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## THE GLOBAL MAGNITSKY ACT

**ABSTRACT.** This article discusses the U.S. Global Magnitsky Act, which was passed in 2016 and which provides a mechanism for the U.S. government to sanction foreign individuals and entities that are involved in human rights abuses and large scale corruption. It also discusses the opportunities that the Act provides for civil society organizations to influence the designation process and the additional due diligence measures that businesses should take in order to ensure compliance with the Act.

The U.S. Global Magnitsky Act (“GMA”)<sup>1</sup>, which was passed in 2016, creates threats for kleptocrats, opportunities for human rights activists, and risks for businesses that do not conduct adequate due diligence on their business partners. This article summarizes the GMA and its implementation thus far, explains how human rights groups can take advantage of it, and explains how business can mitigate the risk of inadvertently dealing with parties designated under the GMA.

### I WHAT IS THE GLOBAL MAGNITSKY ACT?

The GMA builds upon the “Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012”<sup>2</sup> (the “Magnitsky Act”) which was designed to punish individuals responsible for the 2009 death of Russian tax accountant/whistleblower Sergei Magnitsky in a Russian jail. Responding to criticisms that the original Magnitsky Act focused just on Russia, in 2016, Congress passed and President Obama signed the GMA, providing the US Government with a tool to sanction parties who have

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<sup>1</sup> Public Law (“Pub L”) 114–328.

<sup>2</sup> Pub L 112–208.

engaged in human rights abuses in countries other than Russia. The GMA also goes beyond the Magnitsky Act in another way by targeting parties involved not only in human rights violations but also corruption.<sup>3</sup> While there are a number of country-specific sanctions programs targeting human rights abusers (e.g., Burundi, Central African Republic, Democratic Republic of Congo, Syria, Zimbabwe)<sup>4</sup> and corruption (e.g., Zimbabwe)<sup>5</sup> the GMA applies globally. In sum, the GMA significantly expands the bases on which parties involved in human rights abuses and corruption around the world can become subject to U.S. sanctions.

The GMA authorizes the President to impose sanctions on any party (individual or entity) who the President determines, based on credible evidence:

- To be responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any non-US country who seek to expose illegal activity carried out by government officials, or to obtain, exercise, or promote human rights and freedoms;
- To have acted as an agent of or on behalf of a non-US person in such activities;
- To be a government official, or a senior associate of such an official, that 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 non-US jurisdictions; or
- To have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such activities.<sup>6</sup>

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<sup>3</sup> The GMA is also distinct from the Countering America's Adversaries Act ("CAATSA") which also provides for the imposition of sanctions on persons engaged in certain abuses or violations of human rights in Iran, Russia, and North Korea, as well as certain acts of corruption in Russia. In contrast to the GMA which is, at its name suggests, global in application, CAATSA is specifically directed at Iran, Russia and North Korea.

<sup>4</sup> Executive Orders 13712, 13667, 13671, 13572, and 13469.

<sup>5</sup> Executive Order 13469.

<sup>6</sup> Pub L 114-328.

## II WHAT ARE THE SANCTIONS AND PENALTIES THAT CAN BE IMPOSED UNDER THE GLOBAL MAGNITSKY ACT?

Parties sanctioned under the GMA are subject to visa bans and are designated on the List of Specially Designated Nationals (“SDNs”) maintained by the US Office of Foreign Assets Control (“OFAC”) in the US Treasury Department. Entities 50% or more owned by these SDNs are themselves treated as SDNs, even if not explicitly named on the SDN List. This can significantly expand the impact of a designation of an individual with substantial commercial holdings.

Being designated as an SDN can wreak financial havoc on the parties designated, which is of course the point. SDNs are cut off from the U.S. market – they can’t buy, sell, invest, etc. in the United States. All of the property and interests in property of SDNs within US jurisdiction are blocked, and “US Persons” are generally prohibited from engaging in transactions with SDNs, directly or indirectly. For purposes of the GMA, “U.S. Persons” include (i) entities organized under US laws and their non-US branches, (ii) individuals or entities in the United States, or (iii) US citizens or permanent resident aliens (“Green Card” holders) wherever located or employed. Non-US Persons, including separately incorporated non-US subsidiaries of US companies, may be subject to US jurisdiction if they “cause” U.S. Persons to engage in SDN-related transactions. Transactions involving USD payments are almost always in U.S. jurisdiction as virtually all USD payments are “cleared” through the U.S. financial system.

