



FINANCIAL INTEGRITY
NETWORK

Financial Integrity Network Policy Alert
United States Issues First Global Magnitsky Sanctions

January 4, 2018

Summary

On December 21, 2017, President Trump announced Executive Order 13818 to target serious human rights abuses and corruption around the world and implement the Global Magnitsky Human Rights Accountability Act. In an annex to the order, the President imposed sanctions on 13 serious human rights abusers and corrupt actors. In addition, the Treasury Department's Office of Foreign Assets Control (OFAC) imposed sanctions on 39 affiliated individuals and entities. Executive Order 13818 authorizes the Treasury Secretary to impose blocking sanctions on non-U.S. persons deemed to be:

- Responsible for or complicit in a serious abuse of human rights;
- Current or former government officials—or persons acting for or on their behalf—who are responsible for or complicit in corruption;
- Current or former government officials—or persons acting for or on their behalf—who are responsible for or complicit in, or have engaged in the transfer or the facilitation of the transfer of the proceeds of corruption;
- Leaders or officials of an entity, including any government entity, that has engaged in, or whose members have engaged in human rights abuse or corruption; and
- Leaders or officials of an entity whose property and interests in property are blocked pursuant to this order as a result of activities related to the leader's or official's tenure.

The Global Magnitsky Act and Executive Order 13818 represent a milestone in the United States' use of conduct-based sanctions authorities, enabling it to target corruption and human rights abuse anywhere in the world. This standalone, global authority builds upon the original Russia- and human rights-focused Sergei Magnitsky Rule of Law Accountability Act of 2012 and other existing country-specific programs that included similar, conduct-based designation criteria.

Annual Congressional reporting requirements in the Global Magnitsky Act suggest that its implementation is likely to result in a sustained focus on sanctions targeting human rights abuses and corruption worldwide. We expect that the legislative reporting requirements will result in additional Global Magnitsky human rights-focused sanctions annually, if not more frequently. The corruption prongs may be used more frequently and in a more aggressive manner that complements U.S. efforts to shore up economic competitiveness. The designations announced alongside the

order targeted corrupt actors, and using economic tools to target corruption is one of the initiatives included in the 2017 National Security Strategy.¹ The administration could decide that using Global Magnitsky Act sanctions to target corrupt business practices abroad could make competition more fair for U.S. firms that have long complained that their obligation to comply with the Foreign Corrupt Practices Act puts them at an economic disadvantage overseas.

Both the corruption and human rights prongs of the Global Magnitsky Act provide a tool the United States can use to signal support for anticorruption and pro-transparency protesters in times of social unrest, particularly those facing violent government reprisals. This use would be consistent with the manner in which the Venezuela sanctions authorities have been deployed, and could apply for example in the context of the current protests in Iran or a hypothetical wave of Arab Spring-like demonstrations.

The use of conduct-based sanctions to pursue corruption and human rights abuse amplifies existing international campaigns to combat corruption and ensure beneficial ownership transparency, underscoring the need for better integrated AML and sanctions screening systems. While continuing to maintain robust sanctions screening systems, financial institutions should review and adjust their AML programs to ensure that they are using an appropriately expansive definition of politically exposed persons and employing country and customer risk rating methodologies that reflect the expanded U.S. emphasis on human rights and corruption.

The Initial Round of Designations

The initial round of designations under the Global Magnitsky Human Rights Accountability Act (“Global Magnitsky Act”) announced on December 21, 2017 included 13 serious human rights abusers and corrupt actors listed in the annex of Executive Order 13818 and an additional 39 affiliated individuals and entities that OFAC named. Although a separate legal authority, the Global Magnitsky Act is related to the Sergei Magnitsky Rule of Law Accountability Act of 2012 (“original Magnitsky Act”), which sought to target persons for gross violations of internationally recognized human rights in Russia, including for actions related to the arrest, detention, torture, and death in Russian custody of lawyer Sergei Magnitsky. Financial institutions already are familiar with the original Magnitsky Act, under which the United States as of December 2017 had sanctioned 49 individuals. The initial round of Global Magnitsky designations, however, illustrates several critical distinctions between the authorities and how they are being applied:

- **Geographic Breadth:** The first round of Global Magnitsky designations spanned the globe, including individuals and entities from Africa, Asia, the Caribbean, Europe, Latin America, and the Middle East, suggesting that the United States intends for enforcement under this act to be truly global.
- **Corruption Focus:** Corruption was a small part of the original Magnitsky Act, only addressed insofar as human rights abuses were perpetrated for profit, to conceal criminal acts such as corruption, or to shut down investigations into criminal acts such as corruption.

¹ “National Security Strategy of the United States,” Dec. 18, 2017, Page 20, <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

In contrast, the narrative justifications for more than half of the 13 individuals listed in the annex to Executive Order 13818 describe allegations of corruption and bribery, suggesting that corruption is likely to be a significant enforcement focus for the Global Magnitsky Act.

