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U.S. House Passes Legislation Focused on Fighting Global Corruption and Kleptocracy

On February 4, 2022, the U.S. House of Representatives passed the America COMPETES Act of 2022, a 3,000 page legislative package designed to strengthen the competitiveness of the U.S. economy and U.S. businesses worldwide.[1] In this article, we discuss four key anti-corruption measures included in the Act:

- The **Countering Russian and Other Overseas Kleptocracy Act** (the "CROOK Act"), which would inject tens of millions of dollars into existing and new anti-corruption programs around the world;
- The **Global Magnitsky Human Rights Accountability Act**, which would reauthorize the President to impose economic sanctions on foreign individuals and entities that engage in corruption or human rights violations;

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1. The America COMPETES Act of 2022, H.R.4521, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/4521/text.

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- The **Foreign Corruption Accountability Act**, which would authorize visa bans on foreign nationals who engage in acts of corruption against U.S. persons; and
- The **Justice for Victims of Kleptocracy Act**, which would create a public database that lists, by country, the total amount of assets stolen by corrupt foreign officials that the United States has recovered.

The effort to enact these powerful anti-corruption measures is in step with the Biden Administration's broader focus on fighting corruption around the world.[2]

The Senate passed its own version of the America COMPETES Act last year, the U.S. Innovation and Competition Act.[3] But the Senate's bill – of the four anti-corruption measures highlighted above – contained only the Global Magnitsky Human Rights Accountability Act. Thus, much remains uncertain as the two chambers go to conference to align their bills before any resulting bill can be voted on again and, if passed, sent to President Biden.

The Countering Russian and Other Overseas Kleptocracy Act

The CROOK Act would fund various anti-corruption efforts around the world and coordinate anti-corruption activities among U.S. agencies and embassies.[4] The legislation would create an Anti-Corruption Action Fund within the U.S. Treasury Department to help combat kleptocracy and bolster vulnerable democratic institutions. Money for the fund would come from a new penalty imposed on the most egregious FCPA violations. In particular, for each FCPA case where criminal penalties and fines exceed $50 million, the CROOK Act would impose a $5 million "prevention payment" to be deposited in the Anti-Corruption Action Fund.[5] Over the last two years, this would have resulted in tens of millions in new anti-corruption funds.

The CROOK Act also would direct the State Department to create an interagency task force aimed at combatting foreign corruption. The Anti-Corruption Task Force would include representatives from different departments and agencies that focus on anti-corruption, including DOJ, the State Department, the U.S. Agency

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2. *See* "United States Strategy on Countering Corruption" (Dec. 6, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf; *see also* Andrew M. Levine, Winston M. Paes, Douglas S. Zolkind, Cara Ortiz & Jennifer Romero, "Biden Administration's Strategy on Countering Corruption Seeks New Era of Global Anti-Corruption Enforcement and Cooperation" at 1-12, FCPA Update, Vol. 13, No. 5 (Dec. 2021), https://www.debevoise.com/insights/publications/2021/12/fcpa-update-december-2021.
3. United States Innovation and Competition Act of 2021, S.1260, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/1260/text.
4. CROOK Act, H.R.402, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/402/text?r=1&s=1.
5. Press Release, Brian Fitzpatrick, "Fitzpatrick and Keating Reintroduce CROOK Act" (Jan. 23, 2021), https://fitzpatrick.house.gov/2021/1/fitzpatrick-keating-reintroduce-crook-act.

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for International Development, and the Department of Defense. This task force would evaluate the effectiveness of current U.S. programs aimed at assisting foreign countries fighting against corruption. The Secretary of State would manage this "whole-of-government" approach to improve coordination among the departments, agencies, and donor organizations working to stop corruption. Finally, the bill proposes designating and training anti-corruption points of contact at each U.S. embassy to facilitate an interagency approach for targeting corruption. These contacts would make recommendations regarding the use of funds and other measures in their respective countries.

"These bills demonstrate a concerted effort by the House of Representatives to implement some of the reforms that the Biden Administration called for in the U.S. Strategy on Countering Corruption. That said, it is too soon to tell whether this legislation will garner the bipartisan support necessary to be passed...."

