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The Trump Administration Supercharged Global Magnitsky Act Human Rights and Corruption Sanctions

Presidential Executive Order Vastly Expands Sanctions Powers Conferred by the Global Magnitsky Act, Giving the Trump Administration Sweeping Corruption and Human Rights Sanctions Authority Worldwide

On December 20, 2017, the U.S. President issued Executive Order 13818 "Blocking the Property of Persons Involved in Serious Human Rights Abuse and Corruption." [1] EO 13818 in substantial part implements the Global Magnitsky Human Rights Accountability Act ("**Global Magnitsky Act**" or the "**Act**"), a 2016 law that authorizes the President to freeze certain property and restrict the entry into the United States of "foreign persons" that the President determines, "based on credible evidence," are responsible for certain corrupt acts and human rights abuses committed wholly or substantially outside of the United States (the "**Global Magnitsky Sanctions**").[2]

MASSPOINT MAGNITSKY SERIES

This publication is the third installment in a MassPoint Legal and Strategy Advisory PLLC series on the Global Magnitsky Act and Sanctions. Click below to view the first two parts.

-New U.S. Sanctions Are a Powerful Weapon Against Corruption and Human Rights Abuse Worldwide, MassPoint Series No. 1, March 5, 2018.

-From Sergei Magnitsky to Global Magnitsky: United States Asserts Universal Jurisdiction Over Corruption and Human Rights Abuses, MassPoint Series No. 2, March 27, 2018.

Beyond the parameters of the Global Magnitsky Act, EO 13818 markedly enlarges the range of sanctionable conduct and persons. The differences between the language of EO 13818 and the Global Magnitsky Act are substantive and significant. In several instances, EO 13818 expands sanctions by omitting the Act's qualifying language, adding new bases for sanctions, and/or leaving key terms undefined. Key instances of EO 13818's broad and/or uncertain language are discussed below.

As stated in an earlier installment of this MassPoint Magnitsky series, EO 13818 is "remarkably encompassing in scope and potential effect" and is therefore fit to advance its stated purpose to "'impose tangible and significant consequences on those who commit serious human rights abuse or engage in corruption.'"

[1] Exec. Order No. 13,818, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 Fed. Reg. 60,839 (Dec. 20, 2017) ["**EO 13818**" or the "**Order**"].

[2] Global Magnitsky Human Rights Accountability Act, Subtitle F of the National Defense Authorization Act for Fiscal Year 2017, Pub. Law No. 114-328, §§1262-65 at § 1263 (codified at 22 U.S.C. 2656 note) (Dec. 23, 2016).

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EO 13818 Invokes Sanctions Authority Beyond the Global Magnitsky Act

Before addressing the specific ways in which EO 13818 supercharged the Global Magnitsky Act's sanctions provisions, it is necessary to identify the legal underpinning of the Order's expansiveness. EO 13818 declares, pursuant to the International Emergency Economic Powers Act,[3] a "national emergency" with respect to "serious human rights" abuses and a broad range of corrupt acts that threaten "the stability of international political and economic systems" and "constitute an unusual an extraordinary threat to the national security, foreign policy, and economy of the United States."[4]

The declaration of a national emergency is legally consequential because the Global Magnitsky Act does not require the President to declare a national emergency to implement the sanctions it authorizes.[5] By declaring a national emergency and invoking the IEEPA, EO 13818 relies on the IEEPA as independent legal authority for its provisions that exceed or appear to exceed the scope of sanctions authority conferred by the Global Magnitsky Act.[6]

As a practical matter, the President's invocation of IEEPA powers indicates that the Trump Administration, in principle at least, may have plans to more broadly employ sanctions to combat corruption and human rights abuses, in tandem with or separately from U.S. laws that target or provide remedies for certain corrupt conduct or human rights abuses committed substantially or entirely outside of the United States (*e.g.*, in connection with bribery punishable under the Foreign Corrupt Practices Act or human rights abuses actionable by aliens under the Alien Tort Claims Act).[7]

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[3] International Emergency Economic Powers Act, 50 U.S.C. § 1701.

[4] EO 13818, preamble.

[5] Global Magnitsky Act, Pub. Law No. 114-328, § 1263(b)(1)(B) (stating that "the requirements of section 202 of the . . . [IEEPA] . . . shall not apply for the purposes of . . . [the imposition of sanctions]."