- **Non-Government Officials:** The first round of sanctions designated several individuals for their involvement in corruption and bribery who were neither current nor former government officials. While some had direct familial links to current or former officials, at least two appear to have only professional ties to government officials. These designations suggest that the United States Government intends to use the Global Magnitsky Act to target corruption in an expansive way that encompasses professional facilitators.
- **Networks and Entities:** OFAC followed Executive Order 13818 with the designation of two more individuals and 37 entities involved in the misdeeds of the 13 people listed in the executive order’s annex. This suggests that OFAC plans to use the Global Magnitsky Act to designate networks and corporate entities, a targeting strategy that is a signature of very active OFAC sanctions programs but that has not been employed in the context of the original Magnitsky Act.

In addition to the individuals and entities named in the annex and designated by OFAC, financial institutions should be aware that, as with other OFAC sanctions programs, Global Magnitsky Act designations can have ripple effects on the permissibility of dealing with other entities due to what is known colloquially as “the 50 percent rule.” Under this rule, entities that are owned 50 percent or more by Specially Designated Nationals (SDNs) also are blocked, even if the entities are not on the SDN list.

Designation Criteria

The provisions in Executive Order 13818 encompass five distinct designation criteria that apply to non-U.S. persons,² only one of which overlaps with the designation criteria enumerated in the original Magnitsky Act. The new designation criteria unique to the Global Magnitsky Act represent an expansion of U.S. sanctions focus on corruption and bribery, particularly the role of non-government facilitators in transferring bribe payments and laundering the proceeds of corruption.

Designation Criterion Overlapping with Original Magnitsky Act

Criterion 1: Authorizes sanctions against any non-U.S. person determined³ to be responsible for or complicit in, or to have directly or indirectly engaged in, serious human rights abuse. This

² We use the term “non-U.S.” instead of “foreign” throughout for the convenience of readers outside of the United States. The Executive Order uses “foreign person” to mean an individual or entity—including a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization—that is not a United States citizen, permanent resident alien, entity organized under the laws of the United States, or a person located in the United States. See Executive Order, Section 6 for a definition of U.S. person.

³ Such determinations under the Executive Order are made by the Secretary of Treasury, in consultation with the Secretary of State and the Attorney General.

authorization also extends to any non-U.S. person found to have attempted to engage in said conduct. Under this criterion, the Treasury Secretary may impose full blocking sanctions and generally prohibit U.S. persons from transacting with designated individuals and entities.⁴

Implications: This designation criterion is similar to one listed in the original, Russia-focused Magnitsky Act. U.S. persons, including the U.S. branches of non-U.S. financial institutions, are generally barred from transacting with individuals or entities named under this criterion. In the original Magnitsky Act and the text of the Global Magnitsky Act, extrajudicial killings and torture are specifically mentioned as serious human rights abuse. Further, the texts of the Magnitsky Act and the Global Magnitsky Act both emphasize the focus on human rights abuse against individuals either seeking to expose government officials' illegal activity or seeking to obtain, exercise, defend, or promote internationally recognized human rights and freedoms such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections.

Although the laws do not specifically define “gross violations of internationally recognized human rights,” the original Magnitsky Act specifically references several international conventions that financial institutions should view—in addition to U.S. law—as sources for defining what constitute both human rights abuse and internationally recognized human rights.⁵ Global financial institutions concerned about potential future sanctions under this criterion should ensure that they are aware of the contents of these international conventions regardless of whether their home jurisdictions have acceded to them.

Designation Criteria Unique to the Global Magnitsky Act

Criterion 2: Authorizes sanctions against any non-U.S. person determined to be a current or former government official or person acting for or on behalf of such an official, who is responsible for or complicit in, or has engaged in corruption.⁶ This authorization also extends to any non-U.S. person found to have attempted to engage in said conduct. Under this criterion, the Treasury Secretary may impose full blocking sanctions and generally prohibit U.S. persons from transacting with designated individuals and entities.

Criterion 3: Authorizes sanctions against any non-U.S. person determined to be a current or former government official or person acting for or on behalf of such an official, who is responsible for or complicit in, or has engaged in the transfer or the facilitation of the transfer of the proceeds of corruption. This authorization also extends to any non-U.S. person found to have attempted to engage in said conduct. Under this criterion, the Treasury Secretary may impose full blocking sanctions and generally prohibit U.S. persons from transacting with designated individuals and entities.

⁴ This includes the blocking of all property or interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person.

⁵ See: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and the European Convention on Human Rights.

⁶ For both corruption-focused criteria, Executive Order 13818 and the Global Magnitsky Act specify that “corruption” includes the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery.

Implications: These corruption-focused criteria are extremely broad and potentially carry tremendous risk for financial institutions because they target complicity, facilitation, and attempted corruption and facilitation in addition to overt acts of corruption and bribery. It is conceivable that the United States could use these criteria—and Criterion 3 in particular—to sanction a non-U.S. financial institution that processed bribery or corruption payments, although it is not clear from the initial round of designations that the United States intends to use the Global Magnitsky Act or Executive Order 13818 to target financial institutions. Additionally, while it is notable that these criteria target individuals who are neither current nor former officials and it is clear from the first round of designations that the United States intends to use these criteria to target business people directly involved in corruption, it is less clear how or to what extent the United States will use these authorities to target complicity or how broadly it defines “complicit in” or “responsible for.” The FAQs that OFAC issued on Dec. 21, 2017 do not provide any insight on these questions.⁷

Criterion 4: Authorizes sanctions against any non-U.S. person determined to be or have been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in conduct described in the first three criteria. Under this criterion, the Treasury Secretary may impose full blocking sanctions and generally prohibit U.S. persons from transacting with designated individuals and entities.