The Global Magnitsky Human Rights Accountability Act

The America COMPETES Act would reauthorize and strengthen the Global Magnitsky Human Rights Accountability Act, which currently allows the President to impose economic sanctions and deny entry into the United States to any foreign individuals or entities identified as engaging in corruption or human rights violations.[6] Set to expire on December 23, 2022, the law seeks to promote respect for human rights at all levels of government by enabling the President to apply targeted sanctions on any individual involved in a human rights violation, from senior officials to low-level officers and even non-government associates "acting for or on behalf of" government officials. The America COMPETES Act would extend the law while also strengthening some of its key provisions.

The Global Magnitsky Act is designed to be a powerful deterrent, forcing foreign officials who would use unlawful violence or corruption to consider the potential repercussions from the U.S. government. The America COMPETES Act seeks to strengthen the Global Magnitsky Act by widening the scope of humans rights violations covered and also changing the requirement that a foreign actor participate

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6. Global Magnitsky Human Rights Accountability Act, S.284, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/284/text; *see also* Samantha J. Rowe, Karolos Seeger, Jane Shvets, Konstantin Bureiko, Martha Hirst & Merryl Lawry White, "EU Introduces Magnitsky-Style Human Rights Sanctions Regime," Debevoise Update (Dec. 21, 2020), https://www.debevoise.com/insights/publications/2020/12/eu-introduces-magnitsky-style-human-rights.

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in acts of "significant corruption" to "corruption" generally.[7] The revised Magnitsky Act would authorize the President to deny entry into the United States, revoke any already-issued visa, and block property under U.S. jurisdiction of, and prohibit U.S. persons from entering into transactions with, any foreign person (individual or entity) that the President determines:

- is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuses or any violation of internationally recognized human rights; or
- is a current or former government official, or a person acting for on behalf of such an official, who is responsible for corruption, the transfer or facilitation of the transfer of proceeds of corruption, or is the leader or official of an entity who has engaged in these activities.[8]

The COMPETES Act adds a new section to the Global Magnitsky Act focused on promoting cooperation and information sharing with foreign governments. Specifically, the new section directs the President to "establish and regularize information sharing and sanctions-related decision making" with like-minded governments with similar human rights and anti-corruption sanctions programs.[9] This amendment reflects the focus on international cooperation and information-sharing that has become a major theme of the Biden Administration's proposed anti-corruption measures. The amended Global Magnitsky Act seeks to incentivize foreign governments to improve their own accountability mechanisms. By cooperating with the United States on Global Magnitsky investigations, foreign leaders can show that they will not tolerate human rights abusers in their own countries. The Global Magnitsky Act is a powerful anti-corruption tool that, to date, has resulted in sanctions on more than 200 individuals across dozens of countries, inspiring similar regimes in the United Kingdom, Canada, and Australia.[10]

The Foreign Corruption Accountability Act

The COMPETES Act also includes the Foreign Corruption Accountability Act, which would authorize visa bans on any foreign national who engages in an act of corruption against a U.S. person. The initial aim of the legislation was to close a loophole in U.S. sanction authority – discovered after a cobalt mine owner bribed

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7. The America COMPETES Act of 2022, H.R.4521, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/4521/text.
8. *Id.*
9. *Id.*
10. "House Passes Four Anticorruption Bills via 'America Competes Act,'" Transparency International (Feb. 4, 2022), https://us.transparency.org/news/house-passes-four-anticorruption-bills-via-america-competes-act.

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the Congolese military to take land from a U.S. business owner.[11] Since the person perpetrating the corruption was a private citizen, the United States had no statutory authority to punish the individual. This legislation would provide the President authority to ban visas for anyone deemed to have engaged in corruption against a U.S. person abroad, including businesspeople, NGOs, aid workers, and others. For purposes of this bill, "corruption" includes "soliciting or accepting bribes," "using the authority of the state to accept payments," or "engaging in extortion."[12]

The Foreign Corruption Accountability Act also would empower the President to take action against corrupt foreign actors who otherwise could avoid consequences while taking advantage of U.S. citizens and businesses.