[6] The Global Magnitsky Act and the IEEPA are the key legal authorities supporting EO 13818. It is worth noting also that EO 13818 invokes the following additional legal authorities: National Emergencies Act (50 U.S.C. 1601 et. seq.), section 212(f) of the Immigration and Nationality act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code (authorizing the President to delegate authority to certain heads of Executive Branch departments or agencies). EO 13818, preamble.

[7] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (a federal law that essentially prohibits the bribery of foreign officials to gain business advantage and applies to private parties who bribe or attempt or conspire to bribe foreign government officials and are within the legal jurisdiction of the United States by virtue of their U.S. nationality, presence in the United States, or links between the United States and their overseas corrupt acts, attempts, or conspiracies); Alien Tort Claims Act, 28 U.S.C. § 1350 (enacted as part of the Judiciary Act of 1789 and vesting U.S. district courts with original jurisdiction of "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

Human Rights Abusers and Their Enablers Are Sanctionable Under EO 13818 and the Global Magnitsky Act

EO 13818's Human Rights Language is Broader Than the Language of the Global Magnitsky Act

The Global Magnitsky Act authorizes sanctions against any foreign person that the President determines,

> based on credible evidence . . . is responsible for extrajudicial killings, torture, or other ***gross violations of internationally recognized human rights*** committed against individuals in any foreign country who seek . . . to expose illegal activities by government officials . . . or 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.[8]

In addition, the Act sanctions enablers of human rights abuses, specifically those who, in connection with human rights abuses, act as agents or otherwise on behalf of perpetrators.[9]

In contrast to the Global Magnitsky Act, under EO 13818, "any foreign person" determined "to be responsible for, or to have directly or indirectly engaged in, ***serious human rights abuse***" is a blocked person.[10] EO 13818 does not limit the scope of "serious human rights abuses" or provide illustrations, but the Global Magnitsky Act does, albeit inconclusively. While the phrase "internationally recognized human rights" has no universally accepted fixed meaning and is not given one by the Global Magnitsky Act, it nevertheless can have a limiting effect on the scope of human rights abuses sanctionable under the Act, particularly when that phrase is read in conjunction with the Act's illustrations of human rights abuses.[11]

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[8] Global Magnitsky Act, Pub. Law No. 114-328, § 1263(a)(1) (emphasis added). The Global Magnitsky Act defines "gross violations" as that term is defined in the Foreign Assistance Act of 1961 at 22 U.S.C. § 2304(d)(1) that: "'gross violations of internationally recognized human rights' includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person." It is not so clear that the examples of human rights enumerated in the Act are "internationally recognized." Nor is it clear what "internationally recognized" means—*e.g.*, recognized in international (widely adopted multilateral) treaties or by international courts or tribunals that currently have or in the past had consent-based jurisdiction of actions arising in an appreciable number of countries. In any case, it is clear that the illustrative examples of human rights comport with the language of the U.S. Constitution and American Constitutional Law.

As discussed in the second installment of this MassPoint Magnitsky Series, the Global Magnitsky Act has its roots in the Sergei Magnitsky Rule of Law Accountability Act of 2012, particularly its human rights provisions that respond to the circumstances of and surrounding the detention and death of Russian lawyer and whistleblower Sergei Magnitsky.

[9] *Id.* at § 1263(a)(1)(2).

[10] EO 13818, § 1(a)(ii) (emphasis added).

[11] Notably, "internationally recognized human rights" is used in the Rome Statute of the International Criminal Court (ICC), but the United States is not a party to that statute and, accordingly, has not submitted to the jurisdiction of the ICC. The United States has signed, but not ratified, the Rome Statute. The Rome Statute provides in pertinent part that:

> The application and interpretation of law pursuant to this . . . [statute] must be consistent with *internationally recognized human rights*, and be without any adverse distinction founded on grounds such

If disputed, the scope of EO 13818 and the Global Magnitsky Act's human rights provisions may well be resolved by American courts.[12] For now, it is sufficient to note that a plain reading of EO 13818's human rights language indicates that it is broader in scope and potential reach than the Global Magnitsky Act.

The Global Magnitsky Sanctions Define Corruption Broadly and Directly Sanction Foreign Government Officials for Corrupt Acts

Under the Global Magnitsky Act, a "foreign person" who is a "government official, or senior associate of such an official" is sanctionable for corruption if such a person is

> responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions . . . or has materially assisted, sponsored, or provided financial, material, or technological support for, or goods and services in support of . . . [such corruption].[13]

The Global Magnitsky Act's corruption provisions are significant not only because they *directly* target foreign government officials, but also because they define corruption broadly, in contrast to typical anti-corruption laws that tend to target only bribery.

