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House Bill Seeks Greater Oversight of OFAC as to U.S. and Foreign Financial Institutions' Dealings with State Sponsors of Terrorism and Persons Sanctioned Under Magnitsky Laws

On September 7, 2018, Congresswoman Mia Love (R-UT) introduced in the House of Representatives H.R. 6751, the Banking Transparency for Sanctioned Persons Act of 2018 (the "**Banking Transparency Bill**" or "**BTB**").[1] Referred initially to the House Committee on Financial Services, of which Congresswoman Love is a majority party member, the Banking Transparency Bill's purpose is to, *inter alia*, "increase transparency with respect to financial services benefitting state sponsors of terrorism, human rights abusers, and corrupt officials." On September 13, 2018, the voting members of the House Committee on Financial Services unanimously referred the BTB to the House by a vote of 48-0.

This update discusses the BTB's provisions and what it conveys about the current U.S. legal climate around corruption and human rights sanctions, Congress' increasingly activist sanctions posture, and the risk management and compliance inferences that U.S. and foreign financial institutions should draw from the Banking Transparency Bill when viewed in context.

Congressional Oversight of Transactions Involving Designated State Sponsors of Terrorism, Corrupt Actors, and Human Rights Abusers

Granular Reporting to Congress

The BTB's thrust is to carve out for Congress an oversight role, at an operational level, of the Treasury Department's licensing, supervision, and enforcement of U.S. sanctions programs as to U.S. and foreign financial institutions' dealings with designated State Sponsors of Terrorism, corrupt actors, and human rights abusers. This objective is achieved by requiring the Treasury Department—principally through its Office of Foreign Assets Control (**OFAC**), which administers relevant sanctions programs—to twice annually issue to the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs a report that includes:

(1) copies of any licenses issued by the Treasury Department in a preceding 180-day period authorizing a U.S. or foreign financial institution to provide "financial services benefitting a state sponsor of terrorism," and

(2) a list of "any foreign financial institutions" that, in a preceding 180-day period, "knowingly" conducted one or more "significant" transactions, *directly or indirectly*, for natural or legal persons that were:

a. Owned or controlled by, or acting on behalf of, the government of a State Sponsor of Terrorism,[2] or

b. Specially Designated Nationals (or "blocked" persons) sanctioned for corruption or human rights abuses pursuant to the Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (the "**Sergei Magnitsky Act**"), the Global Magnitsky Human Rights Accountability Act of 2016 (the "**Global Magnitsky Act**"), or Executive Order 13818 of December 20, 2017, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption ("**EO 13818**").

Undefined Terms

With respect to transactions by U.S. and foreign financial institutions that "benefit" a government of a State Sponsors of Terrorism, BTB does not define the term "benefit." Key terms pertaining only to foreign financial institutions (**FFIs**) are also not defined. The term "significant," as it relates to a reportable FFI "transaction," is not explained. Nor does the BTB indicate what would constitute an "indirect" transaction on behalf of a party owned or controlled by, or acting on behalf of, a State Sponsor of Terrorism or a sanctioned party. Clarification may be provided in revisions, if any, of the Banking Transparency Bill.

"Knowing" Transactions by FFIs

For the purposes of FFI-related reporting, an FFI "knowingly" engages in a transaction on behalf of a sanctioned person when the FFI has "actual knowledge," or "should have known," of the "conduct, the circumstance, or the result" of the transaction(s).

Unclassified Reports, Classified Annex Option

The Treasury Secretary's report, per an amendment to the Banking Transparency Bill offered by Congresswoman Maxine Waters (D-CA), must be submitted in unclassified form but may include "a classified annex."[3] Neither the BTB nor the Waters Amendment indicates whether the names of any U.S. or foreign financial institutions included in a Treasury Secretary report would be part of the unclassified portion (and therefore public), or part of the classified annex.

Waiver by Treasury Secretary of Reporting as to FFIs

The Banking Transparency Bill permits the Treasury Secretary to "waive" reporting requirements with respect to FFIs upon receiving "credible assurances" that an FFI has ceased or will cease to "knowingly" conduct "significant" transactions with parties tied to State Sponsors of Terrorism or sanctioned for corruption or human rights abuses under the Sergei Magnitsky Act, the Global Magnitsky Act, or EO 13818. The Secretary may also "waive" the BTB's requirements upon certifying to the relevant House and Senate committees, with an explanation, that "waiver is important to the national interest of the United States."

