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One More Arrow in the Government's Anti-Corruption Quiver: The Global Magnitsky Act

By Lori Tripoli, The Anti-Corruption Report

A relatively new statute targeting acts of foreign corruption and an executive order addressing it may well have implications both for U.S. businesses and for foreign ones that happen to have assets in the United States. The Global Magnitsky Human Rights Accountability Act (Global Magnitsky Act), signed into law by President Obama in December 2016, authorizes the president to impose financial sanctions and visa restrictions on foreign persons in response to certain human rights violations or acts of corruption. In December 2017, President Trump issued Executive Order 13818, which identified 13 individuals subject to sanctions and also delegated authority for implementing the law to the Treasury and State Departments.

The Global Magnitsky Act (Pub. L. 114–328, Subtitle F) "is primarily designed to punish foreign government officials, and those who support them, for egregious human rights abuses and rampant public corruption," explained Zachary Adams, a partner at Squire Patton Boggs. With respect to corruption, "the Global Magnitsky Act essentially serves as a counterpoint to the FCPA by targeting the recipient of a bribe," Adams said.

The 2016 law has far-reaching implications "because it authorizes the U.S. government to sanction third parties who act on behalf of corrupt foreign government officials or support foreign government officials in transferring the proceeds of corruption," said Michael Casey, a partner at Kirkland & Ellis. "U.S. companies are prohibited from doing business with designated persons, and required to freeze their assets as well," Casey added.

The Anti-Corruption Report explores the implications of the statute and the executive order for those working in the ABAC space.

See also "Compliance and Self-Protection in an Uncertain Sanctions Environment" (Nov. 1, 2017), and "Five Ways a Company Can Leverage Its Anti-Bribery Compliance Program to Facilitate Sanctions Compliance" (Sep. 14, 2016).

A Closer Look at the Global Magnitsky Act

The Global Magnitsky Act provides a new legal basis that allows the president and the Treasury Department's Office of Foreign Assets and Control (OFAC), through the authority delegated to it by the president, to sanction persons by adding them to the Specially Designated Nationals and Blocked Persons list (Specially Designated Nationals list), said Alexandra López-Casero, a partner at Nixon Peabody.

Sanctioned Bad Actors

"An interesting thing about the Global Magnitsky Act is that it is the first sanctions program that expressly authorizes designations on the basis of corruption – public and private," said Michelle Shapiro, a partner at Dentons. Included among the 13 people upon whom sanctions were imposed via President Trump's executive order are Israeli billionaire Dan Gertler, who, according to the Treasury Department, has been involved in corrupt deals in the Democratic Republic of the Congo; Ángel Rondón Rijo of the Dominican Republic, who has been linked to the Odebrecht corruption case; and Gulnara Karimova, the daughter of a former president of Uzbekistan and who allegedly has accepted bribes from telecommunications companies and was implicated in the Vimpelcom case.

"The United States is taking a strong stand against human rights abuse and corruption globally by shutting these bad actors out of the U.S. financial system," said Treasury Secretary Steven Mnuchin at the time the executive order was issued. "Treasury is freezing their assets and publicly denouncing the egregious acts they've committed, sending a message that there is a steep price to pay for their misdeeds," he continued. The Treasury Department explained in a press release that "all of the assets within U.S. jurisdiction of the individuals and entities included in the Annex to the Order or designated by OFAC are blocked, and U.S. persons are generally prohibited from engaging in transactions with them."

"Unlike many sanctions programs administered by OFAC, Global Magnitsky does not have any geographic restrictions," Adams observed. "True to its name, the first designations under Global Magnitsky underscore its worldwide scope," he continued. "The 13 individuals designated on December 20, 2017, including three dual nationals, represent 15 countries and five continents," Adams said. "As a result, Global Magnitsky does not lend itself to bright line rules and requires particular attention to the parties designated," Adams maintained.

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Comparison to the Earlier Magnitsky Act

The Global Magnitsky Act is the second U.S. law named for Russian lawyer Sergei Magnitsky, who died in 2009 while being illegally detained in a Moscow prison after he accused officials in the Russian government of tax fraud. In the first law, the Sergei Magnitsky Rule of Law Accountability Act of 2012 (Public Law 112–208), Congress found that the "systematic abuse of Sergei Magnitsky, including his repressive arrest and torture in custody by officers of the Ministry of the Interior of the Russian Federation that Mr. Magnitsky had implicated in the embezzlement of funds from the Russian Treasury and the misappropriation of three companies from his client, Hermitage Capital Management, reflects how deeply the protection of human rights is affected by corruption."

