

MOVING FORWARD

SANCTIONS / FOREIGN CORRUPT PRACTICES ACT ALERT | NIXON PEABODY LLP

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Cutting off the bad seed: How recent sanctions could expose international businesses to cash flow problems

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On December 20, 2017, President Trump issued Executive Order 13818 (the “Order”), implementing the Global Magnitsky Human Rights Accountability Act (the “Global Magnitsky Act” or “Act”). The Act, which was enacted by Congress with bipartisan support in 2016, provided the President with broad powers to target foreign individuals and entities believed to be engaged, directly or indirectly, in corruption and human rights violations. At first glance, the Order appears to target only *foreign* companies and nationals. But can the Order—and the blocking powers—be read so broadly that they enable the Secretary of the Treasury to block the assets of a domestic person or company? We think so.

The Global Magnitsky Act

The Global Magnitsky Act authorizes the President to impose sanctions—including the blocking of property—on any “foreign person” that he determines, by credible evidence, has materially assisted, sponsored or provided financial, material, or technological support for a government official (or a senior associate thereof) who is responsible for or complicit in significant corruption. For purposes of the Act, a “foreign person” is defined at 31 C.F.R. 595.304 and includes “any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States), or any entity not organized solely under the laws of the United States *or existing solely* in the United States, but does not include a foreign state.” The term is thus broader than it might immediately appear. The Act defines corruption to include “the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery,” as well as “the transfer or the facilitation of the transfer of the proceeds of corruption.” To carry out its purpose, the Act gives the President the power to block transactions involving the property of persons and entities that fall under the above definitions.

The Order and its interplay with anti-bribery enforcement

In the Order, the President exercises the powers granted to him under the Act and imposes sanctions on several individuals and entities. After kicking off the first round of sanctions related to the Global Magnitsky Act, the President delegated his powers to the Secretary of the Treasury. Now, the

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Secretary of the Treasury may, without prior notice, impose sanctions on any foreign person that he determines has materially assisted a government official to engage in acts of significant corruption.

There is significance to the broad definition of “foreign person” as used in the Act. Because a business must exist **solely** in the United States to avoid falling under the definition, many international businesses are at risk of having their assets blocked by the Secretary of the Treasury if “credible evidence” of corruption is uncovered. As a result, businesses that become involved in investigations into potential violations of the Foreign Corrupt Practices Act (“FCPA”) or foreign anti-bribery laws may, without warning, find themselves with limited cash flow. For example, a New York company doing business in London could lose the ability to finance its operations through a New York bank if the Secretary of the Treasury becomes aware of credible evidence that the company violated the FCPA. Similarly, an international franchisor may be blocked from receiving foreign franchisee royalties if credible evidence of corruption exists. In either case, great harm could be done regardless of how the investigation unfolds.

Those and other challenges may arise from the introduction of the Global Magnitsky Act into the government’s anti-corruption toolbox.

— **Potential for more diverse targets**

While the FCPA criminalizes corrupt actors that have an adequate nexus to the United States, the Global Magnitsky Act can be enforced against any “foreign person” even in the absence of a jurisdictional connection. As a result, overseas companies such as distributors could cause businesses extreme financial harm even if any corrupt behaviour occurred entirely without their knowledge and entirely overseas. Proper due diligence on foreign third-parties could help companies avoid seeing their business operations interrupted.

— **Alternative anti-corruption enforcement option**

Because of its looser enforcement standard, the Global Magnitsky Act may be applied where criminal liability under the FCPA is weak or absent. As a result, the Act may provide an alternative mechanism to punish corrupt parties selectively, quickly and without needing to establish a criminal enforcement case.

Given the broad scope of the Global Magnitsky Act, companies doing business abroad are at risk of financial harm each time a new anti-corruption operation unfolds. Companies should be aware of the possible ramifications that sanctions under the Global Magnitsky Act could have on their daily business operations.

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