With respect to corruption and persons sanctionable for corrupt acts, EO 13818 casts a much wider net. As discussed below, among its various extensions of the Global Magnitsky Act, the Order applies to current ***and former*** foreign government officials and ***any person*** "acting for or on their behalf," rather than just their "senior associates."[14]

EO 13818 Significantly Expands the Range of Conduct and Persons Sanctionable for Corruption

EO 13818 provides, in pertinent part that "any foreign person determined . . . to be a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in" the following acts is a blocked (sanctioned) person:

(1) "corruption, including 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; or

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as gender . . . age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Rome Statute of the International Criminal Court, Art. 21(3) (Applicable Law).

[12] It is worth noting that another recent law, Countering America's Adversaries Through Sanctions Act, Pub. Law No. 115-44, 131 Stat 886 (August 2, 2017) (often referred to as "**CAASTA**"), also employs the "internationally recognized human rights" language and authorizes sanctions for human rights abuses in Russia, Iran and North Korea.

[13] Global Magnitsky Act, Pub. Law No. 114-328, § 1263(a)(3)-(4).

[14] EO 13818 at § 1(a)(B).

(2) the transfer or the facilitation of the transfer of the proceeds of corruption."[15]

The expansive scope and effect of these corruption provisions, and others, are discussed specifically below.

EO 13818 Applies to "Corruption," Not Just "Significant Corruption"

Under EO 13818, parties can be sanctioned for "corruption" and not, as the Global Magnitsky Act provides, for only "significant corruption." While the Global Magnitsky Act illustrates, but does not categorically define, "significant corruption," the omission by EO 13818 of the modifier "significant," along with the other language differences discussed herein, expand the President's anti-corruption sanctions authority beyond the boundaries of the Global Magnitsky Act.

EO 13818 Reaches Current and Former Government Officials (Rather Than Just Current Officials) and All Persons (Not Just "Senior Associates") Acting for or on Their Behalf

EO 13818 applies to "***current or former*** government official[s]," while the Global Magnitsky Act covers only "government official[s]" (present tense).[16] In addition, EO 13818 applies, without limitation, to "***person[s] acting for or on behalf of***" current or former government officials, but the Act applies only to "senior associate[s] of such . . . official[s]."[17] Relative to the Global Magnitsky Act and generally, EO 13818's applicability to ***all "persons acting for or on behalf of"*** current or former government officials brings within its reach a remarkably wide range of foreign government, government-affiliated and private parties.

EO 13818's requirement that persons acting on behalf of current or government officials be "responsible for or complicit in" covered corrupt acts has a potential narrowing effect, but the nature and extent of any narrowing effect is not clear as the Order does not elaborate on the meaning of "responsible for" or "complicit in." For example, where a transfer of corrupt proceeds (discussed below) is done by or through a foreign bank, it is not clear if such a foreign bank would be "responsible" or "complicit," including if the bank conducted adequate due diligence but nevertheless failed to detect the illicit source of funds.

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[15] *Id.* at § 1(a)(ii)(B).

[16] EO 13818, §1(a)(ii)(B) (emphasis added); Global Magnitsky Act, Pub. Law No. 114-328, § 1263(a)(3).

[17] *Id.* (emphasis added). The use of "senior associate" in the Act likely tracks U.S. and international frameworks that delineate which associates of current or former government officials merit scrutiny, particularly on the part of banks and certain other financial institutions for anti-money laundering purposes. For example, the USA Patriot Act (amending the Bank Secrecy Act) and regulations issued thereunder require banks to conduct enhanced due diligence of "close associates" of Senior Foreign Political Figures (SFPF). A "close associate" of an SFPF is "a person who is widely and publicly known to maintain an unusually close relationship with the senior foreign political figure, and includes a person who is in a position to conduct substantial domestic and international financial transactions on behalf of the senior foreign political figure." *See, e.g.*, Federal Financial Institutions Examination Council, Bank Secrecy Act Anti-Money Laundering Examination Manual, Politically Exposed Persons-Overview (discussing the steps banks are required to take to detect and avoid being used to transfer or hide the proceeds of corruption). A Senior Foreign Political Figure (SFPF), as defined and treated by U.S. laws and regulations, is roughly the equivalent of a Politically Exposed Person (PEP) as that term is defined by international anti-money laundering standards, particularly those promulgated by the Financial Action Task Force (FATF). *See, e.g.*, Financial Action Task Force, FATF Guidance, Politically Exposed Persons, June 2013. The links between corruption and money laundering are noted briefly herein.

