

Parties Will Face Barriers Challenging Trade Secret Sanctions

By **Jordan Rice** (May 17, 2023)

In January, the Protecting American Intellectual Property Act became law.[1]

Congress enacted PAIPA to provide the federal government with an additional tool to address trade secret theft by foreign individuals and entities. The statute grants the president authority to impose significant economic sanctions on those involved in trade secret misappropriation.

But PAIPA — absent implementing regulations providing otherwise — provides little opportunity for parties to challenge the imposition of sanctions, presenting significant due process concerns.



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A party sanctioned under PAIPA faces serious economic consequences, including an effective ban from doing business with U.S. entities. Attorneys representing foreign individuals and entities that could be accused of trade secret theft in the U.S. should be aware of PAIPA and any regulations promulgated to implement the statute.

This article describes the president's authority under PAIPA, the current lack of any mechanism for administrative or judicial review, and what potential targets of PAIPA sanctions can expect going forward.

PAIPA requires the president to submit a report to Congress identifying foreign individuals and entities — and CEOs, directors, and subsidiaries of those entities — that have (1) "knowingly" committed or benefited from the "significant" theft of trade secrets, or (2) provided "significant" support for such trade secret theft.[2]

Additionally, for an entity or individual to merit inclusion on the list, the president must determine that the trade secret theft is "reasonably likely to result in, or has materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability" of the U.S.[3] The statute requires the president to issue the first report by July and annually after that.[4]

For entities included in the president's report, the president must select five or more sanctions from a long list of options, including: prohibiting transactions relating to U.S. property, prohibiting U.S. financial institutions from lending to a listed entity, banning U.S. entities from investing in the debt or equity of a listed entity, denying visas to corporate officers, and blocking access to U.S. goods and technology.[5]

Individuals in the president's report are blocked from transactions relating to U.S. property and are denied visas.[6] While any entity or individual included in the president's PAIPA report is presumptively subject to sanctions, the president may waive imposition of sanctions if he determines that it is in the national interests of the U.S.[7]

Whether a party merits inclusion in the president's PAIPA report turns on a series of complex factual and legal issues.

First, there is the issue of whether the purportedly stolen information truly constitutes a trade secret. That breaks down into two sub-issues: whether the owner of the information

derives economic value from the information's secrecy and whether the owner has taken reasonable measures to keep the information secret.[8]

Second, there is the question of whether there was truly theft of the information. That may involve several sub-issues, including whether the entity that purportedly stole the information had a right to use it or acquired the information through legal means, like reverse engineering.[9]

Third, inclusion in the president's PAIPA report turns on the theft of a trade secret was "significant." [10]

Finally, PAIPA sanctions apply only to those whose trade secret theft "is reasonably likely to result in, or has materially contributed to, a significant" threat to U.S. interests.[11] All of those issues could be hotly contested.

In the typical trade secret case, for example, parties frequently expend significant resources disputing whether a trade secret exists and whether it was stolen. PAIPA, however, does not itself provide a mechanism by which a listed entity could challenge its inclusion in the president's report. Without such a mechanism, a party could not argue — among other things — that it had a right to use the information it purportedly stole, that the information was not actually secret or valuable, or that the trade secret owner failed to take reasonable precautions to protect its information.

In the context of similar sanctions lists, federal regulations generally provide a way for listed entities and individuals to challenge their designation in administrative agencies.

Those added to the U.S. Department of the Treasury's Office of Foreign Assets Controls Designated Nationals and Blocked Persons List, for example, may submit arguments and evidence to OFAC if they believe there is an insufficient basis for their inclusion on the list.[12] OFAC is required to conduct a review and provide a written decision to the petitioner, but OFAC need not provide an in-person hearing.[13]

OFAC's determination may be challenged in federal court under the Administrative Procedure Act, but courts review OFAC's decision under the deferential "arbitrary and capricious" standard.[14]

It is possible the executive branch could create a similar administrative review process to challenge inclusion on the president's PAIPA's report list. PAIPA grants the president authority to promulgate regulations to implement the statute.[15] The president typically has delegated similar sanctions authority to other officials, particularly the secretary of treasury or the secretary of commerce.[16] It would not be surprising if the president made a similar delegation of his authority under PAIPA.

Depending on how the president chooses to exercise his delegation authority, it could address some of the due process concerns created by PAIPA's lack of any administrative or judicial review provision.

But without regulations providing for administrative or judicial review, some foreign entities and individuals will face significant barriers to challenging their inclusion in the president's PAIPA report.

Courts lack jurisdiction under the APA to review actions by the president.[17] That may leave parties with no way to challenge their inclusion in the president's PAIPA report. And

while federal courts generally have jurisdiction to resolve constitutional challenges to the president's conduct,[18] courts have held that, as stated by the U.S. Court of Appeals for the D.C. Circuit, a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."[19]

While courts have moderated that holding to a limited extent, concluding that foreign entities "summoned into court" have due process rights,[20] courts continue to apply the principle that a party without ties to the U.S. has no constitutional right to challenge designations similar to those made by the president under PAIPA.[21] That leaves many parties targeted by PAIPA — who may well lack ties to the U.S. — potentially without recourse.

Even if the president promulgates regulations providing for some form of review, they may not prove especially useful to those targeted under PAIPA. Administrative review may be highly circumscribed, as with OFAC sanctions, and subject to highly deferential review in the courts.

And with or without regulations, PAIPA targets without property or presence in the U.S. will be unable to assert constitutional challenges — including under the due process clause — to any sanctions.

As things stand today, parties included in the president's PAIPA report have little ability to challenge their designations. That may well change, however, if and when the president promulgates implementing regulations.

Parties concerned that they could find themselves subject to PAIPA sanctions should closely monitor any regulatory developments.

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[1] Pub. L. No. 117-336, 136 Stat. 6147 (2023).

[2] *Id.*, §2(a)(1).

[3] *Id.*

[4] *Id.*

[5] *Id.*, §2(b)(1).

[6] *Id.*, §2(b)(2).

[7] *Id.*, §2(c).

[8] *Id.* §2(g)(9) (incorporating definition of trade secret from 18 U.S.C. §1839).

[9] See 18 U.S.C. §1839(5)-(6).

[10] PAIPA, §2(a)(1)(A)(i).

[11] Id.

[12] 31 C.F.R. §501.807.

[13] Id.

[14] See, e.g., *Karadzic v. Gacki*, 602 F. Supp. 3d 103, 109 (D.D.C. 2022).

[15] PAIPA, §2(d)(1); see also 3 U.S.C. §301 (authorizing President to delegate "any function which is vested in the President by law" to "the head of any department or agency in the executive branch" or Executive Branch officials who must be appointed by the President and confirmed by the Senate).

[16] E.g., E.O. 13,873 (May 15, 2019); E.O. 13,660 (Mar. 6, 2014); E.O. 13,222 (Aug. 17, 2001).

[17] *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992).

[18] Id. at 801.

[19] *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); see also, e.g., *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 984 (9th Cir. 2012).

[20] *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 815-16 (D.C. Cir. 2012); *First Inv. Corp of Marshall Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 747 (5th Cir. 2012).

[21] See, e.g., *Lopez Bello v. Smith*, No. 21-cv-1727, 2022 WL 17830226, at *9 (D.D.C. Dec. 21, 2022); *Bautista-Rosario v. Mnuchin*, 568 F. Supp. 3d 1, 7-8 (D.D.C. 2021); *Bazzi v. Gacki*, 468 F. Supp. 3d 70, 77 (D.D.C. 2020).