Justice for Victims of Kleptocracy Act

Finally, the America COMPETES Act includes the Justice for Victims of Kleptocracy Act. This legislation would increase transparency by creating a public database of assets stolen by corrupt foreign officials and recovered by the United States. The Act directs DOJ to create a website that clearly lists, by country, the total amount of assets stolen from citizens of kleptocratic regimes and recovered by U.S. law enforcement.[13] The bill also states that "the recovered assets should be returned for the benefit of the people harmed by the corruption under conditions that reasonably ensure the transparent and effective use, administration and monitoring of returned proceeds."[14]

The Justice for Victims of Kleptocracy Act aims to increase transparency and accountability surrounding global corruption in a straightforward, low-cost manner. This bill may help to solve some of the problems encountered by DOJ's Kleptocracy Asset Recovery Initiative, which was created to forfeit the proceeds of foreign official corruption but which has been hindered by difficulties identifying hidden assets and conducting forfeitures.[15] By making public a list of all stolen assets seized from kleptocrats, the bill seeks to demonstrate the United States' commitment to investigating and confiscating stolen assets of corrupt foreign officials engaged in bribery, embezzlement, and other acts of corruption.

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11. Press Release, John Curtis, "Congressman Curtis Introduces Bill to Counter Corruption Against Americans Abroad" (June 14, 2021), https://curtis.house.gov/press-releases/congressman-curtis-introduces-bill-to-counter-corruption-against-americans-abroad.
12. Foreign Corruption Accountability Act, H.R.3887, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3887/text?r=53&s=1.
13. Justice for Victims of Kleptocracy Act of 2021, H.R.3781, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3781/text?r=75&s=1.
14. *Id.*
15. *See* Leslie Wayne, "Shielding Seized Assets From Corruption's Clutches," N.Y. Times (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/business/justice-department-tries-to-shield-repatriations-from-kleptocrats.html; *see also* Kara Brockmeyer, Andrew M. Levine, Jane Shvets, Philip Rohlik, Scott M. Caravello, Andreas Constantine Pavlou, "Pending U.S. Legislation Will Expand Anti-Kleptocracy Initiative," FCPA Update, Vol. 12, No. 5 (Dec. 2020), https://www.debevoise.com/insights/publications/2020/12/fcpa-update-december-2020.

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Conclusion

The major anti-corruption features of the America COMPETES Act include targeting authoritarian leaders in foreign countries who abuse their power to steal assets from state institutions; leveraging diplomatic engagement and foreign assistance to promote the rule of law; establishing an Anti-Corruption Action Fund at Treasury in furtherance of these goals, to be funded from FCPA penalties; creating an interagency Anti-Corruption Task Force at the State Department to improve coordination in countering public corruption; and creating a public database of assets stolen by corrupt foreign officials.

These bills demonstrate a concerted effort by the House of Representatives to implement some of the reforms that the Biden Administration called for in the U.S. Strategy on Countering Corruption. That said, it is too soon to tell whether this legislation will garner the bipartisan support necessary to be passed or whether any significant changes will be made in order to attract such support. We will be closely monitoring legislative developments and will provide future updates.

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DOJ Issues Rare FCPA Opinion and Distinguishes Duress from Illicit Bribery

On January 21, 2022, DOJ issued its first opinion release in since 2020 and only the second since 2014. The opinion procedure enables companies to request DOJ's views on whether a particular fact pattern would violate the FCPA. In Opinion Release 22-01 (the "Release"), a company asked DOJ to opine on whether the company could pay a foreign government's agent to secure the release of an impounded vessel, detained crew, and imprisoned captain with a serious medical condition.[1]

Because of these exigent circumstances, DOJ provided a preliminary opinion within a couple days of the request, advising that it did not intend to take enforcement action, and it published a formal opinion three months later. As is customary, the opinion is very narrow. It focuses on what appears to be a clear case of duress or extortion involving imminent *physical* harm and therefore not an improper payment under the FCPA's anti-bribery provisions.