EO 13818 Sanctions the "Misappropriation of State Assets," Rather Than Just "Expropriation of Public Assets for Personal Gain"

EO 13818 includes in its definition of corruption the "***misappropriation of state assets***" (and distinguishes "misappropriation" from "expropriation of private assets").[18] The Global Magnitsky Act's analogue provision addresses the "expropriation of private or public assets for personal gain" as an example of "significant corruption," but does not cover "misappropriation."[19] Here again, the differences between EO 13819 and the Global Magnitsky Act are significant.

For example, vis-à-vis public and private assets, the term "misappropriation" captures a wider range of conduct than "expropriation."[20] Also, unlike the Global Magnitsky Act, the Order does not require that "misappropriation" be carried out for personal gain, or for any particular purpose—an act of "misappropriation" alone is sufficient. Thus, for example, under EO 13818, a low level state employee or other party who, by a routine or other act, "misappropriates" state assets for the gain of another (*e.g.*, a higher ranking government official), could conceivably be liable for the corrupt act of "misappropriation of state assets."

EO 13818 Applies to All Persons Who Facilitate the Transfer of Corrupt Proceeds Anywhere, Not Just to Government Officials and Their Senior Associates Who Transfer Corrupt Proceeds to Foreign Jurisdictions

Under EO 13818, the ***"transfer or the facilitation of the transfer" of corrupt proceeds by a "current or former government official, or a person acting for or on behalf of such an official" is sanctionable corruption***, if the person acting was responsible for, complicit in, or directly or indirectly engaged in the transfer.[21] On transfers of corrupt proceeds, the Global Magnitsky Act is comparatively limited in scope and reach. The Act authorizes sanctions for ***"the facilitation or transfer of the proceeds of corruption to foreign jurisdictions" by "a government official or a senior associate of such an official***."[22] The language differences are consequential.

First, and as noted above, under EO 13818, both ***current and former*** foreign government officials have sanctions exposure, while ***only current officials*** are covered by the Global Magnitsky Act. Second, and crucially, under EO 13818, ***any person***—not just a "senior associate" of current foreign government officials—is sanctionable for transferring or facilitating the transfer of corrupt proceeds. Thus, foreign banks, individuals, businesses, state-owned enterprises, or other parties could be sanctioned for transferring or facilitating the transfer of corrupt proceeds if the additional and ambiguous criteria of EO 13818 (*i.e.*, responsibility or complicity) are met.

Third, EO 13818 applies to ***transfers of corrupt proceeds anywhere***, and not just to "foreign jurisdictions." Presumably, EO 13818 covers transfers of corrupt proceeds within one country or legal jurisdiction. If so, the operation of this provision would likely present practical challenges, as

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[18] EO 13818, § 1(ii)(B)1) (emphasis added).

[19] EO 13818, § 1(ii)(B)(1); Global Magnitsky Act, Pub. Law No. 114-321, § 1263(a)(3).

[20] The Global Magnitsky Act's use of "expropriation" vis-à-vis state assets seems somewhat odd, as the term is often understood to refer to the taking of private property by state actors, rather than the misuse of state assets. EO 13818, as discussed above, distinguishes between "misappropriation of state assets" and "expropriation of private assets for personal gain." EO 13818 at § 1(ii)(B)(1).

[21] EO 13818, §1(a)(B)(2) (emphasis added).

[22] Global Magnitsky Act, Pub. Law No. 114-328, § 1263(a)(3) (emphasis added).

accessing information and evidence pertaining to domestic transfers of money or other proceeds would, as general matter, be relatively difficult (but certainly not impossible) for U.S. authorities.

That said, and as discussed in a forthcoming installment of this MassPoint Magnitsky series, the Global Magnitsky Act expressly carves out roles in the sanctions designation process for Congress, the U.S. Department of State, foreign governments, and NGOs, all of whom may provide "credible evidence" of sanctionable conduct for the purpose of identifying and designating sanctionable persons. Thus, within the Global Magnitsky Sanctions framework, a number of local and international information sources, from within and outside of the U.S. government, are available and ***must*** be considered by the President "in determining whether to impose sanctions."[23] It is likely that one or more of these sources of "credible information" would be well-positioned to access and provide information about domestic transfers of corrupt proceeds.

