th-congress/senate-bill/1294>

² The PAIPA requirement for the President to impose five or more sanctions from all legally available legal sanctions follows the precedent of a similar mandate from Congress in the Iran Threat Reduction and Syria Human Rights Act of 2012 (“ITRSHRA”), Pub. Law 112-158.

³ Pub. Law 95-223.

⁴ 88 Fed. Reg. 2229, 2230 (Jan. 13, 2023).

⁵ <https://www.federalregister.gov/documents/2019/10/09/2019-22210/addition-of-certain-entities-to-the-entity-list>