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Implementation of the Global Magnitsky Act

Center for the Advancement of Public Integrity

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Implementation of the Global Magnitsky Act: What Comes Next?

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What is the Global Magnitsky Act?

The Global Magnitsky Act is an expansion of the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (the "Magnitsky Act"). The original statute enabled the U.S. government to sanction individuals from the Russian Federation for torture, extrajudicial killings, and other human rights violations. The bill was named after Sergei Magnitsky, a Russian lawyer who died in prison from police abuse and neglect after exposing fraud by members of the Russian government. The Global Magnitsky Act expands the scope of potential sanctions from covering just Russian nationals to covering persons worldwide who engage in human rights abuses or corruption.

How are individuals sanctioned under the Global Magnitsky Act?

In Executive Order 13818, President Trump declared that corruption and human rights abuses abroad constitute a national emergency. The executive order delegated implementation of the Global Magnitsky Act to the "Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General." Together, these officials are empowered to prohibit entry into the U.S. and freeze assets of people considered responsible for corruption and human rights violations. Assets belonging to sanctioned persons that come under the control of the U.S. or its citizens are to be frozen, effectively blocking their access to the U.S. financial system. The U.S. accounts for 37 percent of world financial stock, and even foreign financial institutions often comply out of an "abundance of caution." Entities owned 50 percent or more by a sanctioned person are also subject to sanctions. The Treasury Secretary may freeze assets without prior notice and may lift the sanctions at his or her discretion. Sanctioned assets are placed in interest-bearing accounts until such time as the sanctions are ended, possibly decades later. For instance, as part of the nuclear deal negotiations in 2016 President Obama returned $400 million that was seized from Iran in 1979.

In practice, the Treasury Department's Office of Foreign Assets Control (OFAC) is the subdivision responsible for evaluating and imposing financial sanctions. The law requires that "credible evidence" support sanction imposition. Furthermore, OFAC is statutorily obligated to review evidence presented by the relevant congressional committee chairpersons, foreign countries, and NGOs that a person or entity should be sanctioned. OFAC has 120 days to decide whether to impose sanctions based on evidence presented by the chairpersons of the appropriate congressional committees, such as the House Foreign Affairs Committee. There is no requirement to respond to information presented by NGOs. The law permits the Treasury to end sanctions upon evidence of innocence, prosecution by another government, changed behavior, or, if necessary, to advance American national security interests.

The Secretary of State is authorized by Executive Order 13818 to deny sanctioned persons entry into the United States. This power was utilized on June 12, 2018, when the State Department designated Felix Ramon Bautista Rosario, a senator from the Dominican Republic, as ineligible for entry due to corruption in connection with rebuilding efforts in Haiti. The Secretary of State is charged with the same evidence review obligations as those described above for the Treasury Secretary, and has the same authority to lift the sanctions.

What qualifies as sufficient evidence to justify sanctions?

Because the first Global Magnitsky Act sanctions were just imposed in December 2017, there are not yet any published cases challenging the law. For this reason, it may be instructive to explore analogous laws with similar functions to identify what "credible evidence" under the Magnitsky Act will be. Another area in which nonpublic evidence is used to evaluate sanction imposition is counterterrorism. Following the September 11, 2001 attacks, the Bush administration's Treasury Department sanctioned members of terrorist groups such as Al Qaeda and Hamas based on what it described as "credible evidence." In the case of Hamas, the evidence was clear because the group claimed responsibility for attacks on Israeli civilians and the sanctioned individuals were the organization's public leaders. Both Presidents Bush and Trump created their sanctions regimes through the International Emergency Economic Powers Act. Because counterterrorism sanctions and the Global Magnitsky

Act sanctions share the same underlying legal framework, it is likely that legal challenges to both sets of sanctions will function similarly.

The standards outlined by President Bush in Executive Order 13224 relating to counterterrorism were very broad, allowing the Treasury Secretary, in consultation with other officials, to impose sanctions when deemed "appropriate in the exercise of his discretion." One important challenge to these sanctions was led by the Al Haramain Islamic Foundation (the Foundation), which argued that the freezing of its assets was unconstitutional. The Treasury Department claimed in its press release on the sanctions that it had found "direct links between the U.S. [Al Haramain] branch and Usama bin Laden." Pursuant to 31 C.F.R. § 501.807, the Foundation first presented additional evidence to the Treasury Department seeking administrative reconsideration. After the Treasury Department did not respond to Al Haramain's petition, the Foundation sued, arguing that the sanctions were an unconstitutional property seizure in violation of the Fourth Amendment. Eventually, the lawsuit reached the Ninth Circuit Court of Appeals.

The Ninth Circuit used the Supreme Court's Mathews v. Eldridge balancing test to determine whether the Treasury Department procedures used to impose the sanctions were adequate. This test required the court to weigh:

(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

In the Al Haramain case, the organization's private property rights were balanced against the reliability of the government's procedures and the government's very strong interest in combating terrorism funding. Additionally, the special circumstances of the counterterrorism context, in which information may be kept secret for national security reasons, played an important role in the court's deliberations.

The court's opinion focused on whether "substantial evidence" supported designating the Foundation a terrorism fundraiser. This standard was met by evidence that some of the Foundation's leaders had been separately identified as Al Qaeda supporters, as well as evidence that it had attempted to conceal contributions to Al Qaeda affiliated militants in Chechnya. Importantly, the court held that the Treasury Department "may rely on classified information to make a designation decision." However, even though substantial evidence for the designation existed, the procedures used were found to be inadequate, and the court ordered the Treasury Department to at least provide the sanctioned entity with the reasons for its decision. This obligation can be met by giving an "unclassified summary" of the supporting evidence.