Transfers of Corrupt Proceeds- Anti-Money Laundering Nexus

Of course, where there are transfers or attempted transfers of the proceeds of corruption, there will also be efforts to conceal the illicit origins of such proceeds. Accordingly, parties sanctioned, flagged, or investigated for or in connection with transfers of corrupt proceeds may also find themselves facing liability under U.S. and/or foreign anti-money laundering laws.[24]

EO 13818 Imposes Strict Liability and Vicarious Liability for Corruption on Current and Former "Leaders" or "Officials" of Private and State-Owned Entities

Extraordinarily under EO 13818, ***a current and former "leader or official" of "an entity, including any government entity, that has engaged in, or whose members have engaged in" corruption covered by the Order is sanctionable where the corrupt acts "relate[] to the leader's or official's tenure***."[25] As the foregoing language indicates, this provision applies not just to government entities, but to any entity—private or government. As to the definition of a "leader" or "official," EO 13818 does not define the terms. Presumably, a "leader" or "official" would encompass, at minimum, directors and officers of "an entity."

This provision of EO 13818 is remarkable as it imposes on the "leaders" and "officials" of private and government entities strict and vicarious liability for the corrupt acts of their entities or entity "members" by virtue only of their leadership roles and without any apparent need to show, on the part of such leaders or officials, intent, participation, actual or constructive knowledge, or negligence with respect to sanctionable corrupt acts. Here, EO 13818 applies to foreign parties

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[23] *Id.* at § 1263(c) and (i) (emphasis added) (providing that the "President shall consider . . . information provided jointly by . . . the appropriate congressional committees . . . and credible information obtained by other countries and nongovernmental organizations that monitor violations of human rights" and authorizing an Assistant Secretary of State to submit to the Secretary "the names of foreign persons who may meet the criteria" required to impose sanctions for human rights abuses and corruption.)

[24] *See, e.g.*, Hdeel Abdelhady, Cross-Compliance for Financial Institutions: The Anti-Corruption-AML Nexus, Butterworths Journal of International Banking and Financial Law, September 2014.

[25] *Id.* at §1(a)(C)(1) (emphasis added).

theories of liability that depart from prevailing standards of corporate/entity officer liability in the United States.[26]

EO 13818 Imputes the Sanctioned Status of Private and Government Entities to Their "Leaders"

In addition to imposing strict and vicarious liability for corruption on leaders and officials of private and government entities, ***EO 13818 sanctions any "foreign person" determined "to be or have been a leader of official of . . . an entity whose property and interests in property are blocked pursuant to . . . [the Order] as a result of activities related to the leader's official tenure***."[27] Accordingly, a current or former leader a private or government entity that is blocked pursuant to EO 13818 is also a blocked person if the entity was sanctioned "as a result of activities related to the leader's official tenure."[28]

Key Takeaways

The Global Magnitsky Sanctions are extraordinary for a number of reasons. They are global in reach and require no jurisdictional nexus between the United States and the corrupt acts and human rights abuses they target. Both the Global Magnitsky Act and EO 13818 define corruption broadly, well beyond U.S. and international frameworks that are concerned primarily or exclusively with bribery. The Global Magnitsky Sanctions also depart from U.S. and international anti-corruption frameworks by directly penalizing foreign government officials for corrupt acts, rather than deferring to national authorities and laws to punish their government officials for corruption.

As discussed above, EO 13818 significantly expands the scope and reach of the Global Magnitsky Act and, in doing so, employs extraordinary theories of liability, such as by imposing strict and vicarious liability on the leaders or officials of any foreign entity that is determined to have engaged in sanctionable corrupt acts. Independently and together, the provisions of EO 13818 empower the United States, and particularly the Executive Branch, to sanction a wide range of persons and conduct without meeting the due process, evidentiary, or other requirements that would apply in U.S. courts.

As indicated in a prior installment of this MassPoint series, 52 individuals and entities have so far been sanctioned under EO 13818. It remains to be seen how the Trump Administration (or subsequent administrations) will implement the Global Magnitsky Sanctions. For now, foreign persons in particular—both government and private—should familiarize themselves with the Global Magnitsky Sanctions and assess their risk for liability, particularly for facilitating corrupt acts such as by transferring the proceeds of corruption.■

For more information about the MassPoint Magnitsky Series or MassPoint's other publications or services, please contact the author, Hdeel Abdelhady, at habdelhady@masspointpllc.com or +1-202-630-2512.

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[26] Indeed, even the nascent Responsible Corporate Officer Doctrine, under which certain corporate officers can be held strictly and vicariously liable for acts of a company based on their roles, has been limited in its application (*e.g.*, in certain areas such as food and drugs where there are significant public welfare interests).

[27] EO 13818, § 1(a)(ii)(C)(2) (emphasis added).

[28] *Id.*