The earlier law is Russia-focused, and "targets persons for certain actions related to the case of Russian lawyer Sergei Magnitsky," the Treasury Department explained in Frequently Asked Questions on Global Magnitsky Act sanctions. The Russia Magnitsky Act "also targets persons for gross violations of internationally recognized human rights in Russia," the Treasury Department noted. In contrast, "the Global Magnitsky Act does not just target one country," Shapiro said.

See also "Regional Risk Spotlight: New Laws and Sanctions Complicate the Anti-Corruption Landscape in Russia" (Sep. 6, 2017).

Forbidden Activity

A U.S. company can run afoul of the Global Magnitsky Act or the Russia Magnitsky Act by doing business with people or entities sanctioned pursuant to those laws. "Similar to most U.S. economic sanctions programs, U.S. individuals and entities can be found liable for violating the Global Magnitsky Act and Sergei Magnitsky Rule of Law Accountability Act of 2012 if they engage in any business transactions and/or otherwise deal with individuals and/or entities the U.S. government has sanctioned pursuant to these sanctions programs," Adams said.

"It is also worth noting that U.S. companies could also themselves be sanctioned if they engage in certain activities the U.S. government has declared 'sanctionable' under either the Global Magnitsky Act or the Sergei Magnitsky Act," Adams added. "For example, U.S. companies can be sanctioned under the Global Magnitsky Act if they are engaged in, or provide support to individuals engaged in, the commission of gross human rights violations," he said.

Consequences of Violations

U.S. companies that violate the Global Magnitsky Act "can face substantial civil penalties and, in particularly egregious cases, criminal liability," Adams explained.

"On the civil side, a penalty of $295,141 or twice the amount of the transaction (whichever is greater) may be imposed" on persons and entities that fail to abide by the Global Magnitsky Act, said López-Casero. "A person that conspires with, willfully attempts or causes or otherwise helps someone to intentionally violate" the Global Magnitsky Act "may face 20 years in prison," she said. "A business that commits such a crime may face a $1,000,000 fine," López-Casero added.

Whether a company knew that it was doing business with someone who has been sanctioned is irrelevant. "Many people are surprised to learn that OFAC sanctions violations are strict liability, which means that knowledge and intent are not necessary to impose civil liability," Adams said.

Who Should Be Especially Concerned

Particular industries may be more susceptible to being named on the Specially Designated Nationals list under the Global Magnitsky Act. "Higher-risk industries might include those where high-net-worth oligarchs who have been named and designated "tend to invest", Shapiro said". For example, "energy, mining, some manufacturing, explorations and production, and real estate," may be problematic, she explained.

Additionally, "any U.S. companies that conduct business in countries that have a history of public corruption and human rights abuses should be particularly vigilant," Adams said. "In many respects, the industries particularly susceptible to running afoul of Global Magnitsky track those that are prone to FCPA concerns, including oil and gas, telecommunications, and pharmaceuticals," he continued.

Financial institutions also should pay particularly close attention to this law. "As with any sanctions program administered by OFAC, U.S. financial institutions have a distinct obligation to identify and block assets of the enumerated parties," Adams said.

Potential for Misuse of Federal Power?

Ultimately, the authority granted to the federal government under the Global Magnitsky Act is not insignificant. "Overall, it is concerning any time the government is given the power to restrict a person's or company's property without due process,"

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said Isabelle de Smedt, a partner at Nixon Peabody. Even when used properly, the Global Magnitsky Act "comes close to (and may cross) the line of authorizing the seizure of property without probable cause," de Smedt continued.

The amount of evidence required to seize property under the law "appears to fall below the standard for even reasonable suspicion; 'credible evidence' is all that is required," López-Casero noted. "That low standard, when coupled with the lack of any reasonable appellate rights, makes misuse of the GMA framework a legitimate concern," she said.

Global Magnitsky Act v. FCPA

There is some tie-in between the FCPA and the Global Magnitsky Act; they "overlap and may target the same corrupt activity," de Smedt said. Indeed, "the government might use both the Global Magnitsky Act and the FCPA where it can," Shapiro observed. For instance, "the government might potentially use a designation on the Specially Designated Nationals list as part of a broader negotiation and resolution against a non-U.S. person or entity," Shapiro explained.