Engaging in prohibited transactions with SDNs designated pursuant to the GMA or its implementing authorities can result in civil penalties under the International Economic Emergency Powers Act (“IEEPA”). Currently, civil penalties can be as high as \$295,141 (an amount adjusted annually for inflation) or twice the amount of the underlying transaction, whichever is greater. Criminal penalties under IEEPA can reach up to \$1,000,000, 20 years’ imprisonment, or both. In addition, those who knowingly and intentionally attempt to evade sanctions and/or conspire to do so can potentially be criminally prosecuted under various U.S. criminal statutes, including, for example, those relating to money laundering. Finally, dealing with an SDN can put the non-US company itself at risk of being designated as an SDN, based on the language in E.O. 13818 authorizing OFAC

to designate parties who provide “support” for SDNs designated under the GMA.

### III HOW HAS THE GLOBAL MAGNITSKY ACT BEEN IMPLEMENTED?

On December 21, 2017, citing the authority granted in the GMA, President Trump implemented the GMA by signing Executive Order 13818 “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption,” which stated that:

[T]he prevalence and severity of human rights abuse and corruption that have their source in whole or in substantial part, outside the United States ... have reached such scope and gravity that they threaten the stability of international political and economic systems. Human rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; perpetuate violent conflicts; facilitate the activities of dangerous persons; and undermine economic markets. The United States seeks to impose tangible and significant consequences on those who commit serious human rights abuses or engage in corruption, as well as to protect the financial system of the United States from abuse by these same persons.<sup>7</sup>

Attached to the Executive Order was an Annex designating the first 13 individuals under the GMA. With the Executive Order in place, this set the stage for future designations by OFAC.

### IV WHAT HAVE BEEN THE DESIGNATIONS TO DATE?

To date, 84 individuals and entities have been designated as SDNs under E.O. 13818.<sup>8</sup>

The Trump Administration has stated that it takes “an expansive view of the implementation of the Global Magnitsky Act”. In reviewing candidates for designation, the Administration “engag[es] every diplomatic post and bureau at the State Department” and “work[s] very closely with the intelligence and law enforcement communities, the Department of the Treasury, NGOs, and Con-

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<sup>7</sup> Executive Order 13818; Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, available at <https://www.state.gov/e/eb/tfs/spi/globalmagnitsky/>, last visited 6 September 2018.

<sup>8</sup> Ibid.

gress.”<sup>9</sup> According to the Administration, its objective is “to leverage this new global tool to pursue tangible and significant consequences for the entire spectrum of those who commit human rights abuses and engage in corruption [and] to target those who will send a strong message to the international community ... that the United States takes seriously our role in promoting international norms.”<sup>10</sup> The Treasury Department has stated that it intends to use the GMA to target “financial facilitators” who help “corrupt senior foreign political figures access the U.S. and international financial system to move or hide illicit proceeds, evade U.S. and global sanctions, or otherwise engage in illegal activity, including related human rights abuses.”<sup>11</sup>

Those sanctioned to date under E.O. 13818 include:

- Yahya Jammeh, the former President of Gambia, who allegedly created a unit within the armed forces to terrorize, interrogate, and kill Gambian citizens whom he believed threatened his reign. In a related action, OFAC designated a number of entities associated with Jammeh.<sup>12</sup>
- Mukhtar Hamid Shah, a Pakistani surgeon, who was a leader in an illicit organ-trafficking network involved in the kidnapping, detention, and removal of kidneys from Pakistani laborers.<sup>13</sup>
- Dan Gertler, an international businessman and billionaire, who allegedly used his connections with the president of the Democratic Republic of the Congo, as well as other officials, to amass a fortune through hundreds of millions of dollars’ worth of opaque and corrupt mining and oil deals. In a related action, OFAC designated a number of entities associated with Gertler.<sup>14</sup>
- Artem Chayka, the son of the Russian Prosecutor General Yuriy Chayka, who allegedly leveraged his father’s position and ability to

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<sup>9</sup> US State Department Background Briefing on the Rollout of the Global Magnitsky Sanctions, available at <https://www.state.gov/r/pa/prs/ps/2017/12/276734.htm>, last visited 6 September 2018.

