

## NEW OFAC EXECUTIVE ORDER TARGETING HUMAN RIGHTS ABUSES, CORRUPTION, AND THE TRANSFER OF THE PROCEEDS OF CORRUPTION HAS BROAD IMPLICATIONS

### OVERVIEW

On December 20, 2017, the President significantly extended the potential extraterritoriality of US foreign bribery laws by issuing an Executive Order "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption" (the "**EO**"). This EO implements the Global Magnitsky Human Rights Accountability Act (the "**Act**"), targeting serious human rights abuses, corruption, and the transfer of the proceeds of corruption (the "**Proscribed Activities**"). Without defining corruption, the EO states that it includes "*the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery.*"

Of note, the EO authorizes the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate non-US persons that have engaged in bribery and corruption. This designation authority applies even if such activities are outside the jurisdiction of US foreign bribery laws such as the US Foreign Corrupt Practices Act ("**FCPA**") which generally only applies to US issuers and domestic concerns. This decision to designate is in the discretion of the Secretary of the Treasury and courts, therefore, cannot overturn the decision without a showing of arbitrary and capricious conduct or fraud in reaching such determination. This permits the US government to proceed with hard-hitting administrative sanctions without first having to prove a criminal or even civil case.

Specifically, the EO prohibits "**US persons**" from directly or indirectly engaging in or facilitating any transactions involving persons that have been designated under the EO. US persons includes any US 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.

US persons are also required to block all property and property interests of such designated persons that come under their possession or control. Under OFAC's so-called 50 Percent Rule, the blocking requirement extends to all entities that are, directly or indirectly, 50 percent or more owned by one or more blocked persons in the aggregate even if such entities are not themselves designated persons.

In addition to designating the persons listed in the annex to the EO, the EO also authorizes the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate foreign (i.e., non-US) persons whom the Secretary of the Treasury determines:

- a) to be responsible for or complicit in, or to have directly or indirectly engaged in, the serious human rights abuses;
- b) to be a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in corruption or the transfer or the facilitation of the transfer of the proceeds of corruption;
- c) to be or have been a leader or official of: (i) an entity, including any government entity, that has engaged in, or whose members have engaged in, any of Proscribed Activities relating to that person's tenure at the entity; or (ii) an entity whose property and interests in property are blocked pursuant to the EO as a result of activities related to the person's tenure at the entity; or
- d) to have attempted to engage in any of the Proscribed Activities;
- e) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of: (i) any Proscribed Activity; (ii) any person who has been designated or blocked under the EO; or (iii) any entity, including any government entity, that has engaged in, or whose members have engaged in, any Proscribed Activity;
- f) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the EO; or
- g) to have attempted to engage in any of the activities described in (e) and (f) above.

## DESIGNATIONS TO DATE

On December 21, 2017, OFAC added Israeli billionaire Dan Gertler, along with his companies, to the Specially Designated Nationals ("**SDN**") List because of his ongoing dealings in the Democratic Republic of Congo ("**DRC**"). Gertler is reportedly one of the biggest individual mining investors in the DRC, which, according to OFAC, has "*reportedly lost over USD 1.36 billion in revenues from the underpricing of mining assets that were sold to offshore companies linked to Gertler.*" The State Department echoed this sentiment during its Background Briefing, homing in on Gertler's "*hundreds of millions of dollars' worth of opaque and corrupt mining and oil deals*" in the DRC.

By way of background, news publications had linked Gertler to the Och-Ziff bribery and corruption scandal that involved DRC government officials, dating back to 2007. In 2016, Och-Ziff settled those charges with the US Department of Justice ("**DOJ**") and the US Securities and Exchange Commission ("**SEC**") for a total of USD 412 million. According to DOJ, it was "*a widespread scheme involving the bribery of officials in the [DRC] and Libya.*" In the settlement documents, DOJ referenced the involvement of a businessman or "*DRC Partner*" as a conduit for funneling over USD 100 million in bribes to government officials.

## **FUTURE DESIGNATIONS**

In addition to Gertler's designation, US authorities have indicated that future designations could occur anywhere "*including in Burma.*" This reflects earlier State Department press releases indicating that US authorities could use the Act as a basis for designating certain members of the Burmese military.

## **IMPLICATIONS**

The implications of the EO extend well beyond sanctions compliance. Non-US companies and individuals that have engaged in bribery but have been outside the jurisdictional reach of the FCPA (or otherwise presented issues of proof at trial for DOJ), can now be subject to OFAC sanctions that essentially cut them off from the US financial system or dealings with any US persons, thereby generally complicating their international financial transactions. Although the EO does not limit OFAC's designation authority to serious corruption, based on the initial designations, we believe that it is likely that OFAC will reserve the designation for significant cases of corruption involving non-US government officials.

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