Foreign Financial Institutions Expected to Observe Terrorism Designations and Comply With Magnitsky Sanctions Programs

Assuming that Congress would act on information concerning FFI dealings with sanctioned parties, the "knowing" language effectively imposes on FFIs a duty to know whether parties on whose behalf transactions are conducted, *directly or indirectly*, are sanctioned under the Sergei Magnitsky Act, the Global Magnitsky Act, or EO 13818 (which is significantly broader in scope than the Global Magnitsky Act, on which it is premised in part).[4]

FFIs, like U.S. financial institutions, are expected to avoid unauthorized transactions that "benefit" State Sponsors of Terrorism and, apparently, to comply with U.S. sanctions imposed under the Sergei Magnitsky Act and Global Magnitsky Act, even though the *direct* obligation to comply with the sanctions applies to U.S. Persons (including U.S. branches of FFIs and foreign persons while in the United States).[5]

Broader Significance of the Banking Transparency Bill, Increasing Importance of Human Rights and Corruption Sanctions

The BTB, of course, is not law, and it is not certain that it will become law. Nevertheless, the BTB's introduction in the House is significant by itself for a number of reasons, including for what it confirms about the evolving legal climate in the United States around corruption and human rights sanctions and Congress' evolving activist stance on sanctions.

The BTB provides yet another example of the growing importance and perceived utility—in both of the political branches of the U.S. Government[6]—of the Magnitsky Sanctions programs, particularly

the Global Magnitsky Sanctions that target corruption and human rights abuse worldwide.[7]

Moreover, the Banking Transparency Bill indicates an interest on the part of members of Congress —in this case, as of now, the important House Financial Services Committee—to have access to information as to specific U.S. and foreign financial institutions' transactions and OFAC/Treasury authorizations, ostensibly for the purposes of oversight, future legislation, or referring to the President persons for potential sanctions action.[8]

This is noteworthy, as the provision of such financial institution- and transaction-specific information to Congress, as a matter of course and on a biannual basis, directly inserts the legislative branch into executive functions performed by the Treasury Department primarily through OFAC.[9] The BTB's sponsor, Congresswoman Love, stated that having the Treasury Department share "this kind of information with Congress should be automatic, as licenses represent exemptions to our sanctions programs . . . Congressional oversight of sanctions is limited without visibility into the transactions Treasury is authorizing."[10]

For American financial institutions, and more particularly for FFIs, the sharing of institution- and transaction-specific information with Congress would likely raise a range of concerns—some of which are discussed below—and potentially conflict with the laws of the home jurisdictions or other jurisdictions in which FFIs operate.

Key Takeaways

Corruption and Human Rights: A New Ballgame for Financial Institutions

Financial institutions engaged in international business, whether based in the United States or overseas, should interpret the introduction of the Banking Transparency Bill as an additional signal to take seriously the U.S. legal position and increasingly aggressive enforcement posture against human rights abuses and corruption, beyond the parameters of foreign official corruption targeted by the Bank Secrecy Act (as amended by the USA Patriot Act) and the FATF Recommendations pertaining, respectively, to Senior Foreign Political Figures and Politically Exposed Persons.[11]

The need for banks and other financial institutions to calibrate (or recalibrate) anti-corruption and anti-human rights abuse measures appropriately for the current U.S. legal environment was further clarified in June when the Treasury Department bureau with principal responsibility for anti-money laundering enforcement, the Financial Crimes Enforcement Network (FinCEN), issued an advisory to financial institutions on human rights abuses and corruption.[12]

Congressional Activism, Politics, Reputational Risk

Moreover, financial institutions (and others) should take note of Congress' increasing activism in the area of sanctions oversight and enforcement. While a more pronounced Congressional role may not in all instances *directly* affect financial institutions or others required by law or for practical reasons to comply with U.S. sanctions (the Banking Transparency Bill would, if enacted, have a direct impact), Congress' interest and greater willingness to dictate the terms of sanctions enforcement will influence the Executive Branch's conduct in some or more cases.

Moreover, Congress' knowledge of or involvement in transactions involving specific U.S. or foreign financial institutions is likely to infuse a degree of politics (or public policy) into specific sanctions enforcement matters, with the potential for greater publicity and commercial and reputational risk for relevant financial institutions and other parties.

Financial institutions should bear in mind that dealings with an Executive Branch enforcement agency, generally discreet by nature, are not the

same as being the subject of Congressional action or interest.