<sup>10</sup> Ibid.

<sup>11</sup> PEP Facilitator Advisory, FIN-2018-A003, 12 June 2018.

<sup>12</sup> US Department of the Treasury Press Release “United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe”, 21 December 2017, available at <https://home.treasury.gov/news/press-releases/sm0243>, last visited 6 September 2018.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

help his co-conspirators unfairly win state-owned assets and contracts and put pressure on business competitors.<sup>15</sup>

- Gulnara Karimova, the daughter of former Uzbekistan leader Islam Karimov. According to the Administration, Karimova headed a powerful organized crime syndicate that leveraged state actors to expropriate businesses, monopolize markets, solicit bribes, and administer extortion rackets. In July 2017, the Uzbek Prosecutor General's Office charged Karimova with directly abetting the criminal activities of an organized crime group whose assets were worth over \$1.3 billion. She was also charged with hiding foreign currency through various means, including the receipt of payoffs in the accounts of offshore companies controlled by an organized criminal group, the illegal sale of radio frequencies and land parcels, siphoning off state funds through fraudulent dividend payments and stock sales, the illegal removal of cash, the non-collection of currency earnings, and the import of goods at inflated prices. She also laundered the proceeds of corruption back to her own accounts through a complex network of subsidiary companies and segregated portfolio funds.<sup>16</sup>
- Roberto Jose Rivas Reyes, the President of Nicaragua's Supreme Electoral Council, who has been accused in the press of amassing sizeable personal wealth, including multiple properties, private jets, luxury vehicles, and a yacht with investigations into his alleged corruption having been blocked by Nicaraguan government officials. According to the Treasury Department, he has also perpetrated electoral fraud undermining Nicaragua's electoral institutions.<sup>17</sup>
- Benjamin Bol Mel, the President of the Thai-South Sudan Construction Company Limited (ABMC) who also served as the Chairman of the South Sudan Chamber of Commerce, Industry and Agriculture and South Sudanese President Salva Kiir's principal financial adviser. According to the Treasury Department, ABMC allegedly received preferential treatment from high level officials, and the government of South Sudan did not hold a competitive process for selecting ABMC to do tens of millions of dollars worth of maintenance work on roads that had been completed only a few years before. In a related action, OFAC also

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

designated ABMC Thai-South Sudan Construction Company Limited and Home and Away LTD.<sup>18</sup>

- Angel Rondon Rijo, a politically connected businessman and lobbyist in the Dominican Republic who funneled money from Odebrecht, a Brazilian construction company, to Dominican officials, who in turn awarded Odebrecht projects to build highways, dams, and other projects.<sup>19</sup>
- Julio Antonio Juarez Ramirez, a Guatemalan Congressman accused of ordering an attack in which two journalists were killed and another injured.<sup>20</sup>
- Francisco Javier Diaz Madriz, a Nicaraguan Police official under whose command the Nicaraguan National Police engaged in serious human rights abuse against the people of Nicaragua.<sup>21</sup>
- Fidel Antonio Moreno Briones, who is accused of directing acts of violence by the Sandinista Youth and pro-government armed groups which have been implicated in numerous human rights abuses related to protests against the Nicaraguan government.<sup>22</sup>
- Jose Francisco Lopez Centeno, an official with two Nicaraguan oil companies and the Treasurer of Nicaragua's ruling FSLN party who has been accused of leveraging his position to his and his family's benefit by using companies they own to win government contracts.<sup>23</sup>
- Aung Kyaw Zaw, Khin Maung Soe, Thura San Lwin and Khin Hlaing, Burmese military commanders who commanded units which engaged in serious human rights abuses.<sup>24</sup>

As the list above shows, those designated thus far often sit at the intersection of financial crime, political corruption and human rights abuses, three types of criminal activity which often go hand in hand.

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> US Department of State, "Global Magnitsky Designations for Nicaragua" available at <https://www.state.gov/r/pa/prs/ps/2018/07/283833.htm>, last visited 6 September 2018.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> US Department of the Treasury Press Release, "Treasury Sanctions Commanders and Units of the Burmese Security Forces for Serious Human Rights Abuses," available at <https://home.treasury.gov/news/press-releases/sm460>, last visited 6 September 2018.

As you can see, this includes a number of individuals in countries that are not currently the subject of SDN programs.