"It is certainly possible" that the Global Magnitsky Act will be more likely to be used by the U.S. government when someone is unreachable via the FCPA, de Smedt said. "To date we have not witnessed the Executive Order being used this way, but give the government some time. Prosecutions under the FCPA have occasionally been stifled by the need to establish personal jurisdiction over a foreign defendant. The Executive Order enables the government to extract its pound of flesh without worrying about meeting the typical jurisdictional requirements," she noted.

Casey sounded a similar view. "The Global Magnitsky Act removes jurisdictional barriers so that the U.S. government can take punitive actions against corrupt foreign government officials," he said. "In the past, foreign government officials who participated in bribery schemes could face liability under the FCPA or other federal statutes, but only if they were subject to U.S. jurisdiction," Casey explained. The Global Magnitsky Act "authorizes the imposition of sanctions on corrupt foreign government officials regardless of their personal ties to the United States or whether the corruption scheme is connected to the United States," he said.

See "How Anti-Corruption Compliance Can Springboard Sanctions Compliance" (Feb. 15, 2017).

Action Items for In-House Counsel

Practitioners suggested that in-house counsel be vigilant in their third-party screening efforts and take a risk-based approach. "Each time a program is layered on another, the world gets more complicated, and so it remains important for companies to have a screening process and to have standardized due diligence around who their business partners are," Shapiro explained. That said, however, she noted that "there is no set of specific due diligence protocols a company has to follow to avoid doing business with an entity on the Specially Designated Nationals list." Instead, "much like when conducting FCPA due diligence, a company should take a risk-based approach that should be tailored appropriately to their business," Shapiro said.

It is important for companies to know not only who is on the Specially Designated Nationals list but what business interests those entities have. "Global Magnitsky is yet another example of the importance of understanding the beneficial ownership of third parties," Adams explained. The Global Magnitsky Act "prohibits U.S. persons from doing business with individuals and entities designated to the Specially Designated Nationals list pursuant to the Act, as well as any entity owned 50 percent or more by the sanctioned individuals or entities," he noted. "Even more concerning from a compliance perspective, these business interests are often not designated by OFAC, which makes a purely list-based approach problematic," Adams cautioned.

Commercially available screening tools can aid effective screening. "Rather than using the free government consolidated screening lists, we generally recommend subscribing to commercially available, reputable screening software, which automatically rescreens all names that have been entered on a recurring basis (aka as "dynamic screening"), given that the U.S. Restricted Persons Lists [those issued by the U.S. Departments of the Treasury, Commerce and State] frequently change," said López-Casero. The "dynamic screening" feature allows the software automatically to run, "on a daily basis, each of the company's business partners against new sanctions and new designations," she explained. Commercially available software "generally also keeps an automatic audit trail," López-Casero added.

Even when there is not direct hit on a specific person when searching the Specially Designated Nationals list, a company "might learn negative information about potential involvement in corruption" using commercially available screening tools, Shapiro said. OFAC also has "a helpful listserv

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that can be used to keep track of sanctions updates," Adams noted. "Further, in reviewing certain proposed transactions and/or new business dealings, in-house counsel should of course ensure that the proposed transaction will not involve activities the U.S. government has declared as 'sanctionable' under the Global Magnitsky Act," Adams said.

Even companies that are not based in the United States should be aware of this law. "Although companies that are not 'U.S. persons' can conceivably continue doing business with the enumerated parties identified as being involved in human rights violations or public corruption, they must ensure that no U.S. banks and/or U.S. dollars are involved in such transactions," Adams said. U.S. citizens working for such companies could create liability. "Non-U.S. companies should develop and implement a thorough recusal policy for any U.S. citizens or legal permanent residents in their employ," Adams suggested. "Even tangential involvement of those employees in conduct prohibited by Global Magnitsky could create civil and criminal liability for both employee and employer," Adams said.

See our three-part series on in-house perspectives on third-party due diligence; "Right-Sizing and Risk Ranking" (May 24, 2017); "Information Gathering" (Jun. 7, 2017); and "Red Flags and Follow-Up" (Jun. 21, 2017).

A Closer Look at the Specially Designated Nationals List and Sanctions

Getting on the Specially Designated Nationals List

In identifying entities to sanction, the Treasury Department takes the lead, although "Sanctions designations are an inter-agency process," Shapiro said. "The Treasury Department, through OFAC, has the ultimate line authority to make the designation," Shapiro said. "Leading up to that decision, OFAC includes DOJ in its process and tries to avoid disruption of law enforcement investigation or prosecution," Shapiro said.

