

Global Magnitsky: The Swiss Army Knife Of Sanctions

By **Hdeel Abdelhady** (August 7, 2018, 3:39 PM EDT)

The Global Magnitsky corruption and human rights sanctions have been described as “smart sanctions” because they target specific conduct, rather than an entire country. To the extent that “smart” connotes limitation, the categorization should be taken with a grain of salt.

The Global Magnitsky sanctions program applies worldwide, without any requirement of a jurisdictional nexus with the United States. It defines corruption broadly enough to capture a wide range of conduct and persons. The sanctions target “serious human rights abuse,” but do not define the term. Moreover, the sanctions are readily deployable. No tailored legislation, executive order or other administrative process — other than a sanctions determination by the Secretary of Treasury in consultation with the Secretary of State — is required to impose sanctions anywhere, anytime.



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Given their global reach, substantive breadth and wide applicability, the Global Magnitsky sanctions have distinct utility value as they can be readily employed for multiple legal, policy and strategic objectives. They are the Swiss army knife of sanctions.

To date, 78 individuals and entities have been sanctioned for corruption and human rights abuses. The most recent of these sanctions actions, against Turkey, has triggered speculation as to its motives and objectives. This is discussed below, as are some of the provisions that suggest the Global Magnitsky sanctions program was formulated for sweeping applicability and enforcement latitude.

Utility Value: Sanctions on Turkish Officials

The United States last week took the unprecedented step of sanctioning officials of a NATO member state — the justice and interior ministers of Turkey. According to the U.S. Department of Treasury, each of the Turkish ministers was sanctioned for “being the leader of an entity” — respectively, Turkey’s Ministry of Justice and Ministry of Interior — “that has engaged in, or whose members have engaged in, serious human rights abuse.”[1]

The “serious human rights abuse” at issue is the detention of Andrew Brunson, a pastor and U.S. citizen who reportedly has lived in Turkey for over 20 years and, after the coup attempt in 2016, was charged with espionage and having links to designated terrorist organizations, the Gülen Movement and PKK.[2] Brunson is “one of 20 American citizens who have been prosecuted under a government crackdown” following the 2016 coup attempt.[3]

Some have attributed the sanctions action to domestic political motivations, to rally the U.S. president’s voter base ahead of November elections. “It’s pretty remarkable,” said one commentator, “how far the Trump administration is willing to go ... putting at jeopardy the relationship with a NATO ally over a preacher. ... [I]t just shows the importance of the evangelical vote in the U.S. as it heads to midterms.”[4]

Other accounts suggest that sanctions (and other U.S. legal matters) were on the table in U.S.-Turkey negotiations, to extract concessions or exact a penalty. According to Bloomberg, the Trump administration offered, in exchange for Brunson’s release, “a lenient fine” for Turkey’s state-owned

Halkbank after one of its senior executives[5] — in connection with the high profile Reza Zarrab sanctions and money laundering case[6] — was convicted by a U.S. jury earlier this year for violations of U.S. sanctions on Iran and other offenses.[7] The administration reportedly also offered to return the Halkbank executive to Turkey to serve out the remainder of his sentence.[8] But when Turkey failed to deliver Brunson, the administration imposed sanctions, and more may follow.

Even setting aside interpretations of the Turkey sanctions action, it demonstrates the Global Magnitsky sanctions program's utility — sanctions were available and imposed, it appears, without need for much advance legal groundwork tailored for context.[9]

Broad Sanctions Scope and Enforcement Authority

The Global Magnitsky sanctions program was promulgated on Dec. 20, 2017, by Executive Order 13818, "Blocking the Property of Persons Involved in Serious Human Rights Abuse and Corruption." [10] EO 13818 partially implements the Global Magnitsky Human Rights Accountability Act of 2016, or "Global Magnitsky Act," which authorizes the president to impose sanctions on "foreign persons" for "gross violations of internationally recognized human rights," such as torture and extrajudicial killings, and broadly defined corruption, including "the expropriation of private or public assets for personal gain [and] corruption related to government contracts." [11] This law is distinct from the better known Sergei Magnitsky Rule of Law and Accountability Act of 2012, commonly the "Magnitsky Act."

EO 13818 sizably expands the range of sanctionable conduct and persons, and relies on the International Emergency Economic Powers Act in support of its provisions that exceed the sanctions authority conferred by the Global Magnitsky Act. [12] Examples of EO 13818's relative expansiveness include (but assuredly are not limited to) the following:

- EO 13818 targets "serious human rights abuse." However, because the order does not define "serious human rights abuse," the concept is malleable and broader than the "gross violations of internationally recognized human rights" targeted (but not strictly limited) by the Global Magnitsky Act. [13] The sanctions imposed on Turkish officials illustrate this flexibility. It is not at all clear that the detention of Andrew Brunson constitutes a "serious human rights abuse" under U.S. or international law, including under the Global Magnitsky Act.
- EO 13818 targets "corruption." In contrast, the Global Magnitsky Act targets "significant corruption." The order applies to corruption by foreign persons who are current and former government officials and all "persons" acting for or on their behalf. The Global Magnitsky Act applies only to "government officials" (present tense) and their "senior associates." [14] With these and other language differences, EO 13818 markedly expands the range of acts and persons sanctionable for corruption.
- Under EO 13818, the transfer, or facilitation of the transfer, of corrupt proceeds by "persons acting for or on ... behalf" of current or former government officials is a corrupt act. [15] This language is far-reaching and flexible. Neither the order nor its implementing regulations provide guidance, for example, as to whether "acting for or on behalf" of a current or former government official requires knowledge or willfulness. If no knowledge is required, financial services providers in particular could find themselves in the crosshairs for transfers of proceeds of broadly defined corruption.
- EO 13818 employs extraordinary theories of corporate/entity officer liability. Under the order, foreign persons who are current or former "leaders or officials" of "an entity" (government and private) are strictly and vicariously liable — and thus sanctionable — for serious human rights abuses and certain corrupt acts "engaged in" by the "entity" or its "members" "relating to the leader's or official's tenure." [16] The "engaged in" language suggests that passive conduct could trigger entity liability. Further, the order does not explain what "relating to" entails. Nor

does it define “members” or otherwise indicate if that term includes majority or other owners, management, employees generally or others. Also, the order does not define “leader” or “official.” The Treasury Department’s statement on the Turkey sanctions indicates that it counts heads of government agencies, like the Turkish ministers, as “leaders.” Presumably, a “leader” or “official” of a company (private or state-owned) would include a CEO, other officer or director (or their equivalents). Additionally, the Treasury Department’s statement could be read to confirm that strict and vicarious liability standards apply to “leaders” and “officials,” as the statement makes no reference to specific sanctionable acts undertaken by or at the direction of the ministers.[17]

- EO 13818 imputes the sanctioned status of a sanctioned entity to its current or former leaders or officials, if the entity was sanctioned under the order for any conduct “as a result of activities related to the leader’s or official’s tenure.”[18] This provision is analogous to OFAC’s “50 percent rule” inasmuch as it imputes the sanctioned status of one person (natural or legal) to a related person, in this case by virtue of association rather than ownership.[19]

Certain U.S. Persons Are “Foreign Persons” With Full Sanctions Exposure

As compared to U.S. persons, “foreign persons” have much greater legal exposure under the Global Magnitsky sanctions. Notably, two classes of U.S. persons are, by definition, “foreign persons,” and accordingly have full sanctions exposure: (1) dual citizens and nationals and (2) entities “not solely organized under the laws of the United States or existing solely in the United States.”[20] Multinational companies/entities in particular should understand their status and scope of potential liability.

Financial and Immigration Sanctions; Civil and Criminal Penalties

Entities and individuals sanctioned under the Global Magnitsky sanctions are “specially designated nationals” or “blocked” persons whose property and interests in property in the United States or in the possession or control of U.S. persons (wherever located) are blocked and may not, without authorization, be transacted in.[21] Additionally, foreign sanctioned persons are generally barred from entry into the United States.[22] Violations of the Global Magnitsky sanctions are subject to civil and criminal penalties set forth in the International Emergency Economic Powers Act.[23]

Practical Steps for Foreign and U.S. Parties: Educate, Incorporate, Mitigate

Foreign and U.S. parties with international business, other activities or connections should educate themselves, incorporate the Global Magnitsky sanctions into their regulatory and compliance portfolios and assess and mitigate their potential sanctions risk.

In doing so, special attention should be given to the sanctions provisions applicable to complicity, facilitation or other indirect or incidental conduct related to corruption and human rights abuse. Along these lines, banks and other financial services providers should take note of their particular risk of liability for transfers and facilitations of transfers of corrupt proceeds. Their anti-financial crime policies and resources (including personnel), should incorporate the Global Magnitsky sanctions.

More generally, it would be unwise to assume that the Global Magnitsky sanctions should concern only corrupt foreign officials, human rights abusers and anti-corruption and human rights advocates. The Global Magnitsky sanctions cast a wide net.

As the sanctions provisions discussed above indicate, a wide range of parties around the world are potentially sanctionable for, among other acts, certain associations with culpable parties and unwitting facilitation of corruption and human rights abuses before and after the fact.

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[1] U.S. Department of the Treasury, Treasury Sanctions Turkish Officials with Leading Roles in Unjust Detention of U.S. Pastor Andrew Brunson, Aug. 1 2018, <https://home.treasury.gov/news/press-releases/sm453>.

[2] Eric Levenson, Who is Andrew Brunson, the detained pastor central to the US-Turkey dispute?, CNN, July 29, 2019, <https://www.cnn.com/2018/07/29/politics/andrew-brunson-pastor-turkey-detained/index.html>.