## V WHAT OPPORTUNITIES DOES THE GLOBAL MAGNITSKY ACT PROVIDE FOR CIVIL SOCIETY?

The GMA provides a meaningful opportunity for NGOs and civil society to participate in the SDN designation process. It specifically provides that in determining whether to impose sanctions, the President shall consider “credible information obtained by ...non-governmental organizations that monitor violations of human rights.”<sup>25</sup> To this end, the State Department and Treasury Department have both established email addresses to which such information may be submitted. The State Department address is [globalmagnitsky@state.gov](mailto:globalmagnitsky@state.gov) and the Treasury Department address is [glomag@treasury.gov](mailto:glomag@treasury.gov).

In order to facilitate human rights groups participation in the designation process, the Commission on Security & Cooperation in Europe: U.S. Helsinki Commission (the “Helsinki Commission”) recently conducted a briefing on “How to Get Human Rights Abusers and Kleptocrats Sanctioned Under the Global Magnitsky Act.”<sup>26</sup> At the briefing, speakers, who included Helsinki Commission staffers, prominent human rights activists, and former US government officials, discussed the most effective ways to convey information about human rights abusers to the US government and to obtain designations of those whom they think meet the statutory criteria.

For example, Rob Berschinski, Senior Vice President of Human Rights First, and former Deputy Assistant Secretary of State, explained that the NGOs who want to turn over information to the government should focus on “the chain of command, so that the government theoretically can go after not only the person wielding the baton or the Kalashnikov, but also the person that ordered the crime from above.”<sup>27</sup> He also stressed the importance of providing the government with multiple corroborating sources and recommended using information collected by U.N. special rapporteurs and

<sup>25</sup> Global Magnitsky Act, Public Law 114–328-Dec. 23 2016, Sec. 1263 (c)(2).

<sup>26</sup> A full transcript of this briefing is available at Helsinki Commission, [https://www.csce.gov/sites/helsinkicommission.house.gov/files/unofficial-transcript/0313%20How%20to%20Get%20Human%20Rights%20Abusers%20and%20Kleptocrats%20Sanction\\_Scrubbed.pdf](https://www.csce.gov/sites/helsinkicommission.house.gov/files/unofficial-transcript/0313%20How%20to%20Get%20Human%20Rights%20Abusers%20and%20Kleptocrats%20Sanction_Scrubbed.pdf), last visited 6 September 2018.

<sup>27</sup> *Ibid.*



other objective, credible sources in this capacity. Berschinski also noted that because designation under the GMA is discretionary (in contrast to the Magnitsky Act which requires the Administration to designate those found to be involved in Magnitsky's death) "the U.S. government must be convinced not only that the evidentiary threshold has been met in a particular case, but that it's also in the U.S. national interest to sanction an individual or an entity." Thus, he explained, a designation is more likely if it can be shown that anti-corruption reform is being prevented by an entrenched corrupt old guard and that designations under the GMA "can have an outsized effect beyond the immediate effect both on those individuals and the larger deterrent effect."<sup>28</sup> At the same time, he cautioned, the application for designation must also address the potential political "blowback" and should explain how such blowback could be minimized.<sup>29</sup>

Brad Brooks-Rubin, Managing Director of The Sentry, an NGO, and formerly with the State and Treasury Departments, explained the designation process from the perspective of a former US government official. According to Brooks-Rubin, the "targeters" first draft a legal memorandum, called an "evidentiary" which explains why a proposed designee should be sanctioned under the criteria in the relevant executive order (in the case of the GMA, EO 13818). He also stressed the importance of including as much identifying information as possible, including, where possible, passport numbers, address and registration license numbers and urged submitters not to "self-censor" and to include as much information as possible, even if they think that it might not be relevant.<sup>30</sup> However, he noted, the most important part of the evidentiary is specific examples of bad acts that meet the criteria of the executive order and explained that more recent information (ideally within the past five years) is better because sanctions are aimed at producing a change in behaviour and are therefore more appropriately focused on ongoing activity. He also cautioned NGOs to resist the temptation to narrate and/or provide their own assessment and to rely, to the extent possible, on objective, primary information.<sup>31</sup> While submitters need not identify their sources, Brooks-Rubin explained that they do need to explain the

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

basis for the sources' knowledge and the reasons why they consider the sources credible.<sup>32</sup> Finally, he noted that if submitters are aware of any exculpatory information about the subject, they should include that in the submission, rather than allow the government evaluators to discover it themselves and risk losing credibility.<sup>33</sup>

In short, civil society groups that want to get kleptocrats and human rights abusers designated under GMA should (1) frame their submissions in terms of the statutory criteria listed above, (2) provide as much recent evidence as possible, being careful to explain the bases for crediting the evidence and (3) explain why the proposed designation furthers U.S. national security interests and the underlying policy goals of the GMA.

