

**C L I F F O R D**  
**C H A N C E**



**PRESIDENT TRUMP,  
HUMAN RIGHTS,  
US SANCTIONS AND  
GLOBAL BUSINESS:  
TRAPS FOR THE  
UNWARY**



**— THOUGHT LEADERSHIP**

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## **PRESIDENT TRUMP, HUMAN RIGHTS, US SANCTIONS AND GLOBAL BUSINESS: TRAPS FOR THE UNWARY**

Over the past year, completely contrary to public expectations, President Trump has unleashed the power of US economic sanctions to champion human rights and fight corruption globally. As laudable as this initiative may seem at first glance on public policy grounds, it also raises serious legal questions and creates new risks and uncertainties for the global business community.

In accordance with the Global Magnitsky Human Rights Accountability Act, on December 20, 2017, President Trump issued Executive Order (EO) 13818 “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption”. As summarized by the US Treasury Department’s Office of Foreign Assets Control (OFAC), the Global Magnitsky (or GloMag) EO “declares a national emergency with respect to serious human rights abuses and corruption globally, identifying these issues as threats to the national security, foreign policy, and economy of the United States” and authorizes OFAC to list as Specially Designated Nationals (SDNs) persons and entities determined by the US Treasury, State and Justice Departments “to be responsible for or complicit in, or to have directly or indirectly engaged in, certain human rights abuses or corrupt acts anywhere in the world”.

Using its GloMag authority, OFAC has listed dozens of current and former political leaders, military and security officials and business persons globally as SDNs, thereby prohibiting the involvement of US persons or the US financial system in any dealings involving them, any entity owned 50% or more by them or any of their property interests. In addition, even engaging in entirely non-US dealings with these sanctions targets can expose the non-US participants to the risk that OFAC

could, if it so chooses and at its discretion, designate them as SDNs for providing “material assistance” to an SDN. Because of the aggressive enforcement of US sanctions against the international banking community, banks globally seek to avoid transactions involving SDNs or companies or assets owned by them. US sanctions designations therefore deprive the targets not only of access to the US economy and US financial system but to normal banking channels globally.

Examples of the extraordinary reach and variety of OFAC’s GloMag designations to date include Benjamin Bol Mel, the allegedly corrupt head of a South Sudanese construction company, Mukhtar Shah, a Pakistani surgeon allegedly specializing in transplants using kidneys obtained from traffickers in human organs, Angel Rondon Rijo, a businessman in the Dominican Republic who allegedly paid bribes for the Brazilian construction company, Odebrecht, Dan Gertler, an Israeli businessman who allegedly obtained mining assets in Africa through bribery, and two Turkish cabinet ministers, whom the Trump Administration held responsible for the arrest and detention of US Pastor, Andrew Brunson. For a more complete summary, see <https://www.state.gov/e/eb/tfs/spi/globalmagnitsky/>.

OFAC removed the Turkish ministers from the SDN list following the release of Pastor Brunson, but for the other SDNs delisting is a far more distant prospect. This requires a petition to OFAC, full cooperation with a US government investigation into the facts and circumstances of the alleged illicit activity and no due process rights whatsoever, unless and until OFAC might choose to deny the petition and a (typically futile) appeal can be made to the courts, which give substantial deference to OFAC's authority and position. Because OFAC historically has used its sanctions designation authority for national security purposes (e.g. the war on terror), OFAC provides no due process rights in advance of a designation and in most cases the subject of the designation has no prior notice of the action.

Instead, the relevant US Treasury, State and Justice Department officials select OFAC's GloMag sanctions targets based on their confidential and classified assessment of the available evidence, together with US political and diplomatic considerations that no court of law would recognize, without any opportunity for the targets to defend themselves before the sanctions cripple their business and force them into economic exile.

It is a classic case of the ends justifying the means, which is hardly a sound foundation for supporters of global criminal justice. It also exposes the global business community to the risk that their counterparties across the emerging markets, if owned by persons at potential risk of an OFAC designation, might suddenly become prohibited persons under US sanctions. Since the presence of such at-risk counterparties is endemic in many emerging markets, investors, lenders and other international participants in such markets need to ensure they have considered the potential OFAC risk and, if they proceed with the transaction, have sufficient termination and/or ouster rights and wind-down strategies in place in the event of a designation.

The need for such diligence will only grow over time. The US government's addiction to sanctions as a response to foreign provocations is entirely bipartisan. The use of OFAC to circumvent the criminal justice system by putting violators of human rights and corrupt business persons globally out of business rather than on trial will almost certainly outlast President Trump and become one of his most unexpected legacies to successor Administrations.



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