[3] Carlotta Gall, Turkey Resists Pressure to Release American Pastor From Jail, N.Y. Times, July 18, 2018, <https://www.nytimes.com/2018/07/18/world/europe/andrew-brunson-turkey.html>.

[4] Natasha Turak, Trump's Turkey sanctions are all about the midterms — but will end up helping Russia, CNBC, Aug. 2, 2018, <https://www.cnbc.com/2018/08/02/trumps-turkey-sanctions-are-all-about-the-midterms-may-help-russia.html>.

[5] Benjamin Harvey, U.S. Prepares List of Sanctions Targets in Turkey, Bloomberg, Aug. 1, 2018, <https://www.bloomberg.com/news/articles/2018-08-01/u-s-said-to-prepare-list-of-turkey-economic-sanctions-targets>.

[6] Nina Agrawal, Turkish gold trader Reza Zarrab makes plea deal in Iran sanctions case, Los Angeles Times, Nov. 28, 2017, <http://www.latimes.com/nation/nationnow/la-na-reza-zarrab-trial-20171128-story.html>.

[7] U.S. Department of Justice, Turkish Banker Convicted of Conspiring to Evade U.S. Sanctions Against Iran and Other Offenses, Jan. 3, 2018, <https://www.justice.gov/opa/pr/turkish-banker-convicted-conspiring-evade-us-sanctions-against-iran-and-other-offenses>.

[8] Halkbank is understood to now be under investigation by two U.S. agencies. While it is not uncommon for law enforcement authorities to consult with relevant executive branch agencies or officials regarding legal actions implicating U.S. foreign relations, the offers reportedly made by the administration regarding pending or potential legal matters are noteworthy.

[9] As indicated above, sanctions determinations are made by the Secretary of the Treasury in consultation with the Secretary of State. EO 13818, *infra* note 10, at § 8. There are news reports that the Secretary of State "may have been surprised" by sanctions "threats" against Turkey just days before sanctions were imposed. Andrea Mitchell et al., Was Secretary of State Pompeo surprised by Trump threats against Turkey?, NBC News (July 26, 2018), <https://www.nbcnews.com/politics/politics-news/secretary-state-blindsided-trump-threats-against-ally-n895111>.

[10] 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).

[11] Global Magnitsky Human Rights Accountability Act, Pub. Law No. 114-328, §§ 1262-65 at § 1263 (codified at 22 U.S.C. § 2656 note) (Dec. 23, 2016). See, e.g., Hdeel Abdelhady, From Sergei Magnitsky to Global Magnitsky: United States Asserts, MassPoint PLLC, Mar. 27, 2018, <https://masspointpllc.com/wp-content/uploads/Sergei-Magnitsky-to-Global-Magnitsky.Universal-Jurisdiction.MassPoint-PLLC-Series-No.-1.pdf>.

[12] EO 13818, preamble. For a detailed comparison of EO 13818 and the Global Magnitsky Act, see, e.g., Hdeel Abdelhady, The Trump Administration Supercharged Global Magnitsky Act Human Rights and Corruption Sanctions, MassPoint PLLC, Apr. 3, 2018, <https://masspointpllc.com/wp-content/uploads/Global-Magnitsky-Sanctions.Human-Rights-Abuses.MassPoint-Series-3.pdf>.

[13] EO 13818 at § 1(a)(ii)(A); Global Magnitsky Act at § 1263(a).

[14] EO 13818 at § 1; Global Magnitsky Act at § 1263(a)(3). Directly penalizing current foreign

government officials is a departure from prevailing anti-corruption frameworks. The U.S. Foreign Corrupt Practices Act, for example, punishes parties on the supply side of bribery, and not foreign government officials (foreign officials can be penalized for related offenses, such as money laundering and Travel Act violations). The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention Against Corruption leave the punishment of government officials to national governments.

[15] EO 13818 at § 1(a)(B)(2).

[16] *Id.* at § 1(a)(ii)(C)(1).

[17] That said, the Treasury Department's statement is not precedent or a legal interpretation, and statements on particular sanctions actions (particularly if prepared under time constraints) may not be drafted with a broader legal framework in mind.

[18] EO 13818 at § 1(a)(ii)(C)(2).

[19] Global Magnitsky Sanctions Regulations, *infra* note 21.

[20] Global Magnitsky Act at § 1262(1); Global Magnitsky Sanctions Regulations, 31 C.F.R. § 583.305.

[21] EO 13818 at § 1(a). "Interests in property" means property owned 50 percent or more, directly or indirectly, by one or more blocked parties. Entities owned 50 percent or more by one or more blocked persons are also blocked, pursuant to OFAC's "50 percent rule." 31 C.F.R. § 583.406

[22] EO 13818 at § 2. Exceptions are available where, for example, entry is in the interest of the United States or required by its United Nations commitments.

[23] 31 C.F.R. § 583.701; Global Magnitsky Act at § 1263(f).