Criterion 5: Authorizes sanctions against any non-U.S. person determined to be or have been a leader or official of an entity whose property and interests in property are blocked pursuant to this order as a result of activities related to the leader’s or official’s tenure. Under this criterion, the Treasury Secretary may impose full blocking sanctions and generally prohibit U.S. persons from transacting with designated individuals and entities.

Implications: Criteria 4 and 5 are similarly broad, supporting the use of the Global Magnitsky Act and Executive Order 13818 to target networks of related individuals and entities and implicating members of organizations who were not necessarily personally involved in overt acts of corruption or human rights abuse. These criteria do not specify a level of seniority required to be considered a “leader” or “official” of an entity, nor do they specify that a leader or official must have knowledge—or be reasonably expected to have known—that the entity was involved in corruption or human rights abuse to be subject to sanctions. The FAQs that OFAC issued on Dec. 21, 2017 do not provide any insight on these questions.

Recommendations

The aggressive use of the Global Magnitsky Act amplifies the need for banks to integrate their sanctions and AML functions better while taking an active approach to identifying sources of corruption and human rights-related risk in their customer portfolio and within their branch, affiliate, and correspondent networks. In addition to updating their sanctions screening lists, financial institutions should review their policies and procedures related to beneficial ownership identification, Politically Exposed Persons (PEPs), and customer and market risk-rating. Adequately managing risks associated with the Global Magnitsky Act sanctions will require a

⁷ “FAQ: Global Magnitsky Sanctions,” Dec. 21, 2017, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/12212017_glomag_faqs.pdf.

comprehensive approach to enterprise-wide risk management and coordination among banks' customer due diligence, AML, and sanctions functions.

- The designation of company networks—including several shell companies in traditional secrecy havens such as the British Virgin Islands and Cyprus—during the initial Global Magnitsky Act sanctions should reinforce for financial institutions the importance of robust policies and procedures for identifying and regularly validating beneficial ownership information. This function is particularly important in the context of the “50 percent rule,” because it is necessary to identify clients, accounts, and beneficiaries subject to the Global Magnitsky Act sanctions that have not been specifically named in the Executive Order or placed on the SDN list.
- Understanding when a client, originator, or beneficiary is controlled by or acting for or on behalf of a designated individual or entity is critical even in the context of intermediary wires, when this information is particularly difficult to obtain. Regularly reviewing correspondents' CDD, AML, and sanctions compliance policies and procedures can help your bank understand what risks your correspondents are introducing into your institution.
- The inclusion of several former officials and non-government officials who were either family members or business associates of current or former officials in the first round of Global Magnitsky Act designations highlights the importance of strong PEPs policies and procedures. Financial institutions should review their PEPs definitions, policies, and procedures to ensure that they align with global standards and U.S. regulatory expectations.⁸ In particular, financial institutions should ensure they are applying enhanced due diligence and increased transactional scrutiny not only to current officials but also former officials, their family members, and known associates. Efforts to keep PEPs' client records updated with known associates will be important to mitigating risks associated with Global Magnitsky Act sanctions.
- The designation of several individuals, including PEPs, who had already been charged with crimes in their local jurisdictions also argues for the examination of bank policies on reviewing negative news and incorporating it into customer risk ratings and decisions about maintaining customer relationships. Financial institutions may wish to revisit their guidance on negative news monitoring to ensure that it encompasses reputable non-governmental organizations that monitor human rights, freedoms, and corruption-related issues, as traditional search engines often fail to index these organizations' reports.
- Although illicit finance risks associated with corruption are well known, the Global Magnitsky Act dramatically expands the scope of sanctions risk associated with corruption and bribery. Financial institutions should ensure that their country risk rating methodologies account for corruption, and should take this opportunity to reexamine their risk appetite vis a vis operating in and serving customers in jurisdictions deemed highly corrupt.⁹ The emphasis in the Global Magnitsky legislation and Executive Order 13818 on

⁸ For information on global standards, see FATF Recommendation 12 on Politically Exposed Persons and for U.S. regulatory expectations, see the FFIEC manual.

⁹ See World Bank World Governance Indicators, Control of Corruption indicator.

corruption in government contracts and in the extractives industry also argues in favor of ensuring that customer and industry ratings reflect these escalated risks.

- Similarly, financial institutions should reexamine their risk rating systems to ensure that a country's record on human rights is adequately considered as a source of sanctions risk. The Global Magnitsky Act legislation and Executive Order 13810 also emphasize core freedoms that are part of the U.S. political identity such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, the repression of any of which should now be considered a sanctions risk factor.