"Before a person or entity is designated, the Treasury Department will share with DOJ the target's dossier, which would include its public profile as well as government intelligence," Shapiro said. "Among other things, DOJ will, in essence, assess whether they believe there would be sufficient evidence to charge the target if the improper conduct that happened outside the U.S. could have otherwise been charged in the U.S., regardless of potential jurisdictional deficiencies or procedural hurdles," Shapiro said.

The fact that the overall list of bad actors included in President Trump's Executive Order 13818 is relatively short does not necessarily indicate that the likelihood of a company experiencing a Global Magnitsky Act problem is fairly remote. "The initial list of persons targeted by Global Magnitsky Act sanctions has symbolic significance," Casey said. "Each of the thirteen designated individuals is from a different country. Some of the sanctioned persons are foreign government officials involved with corrupt activities while others are non-U.S. nationals responsible for human rights abuses," he observed. "Through these designations, the U.S. government has signaled that it would utilize the Global Magnitsky Act to target persons throughout the world engaged in a broad range of illicit conduct," Casey said.

U.S. companies ignore such a list at their peril. "It would be a mistake for in-house counsel to treat an encounter with the Global Magnitsky Act as a 'remote' possibility," said de Smedt. "Although true that the Global Magnitsky Act list of sanctioned persons and entities might not be as long as others, the consequences of violating the Global Magnitsky Act warrant its consideration," she continued. "Fines may be imposed for each violation of the Global Magnitsky Act," explained López-Casero. If the Act is ignored, "an unsuspecting (or rather, reckless) company may rack up a crippling amount of fines that could have been easily avoided. Due to the simplicity of sanctions screens, OFAC will not be kind to ignorance," she maintained.

Ultimately, the executive branch wields a lot of power with the Global Magnitsky Act. "The federal government's authority under the Global Magnitsky Act is a very powerful tool because the government does not need to adhere to the same burdens of proof and evidentiary standards it would need to bring an FCPA action," Shapiro said. "The government gets to decide whether to designate someone on the Specially Designated Nationals list without the person being involved in the conversation," Shapiro said. "The designation itself does not require court involvement," Shapiro said.

Removal From the Specially Designated Nationals List

Once placed on the Specially Designated Nationals list, it is hard to be removed from it. "To be delisted is quite an uphill battle, particularly for individuals," Shapiro explained. "There either has to be a mistake of fact, like 'I'm not that guy,' or a changed circumstance, but that is a high standard," Shapiro said.

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Businesses may have a somewhat easier time. "It is a little different with commercial entities that get designated because companies can demonstrate that they have changed: they might get rid of the bad actors, or they might make a change in management," Shapiro said. "It is much more difficult for a person to demonstrate that he or she is no longer a bad actor," she observed.

Yes, Enforcement Happens

Lest one be tempted to think the risk of enforcement against companies doing business with those who have been sanctioned is minimal, consider the matter of Richemont North America, Inc. Doing business under the name Cartier, in 2017, the company reached a $334,800 civil settlement with the government after it shipped jewelry in 2010 and 2011 to Shuen Wai Holding Limited, an entity in Hong Kong that had been added to the list of Specially Designated Nationals in 2008.

"On four separate occasions, an individual purchased jewelry from one of Richemont's Cartier boutiques located in California or Nevada and provided Shuen Wai's name and mailing address to Richemont as the ship-to party. Although the information and documentation provided to Richemont contained the same name, address, and country location for Shuen Wai as they appear on the SDN List, Richemont did not identify any sanctions-related issues with the transaction prior to shipping the goods," the Treasury Department wrote of the matter, which involved Foreign Narcotics Kingpin Sanctions Regulations.

"OFAC considered the following to be aggravating factors: (1) Richemont failed to exercise a minimal degree of caution or care with respect to the conduct that led to the apparent violations; (2) Richemont caused significant harm to the objectives of U.S. sanctions regulations by dealing in the property of an SDN and allowing an SDN access to the commercial marketplace; and (3) Richemont is a commercially sophisticated entity with global operations operating in an industry at high risk for money laundering," the Treasury Department wrote. Mitigating factors included Richemont's cooperation and that it took remedial action.

See also "DOJ and SEC Continue to Stress the "Holy Trinity" of Self-Disclosure, Cooperation and Remediation" (Nov. 9, 2016).

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