The facts underlying the Release are somewhat more complex than straightforward physical duress and are unlikely to apply, even as a guide, beyond its very narrow facts. Moreover, although the unusual issuance of a preliminary opinion was useful in this circumstance, the three-month delay in issuing a formal opinion reflects one of the primary reasons the opinion release procedure is so rarely used.

Release 22-01

The Release arises from a unique set of facts. The requestor was a U.S. domestic concern involved in shipping. One of the requestor's vessels sought to enter port in Country B, but the port was fully occupied and the vessel was advised to lay anchor at designated coordinates in international waters. The coordinates provided to the vessel were incorrect, and the vessel accidently anchored in Country A's waters and was intercepted by Country A's navy. The vessel was detained at sea with its crew aboard, and the vessel's captain was taken ashore and imprisoned. The captain was "suffering from serious medical conditions that would be significantly exacerbated by the circumstances and conditions of his detention and created a significant risk to his life and well-being."[2]

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1. United States Department of Justice, Opinion Procedure Release No. 22-1 (Jan. 21, 2022), https://www.justice.gov/criminal-fraud/opinion-procedure-releases (hereinafter "Release").
2. *Id.* at 2.

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Shortly thereafter, a third party claiming to represent Country A's navy approached the requestor demanding a large payment in exchange for the release of the captain, crew, and vessel. Despite repeatedly being asked by the requestor, the third party refused requests to provide a formal basis for payment. Instead, the third party demanded an immediate cash payment of $175,000, without which the third party said the captain and crew would be detained for a longer period and the vessel seized.

At the same time that it was negotiating with the third party, the requestor was also seeking assistance from U.S. government agencies to deal with Country A. As these efforts did not bear fruit, on October 19, 2021, the requestor sought an opinion from DOJ regarding the payment to the third party. DOJ responded with a short "preliminary opinion" on October 21, "[d]ue to the highly unusual and exigent circumstances identified in the Request, including the risk of imminent harm to the health and well-being of individuals." The formal opinion was issued three months later.[3]

DOJ indicated that it would not pursue an enforcement action based on the above facts because the payment would not be made "corruptly" or in order to "obtain or retain business." Regarding corrupt intent, DOJ quoted *United States v. Kozeny* for the proposition that acts taken under duress do not constitute crimes, namely that "an individual who is forced to make a payment on threat of injury or death would not be liable under the FCPA."[4] Although the nature of the captain's "serious medical condition" is not disclosed in the Release, DOJ appears to have been convinced that his continued detention would "creat[e] a serious and imminent threat to his health, safety, and well-being."[5] As to the absence of a business purpose, DOJ noted that the requestor had no business with Country A, and the vessel's detention was the result of an error. As evidence of the lack of corrupt intent, DOJ also cited the requestor's transparency, both in attempting to obtain documentation from the third party and in engaging with other U.S. government personnel.

The Release explicitly states that the "imminent threat" faced by the ship's captain is "readily distinguishable from other situations in which a company is threatened with severe economic or financial consequences in the absence of a payment." Economically coercive payments, "especially in countries in which [companies] are in historical, pending, ongoing, anticipated, or sought-after business relationships with government actors may well give rise to liability under the FCPA."[6]

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3. *Id.* at 1, n.1.
4. 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008).
5. Release at 3, n.3.
6. *Id.* at 4.

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Analysis

At first impression, the Release appears to be a straightforward application of the law of duress. It is therefore somewhat surprising that the requestor sought an opinion. It is also surprising that it took DOJ three months to issue a formal opinion, twice seeking additional information from the requestor (who presumably already had made the payment). Although the formal opinion focuses on the threat to the captain's life and health, it also discloses that the payment in question was a cash payment of $175,000, which might explain why the requestor sought the opinion. Moreover, the payment described in the Release was more than simply an extorted payment in exchange for the release of the captain. It also covered the release of the captain, the crew, *and the vessel*, which "would [have been] seized" if the payment was not made.[7]

"That a payment made in response to an imminent threat to the life or health of an employee does not violate the FCPA is hardly a novel conclusion…. This fact (and the exigent circumstances) enabled DOJ to take the unusual step of providing a preliminary opinion very quickly."