The "Go To" Global Magnitsky Sanctions

Finally, the Global Magnitsky Sanctions in particular, given their worldwide reach and unique utility value, are increasingly becoming the "go to" sanctions framework for penalizing conduct that clearly—and in some cases not so clearly[13]—constitutes corruption or human rights abuses as broadly defined by the Global Magnitsky Act and even more broadly by EO 13818. It would be a mistake for financial institutions and other private sector actors to downplay the Global Magnitsky Sanctions' relevance to or potential significance for their business.[14]

Clear Bottom Line for Financial Institutions

In short, the current U.S. legal climate requires risk-aware U.S. and foreign financial institutions to know their customers better and guard against the risks of doing business with, on behalf of, or for the benefit of persons engaged in corruption and human rights abuse as broadly defined by current law, regulation, and enforcement authorities. ■

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Notes

[1] H.R. 6751, the Banking Transparency for Sanctioned Persons Act of 2018. Congresswoman Love offered an amendment in the nature of a substitute that was adopted by voice vote; Congresswoman Maxine Waters (D-CA) offered an amendment to the amendment in the nature of a substitute that was also adopted by voice vote (the "**Waters Amendment**").

[2] State Sponsors of Terrorism are designated by the Department of State and currently are: (1) North Korea, (2) Sudan, (3) Iran, and (4) Syria.

[3] Waters Amendment, *supra* note 1.

[4] *See, e.g.*, Hdeel Abdelhady, The Trump Administration Supercharged Global Magnitsky Act Human Rights and Corruption Sanctions, MassPoint PLLC, April 3, 2018.

[5] Under the Global Magnitsky Act, a "United States person or U.S. person means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches); or any person in the United States." 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, § 1262(4) (incorporating the definition of United States Person codified in the OFAC Terrorism Sanctions Regulations at 31 C.F.R. § 595.315). EO 13818 employs the same definition of United States Person. EO 13818 at § 6(c).

[6] *See, e.g.*, Hdeel Abdelhady, Global Magnitsky Sanctions "a Central Tool of U.S. Foreign Policy", MassPoint PLLC, May 28, 2018 and Global Magnitsky: The Swiss Army Knife of Sanctions, Law360, August 7, 2018. *See also* MassPoint's Magnitsky Law and Sanctions site for posts covering some of the various calls from Congress and elsewhere to impose Global Magnitsky Sanctions on, *e.g.*: Chinese officials and technology firms for responsibility for or complicity in human rights abuses against Uighurs and other minority groups and on Sudanese officials and private entities that support them in perpetrating corruption and human rights abuses.

[7] For a discussion of the links and differences between the Sergei Magnitsky Act and the Global Magnitsky Act, *see* Hdeel Abdelhady, From Sergei Magnitsky to Global Magnitsky: United States Asserts Universal Jurisdiction Over Corruption and Human Rights Abuses, MassPoint PLLC, March 27, 2018.

[8] Both the Sergei Magnitsky Act and Global Magnitsky Act authorize Congress to provide to the President with information about perpetrators of corruption and human rights abuses and require the President to consider that information in making sanctions determinations. Sergei Magnitsky Rule of Law Accountability Act of 2012 (Title IV of Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. Law No. 112-208, 126 Stat. 1502, § 404; Global Magnitsky Act at § 1263(c).

[9] Congress has in the past two years taken a more activist approach on sanctions. *See, e.g*., Hdeel Abdelhady, Russia Summit Could Spur Congressional Activism on Sanctions, Trade, MassPoint PLLC, July 18, 2018.

[10] Release, Office of Congresswoman Mia Love, Rep. Love Bill to Increase Congressional Oversight of Sanctions on State Sponsors of Terrorism, Sept. 14, 2018, at https://love.house.gov/press-releases/rep-love-bill-to-increase-congressional-oversight-of-sanctions-on-state-sponsors-of-terrorism/.

[11] *See, e.g*., Trump Administration Supercharged Global Magnitsky Act Human Rights and Corruption Sanctions, *supra* note 2, at 5 and n. 17 (discussing, *inter alia*, U.S. enhanced due diligence requirements pertaining to Senior Foreign Political Figures) and Hdeel Abdelhady, Departing from Prevailing Legal Standards, United States Directly Sanctions Foreign Government Officials for Corruption, MassPoint PLLC, April 6, 2018.

[12] FinCEN, Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators (June 12, 2018).

[13] *See, e.g.,* Hdeel Abdelhady, Global Magnitsky: The Swiss Army Knife of Sanctions, *supra* note 4 (discussing the utility value of the Global Magnitsky Sanctions).

[14] Recent calls by Congress members to impose Global Magnitsky Sanctions on Chinese officials and two global Chinese technology companies for human rights abuses are illustrative, as is the imposition of sanctions on Israeli businessman Dan Gertler and companies affiliated with him in connection with corruption in Congo's (DRC) extractives industries. *See* Hdeel Abdelhady, World Wide Web of #Tech Supply Chain Risk, MassPoint PLLC, August 30, 2018 and U.S. Anti-Corruption Enforcement in Africa's Extractives Industry Creates Legal and Supply Chain Risk for Mining, Tech and Others, MassPoint PLLC, July 3, 2018.