

The Global Magnitsky Human Rights Accountability Act: Sanctions Tool for Promoting U.S. Human Rights Agenda

Written by Gwendolyn Wilber Jaramillo, Shrutih V. Tewarie, Isa Mirza

December 2, 2016

Overview

After months of closed-door discussions, Congress this week released the text of the negotiated National Defense Reauthorization Act (“NDAA”) for appropriating defense funds in fiscal year 2017. Tucked deep into the NDAA are provisions that could provide the incoming Trump Administration and the next Congress with a new framework to use U.S. sanctions law in support of international human rights principles. This framework, known as the “Global Magnitsky Human Rights Accountability Act” is based upon a 2012 sanctions law that applied only to human rights abuses in Russia – the Sergei Magnitsky Rule of Law Accountability Act of 2012.

If enacted into law, the Global Magnitsky Act will allow the next Administration to apply human rights-based sanctions to individuals in any country in the world. The Act may be part of a paradigm shift in the way U.S. sanctions law is utilized. Unlike most U.S. sanctions regimes that target issues in specific countries by sanctioning governments or groups of individuals and entities, the Act could be applied to sanction individuals anywhere in the world who have engaged in activities deemed to violate certain international human rights standards. The Act could offer an expanded scope to the Treasury Department’s Office of Foreign Assets Control (“OFAC”) in promoting U.S. policies globally, much as the 2015 sanctions on malicious cybersecurity undertakings expanded the group of activities, including drug trafficking and terrorism, that are global targets of OFAC sanctions.

Under the terms of the Act, the State Department’s Bureau of Democracy, Human Rights & Labor (“DRL”) would be given authority to determine who is placed on the sanctions list, which will presumably be implemented by OFAC. In making the determinations, however, the Administration is required to consider “credible information obtained by other countries and nongovernmental organizations that monitor violations of human rights” as well as information provided by certain committees of Congress. This provision could make the Act a powerful tool for human rights activists. The human rights community will have a new channel to advocate for decisive U.S. action against foreign officials and associates who are engaged in corrupt activity or the willful, violent suppression of political opponents, peaceful protesters, and investigative journalists.

Sanctionable Activity and Sanctions

Under the Act, individuals may be subject to sanctions if they:

- Engage in or act on behalf of those engaged in extrajudicial killings, torture or other violations of internationally recognized human rights committed against those that seek to expose illegal government activity or defend and promote internationally recognized human rights and freedoms;
- Are government officials or senior associates of government officials engaging in significant corruption; or
- Provide material assistance to government officials or their senior associates that are engaging in significant corruption.

The sanctions include:

- Ineligibility to receive a visa to enter the U.S.;
- Revocation of an existing U.S. visa; or

- Freezing of property interests subject to U.S. jurisdiction
- Prohibition on transactions subject to U.S. jurisdiction in which the sanctioned individual has a property interest

An unusual carveout to the property freeze and transaction sanctions in the Act states that transactions involving the importation of goods into the United States may not be sanctioned. This is an unusual exception to the mechanics of an otherwise typical property-blocking tool. It may be extremely challenging to implement such an exception, given that financial institutions and most global companies utilize automated screening software to detect and block sanctioned parties. Creating a feasible exception for import transactions may prove to be quite a headache.

Next Steps

The Obama Administration fiercely resisted implementing the original 2012 Magnitsky Act. Indeed, when Hillary Clinton was Secretary of State, the State Department fought hard to prevent the original 2012 Magnitsky Act from becoming law, in order not to jeopardize the planned “reset” of relations with Moscow, and to maintain flexibility in the Administration’s response to issues in Russia. In this case, President Obama may not have much choice but to sign the Global Magnitsky Act into law. Because the Act is now part of the much larger NDAA, vetoing the Act would mean rejecting a must-pass measure that authorizes over \$600 billion in defense appropriations and salaries for U.S. military personnel. Such a move would have little precedent.

Despite the Act’s potentially broad scope as a tool to promote human rights, implementation is everything. Even if the regulations permit strong action, it is within the President’s discretion to impose sanctions, or not, even on individuals who may be widely condemned in the human rights community. History suggests that a Clinton Administration would likely have been reluctant to impose the sanctions list. It is difficult to predict a Trump Administration’s actions under the (unknown) next Secretary of State, but Trump’s own closeness with Russian President Vladimir Putin, who was extremely offended by the passage of the original Magnitsky Act, may lead to challenges for strong implementation of the Act under the incoming Trump Administration.

In terms of next steps, the House passed the 2017 NDAA 375-34 today, Friday, December 2. It goes to Senate for debate, which will likely vote early next week. The fact that the measure has already been through the conference procedure suggests it will pass by a significant, bipartisan margin with few or no changes. As noted above, President Obama is expected to sign the bill into law.

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