The fact that the payment was a package deal means that the Release is sure to be cited in future discussions of the FCPA's business purpose test and likely the reason why the Release is unlikely to have practical implications beyond its very limited facts. DOJ opined that one reason it would not take enforcement action was that there was no business purpose behind the payment. But in *United States v. Kay*, the Fifth Circuit held that payments made in order to "obtain or retain business" referred not only to payments made directly in exchange for a contract or business opportunity, but broadly to any "payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person."[8] *Kay* found that bribes paid to reduce tax liability were an example of such indirect assistance. A broad reading of *Kay* could encompass a payment to release an impounded vessel as indirectly assisting in securing business at the next port. DOJ declined to take such a broad reading of *Kay*.

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7. *Id.* at 2.
8. 359 F.3d 738 (5th Cir. 2004).

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Of course, it would be entirely unreasonable to have demanded the requestor to take the time to try to negotiate for the separate release of the captain given the imminent demand and the apparent threat to his life and health, and it is reassuring that DOJ did not do so. These facts also explain the clear limitations DOJ put on the Release:

- DOJ explicitly distinguishes between threats to life or health and economic coercion, suggesting that "severe economic or financial consequences" cannot form the basis of the excuse of duress under the FCPA.[9] DOJ very well may not have provided the opinion if only the vessel had been detained;
- DOJ appears to place significant weight on the requestor's (unsuccessful) attempts to ensure the payment was properly documented by Country A and, especially, the requestor's engagement with other U.S. government authorities;
- DOJ also emphasizes that the vessel's seizure was the result of an error and that the requestor had no business with Country A. The Release thereby contrasts this chance situation with circumstances involving "historical, pending, ongoing, anticipated, or sought-after business relationships with government actors."[10] Such relationships, DOJ opines, would be relevant to a decision to commence an enforcement action, at least in a case involving economic coercion; and
- DOJ explicitly limits the Release to the FCPA's anti-bribery provisions and "offers no view on the permissibility or legality of the payment under any other laws, including the laws of Country A."

The final two points are important in signaling to companies how the Release's unique circumstances likely are not applicable in many other circumstances. The focus on the chance nature of the seizure and the fact that the requestor had no business in Country A suggests that DOJ likely would not apply the same reasoning to any kind of regular payments or payments that become incidental to or 'part of doing business' in a particular jurisdiction.

Companies have been prosecuted under anti-terrorism and other laws for paying protection money to rebel groups ostensibly to ensure the safety of their employees,[11] and the Release likely does not signal a change to DOJ's view of such payments. The Release declines to commence an enforcement action when a

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9. Release at 4.
10. *Id.* at 4.
11. *See e.g.*, United States Department of Justice, "Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay $25 Million Fine," Press Rel. 07-161 (Mar. 19, 2007), https://www.justice.gov/archive/opa/pr/2007/March/07_nsd_161.html.

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payment appears to be the only way to avoid death or serious bodily harm. Nothing in the Release suggests that DOJ would react similarly if ceasing or reducing business opportunities in a particular jurisdiction was an alternative to payments.

Conclusion

That a payment made in response to an imminent threat to the life or health of an employee does not violate the FCPA is hardly a novel conclusion (indeed, that express statement by the district court in *Kozeny* is quoted in the Release). This fact (and the exigent circumstances) enabled DOJ to take the unusual step of providing a preliminary opinion very quickly. However, such a preliminary opinion is extremely rare, and it still took DOJ three months to issue a formal written opinion. The only other recent opinion (from 2020)[12] took nine months. Such delays are one reason more companies do not take advantage of this process. Given that the opinions create a rebuttable presumption of a non-violation of the FCPA, DOJ's caution in issuing them is perhaps understandable. As a result, however, opinions have ceased to be a useful tool for American businesses in most contexts. Neither the preliminary opinion issued in connection with the Release nor the substance of the Release changes this dynamic. Nevertheless, the Release does provide interesting, if factually limited, insight into DOJ's approach to duress.

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12. United States Department of Justice, Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/opinion-procedure-releases.

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