## VI HOW CAN DESIGNATIONS BE CHALLENGED?

In order to address the possibilities of mistake, abuse and change in behavior, the Act also provides mechanisms for lifting sanctions, i.e., removing parties designated as SDNs under E.O. 13818 from the SDN List. Specifically, Section 1263(g) of the Act provides that the President may terminate sanctions if:

- (1) credible information exists that the person did not engage in the activity for which sanctions were imposed;
- (2) the person has been prosecuted appropriately for the activity for which sanctions were imposed;
- (3) the person has credibly demonstrated a significant change in behavior, has paid an appropriate consequence for the activity for which sanctions were imposed, and has credibly committed to not engage in [covered activity] in the future; or
- (4) the termination of the sanctions is in the national security interests of the United States.

This authority to lift GMA sanctions has not yet been used.

### 6.1 *What are the Implications for Businesses?*

In addition to creating opportunities for human rights advocates, the GMA also creates risks for businesses engaging in international transactions. As discussed above, engaging in any transactions or dealings with an SDN can result in significant penalties. Even non-US

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

companies engaging in transactions entirely outside U.S. jurisdiction can themselves be designated as SDNs for providing “support” to an existing SDN, a draconian penalty for any company that wishes to continue doing business with the United States.

So how can companies mitigate these risks? There are a number of ways, including:

- (1) If your “Know Your Customer” due diligence reveals that the counterparty or its shareholders have been tied to human rights abuses or corruption, consider the possibility that they could be designated as SDNs when considering whether to proceed with the relationship or transaction. There is no science behind whether a party will become designated, but with some research, it can sometimes be possible to get a sense of the relative risks.
- (2) Ensure that the company has a robust trade compliance program, including appropriate screening procedures aimed at catching potential transactions with SDNs before they occur.
- (3) Consider a risk-based approach for identifying and screening shareholders of counterparties for purposes of ascertaining entities that may not be identified on the SDN List but are 50% or more owned by SDNs.
- (4) Include trade compliance clauses in all contracts with counterparties, including clauses requiring the counterparty to represent that they are not currently an SDN, are not 50% or more owned by an SDN, and imposing a notification obligation should those facts change. Include termination clauses linked to the trade compliance clauses. Consider an automatic termination clause should the counterparty be designated as an SDN or become 50% or more owned by SDNs.
- (5) Watch out for any red flags indicating that an SDN may be involved in a proposed transaction and, if any, put a hold on the transaction and escalate the transaction for legal/compliance review. The Financial Crimes Enforcement Network (FINCEN) of the Treasury Department recently issued an advisory which advises private companies and, in particular, financial institutions what they should do to avoid doing business with PEPs who may be designated under the GMA. The Advisory explains the various schemes that corrupt foreign PEPs and their facilitators employ to access the U.S. financial system and also identifies 14 red flags of

corrupt PEP behaviour that companies should be on the lookout for when considering counter-parties.<sup>34</sup>

## VII CONCLUSION

The GMA significantly expands the bases on which parties involved in human rights abuses and corruption around the world can become subject to U.S. sanctions. While this introduces opportunities for human rights NGOs that might seek to add human rights abusers and corrupt actors to the SDN List, the increased number of SDNs creates more risk for businesses. To avoid possible penalties or being themselves designated as an SDN, businesses engaging in international transactions should ensure that they have a robust compliance program – including appropriate screening procedures, trade compliance clauses in contracts – and should watch out for red flags that could indicate that an SDN may be involved.

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<sup>34</sup> Financial Crimes Enforcement Network, “Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators”, available at <https://www.fincen.gov/news/news-releases/fincen-issues-advisory-human-rights-abuses-enabled-corrupt-senior-foreign>, last visited 6 September 2018.