It is unclear whether the judiciary will be similarly deferential to the use of secret information to justify Magnitsky sanctions, since the national security concerns may be less pressing than those at play in the context of counterterrorism. Additionally, less of the underlying evidence may be classified in corruption cases than in terrorism cases. But, as the Ninth Circuit Court of Appeals noted, "review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential."

In conclusion, whether there is "credible evidence" to justify sanctions on a foreign entity under the Global Magnitsky Act will be determined by the Treasury Department's Office of Foreign Assets Control. If a sanctioned entity wishes to challenge that decision, they will first have to seek administrative review by the Treasury Department. While the department's decision could then be appealed to the judiciary, it is likely that judges will be extremely deferential to any classified information used by the Treasury Department in its decision to impose sanctions. Sanctioned persons and entities will face an uphill battle to prove that they have been improperly penalized.

In contrast, decisions by the Secretary of State to deny sanctioned persons entry into the U.S. will not be subject to judicial review. As concluded by the Supreme Court:

Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."

Because Congress gave the President authority to deny sanctioned persons entry into America under the Global Magnitsky Act, sanctioned persons will be left without recourse to the judiciary. The only option available to them will be further appeals to the Secretary of State.

Who has been sanctioned so far?

On December 21, 2017, 13 people were financially sanctioned under the Global Magnitsky Act, along with 39 affiliated individuals and business entities. Among those sanctioned for corruption are former Gambian President Yahya Jammeh, the President of Nicaragua's Supreme Electoral Council Roberto Jose Rivas Reyes, mining magnate Dan Gertler, arms dealer Slobodan Tesic, and construction mogul Benjamin Bol Mel. Among those sanctioned for human rights violations were the leaders of several criminal organizations, and a Myanmar general who ordered attacks on Rohingya civilians. Two more people were sanctioned on June 12, 2018, for corruption and human rights abuses.

The sanctions include a mix of people who are in and out of power. For instance, Yahya Jammeh left office in 2017 and is currently sought by his successor for prosecution. In contrast, Roberto Jose Rivas Reyes remains a prominent official in Nicaragua. Human rights groups have criticized the Trump administration for failing to impose sufficient sanctions on persons from countries allied with the United States. The problem of selective enforcement is likely to be a recurring criticism of the Global Magnitsky Act, since the pool of corrupt persons worldwide is quite large. For instance, Dan Gertler was sanctioned for conducting "hundreds of millions of dollars' worth of opaque and corrupt mining and oil deals in the Democratic Republic of the Congo." But given the overall level of corruption in the DRC's mining sector, as documented by groups like Global Witness, individuals such as President Joseph Kabila are arguably more corrupt than Gertler, and yet remain unsanctioned. It is possible that the costs associated with sanctioning a sitting president explain why Gertler has been targeted but Kabila remains unhindered. Until the process for selecting sanctions targets is explained in greater detail, it will be impossible to determine why some individuals are penalized while others who undertake similar activities are not.

What are the implications for businesses and financial institutions?

U.S. financial institutions have substantial responsibilities under the Global Magnitsky Act since "any transaction that evades or avoids" the sanctions is prohibited. This creates additional compliance costs for companies. As described by the law firm Arent Fox, the need to avoid interacting with sanctioned persons and entities requires that companies conduct "due diligence on all customers, vendors, and business partners, and their beneficial owners, internationally." The focus on beneficial owners is necessary to avoid dealing with entities owned 50% or more by a sanctioned person. This aspect may prove especially challenging given the present difficulties in identifying the true owners of companies. Transparency International estimates that the "majority of G20 countries still do not know who owns and controls shell companies and trusts in their territories."

While the costs of compliance are substantial, based on other sanctions regimes set up under the International Emergency Economic Powers Act (IEEPA), the potential penalties for assisting a sanctioned person are probably more severe. For instance, German bank Commerzbank AG was forced to pay over $640 million dollars in fines and forfeiture for violating U.S. sanctions against Iran and Sudan. Likewise, BNP Paribas S.A. was penalized up to $9 billion dollars for similar sanctions violations.

The global mining and commodities trading company Glencore PLC is testing the Global Magnitsky Act by continuing to make royalty payments to Dan Gertler, who is among the sanctioned individuals. Glencore has argued that the royalty payments are necessary to prevent the seizure of its properties in the Congo, as Gertler has already secured an asset freeze worth almost $3 billion in litigation before DRC courts. While Glencore's situation is difficult, it remains to be seen whether the Treasury Department will take measures to secure its compliance.

In conclusion, the Global Magnitsky Act could represent a major change in U.S. sanctions policy since it is aimed at corrupt actors worldwide. This is an expansion from the previous, comparatively limited, sanctions against governments such as Iran, or terrorist groups. But while the potential pool of targetable persons is much larger, it remains to be seen how extensively the administration will utilize this tool and enforce its penalties.

What comes next?

The Global Magnitsky Act is a powerful weapon in the executive branch's arsenal because it is empowered to unilaterally freeze the assets of allegedly corrupt actors worldwide. Furthermore, if the Treasury Department is permitted to rely on classified evidence, as it does with counterterrorism sanctions, it will be difficult to prove that the sanctions are unjustified. The Global Magnitsky Act is set to expire in 2022, and its enforcement in the upcoming years will show a great deal about the administration's commitment to combatting corruption and human rights abuses abroad.