U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 18, 2020

The Honorable Eliot Engel
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
Washington, DC 20515

The Honorable Maxine Waters
Chairwoman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Engel and Chairwoman Waters:

This letter presents the views of the Department of Justice on H.R. 3843, the "Countering Russian and Other Overseas Kleptocracy Act" or the "CROOK Act" as reported by the Committee on Foreign Affairs on December 18, 2019. As we explain below, the bill raises both constitutional and policy concerns.

I. Constitutional Concerns

Section 5 of the bill would declare that "[i]t is the policy of the United States to" "leverage United States diplomatic engagement and foreign assistance to promote the rule of law," to "help foreign partner countries to investigate and combat the use of corruption," to "assist in the recovery of kleptocracy-related stolen assets for victims," and to take other foreign-relations actions related to foreign corruption.

The Constitution commits to the President alone the responsibility to engage in diplomacy and formulate the position of the United States in international fora. *See United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." (internal quotation marks omitted)). "The President's exclusive prerogatives in conducting the Nation's diplomatic relations are grounded in both the Constitution's system for the formulation of foreign policy, including the presidential powers set forth in Article II of the Constitution, and in the President's acknowledged preeminent role in the realm of foreign relations throughout the Nation's history." *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing*

Appropriations Act, 2011, 35 Op. O.L.C. __, at *4 (Sept. 19, 2011). Thus, the President has "exclusive authority to determine the time, scope, and objectives of international negotiations or discussions." *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. __, at *8 (June 1, 2009) (internal quotation marks omitted).

Accordingly, the Congress may not require executive branch officials to engage in discussions with foreign nations or to take particular positions when participating in international fora. Therefore, section 5 would infringe upon the President's constitutional authority. We recommend that rephrasing this provision to indicate that it expresses the "sense of Congress" rather than the "policy of the United States."

II. Policy Concerns

General Concern

The bill raises several policy concerns, but fundamentally, the language of the bill should make clear that any entities that the bill creates or persons it designates to implement its goals — particularly United States embassy personnel in foreign countries — may not interfere with criminal investigations conducted by United States law enforcement personnel overseas. The Department of Justice and other United States law enforcement components often have established working relationships with overseas counterparts, or otherwise work with such counterparts, to investigate, indict, extradite, and prosecute individuals or criminal organizations. These investigations often are complex, long-term, and sensitive. They also may affect the safety of victims, witnesses, and cooperators. Accordingly, in order to ensure the integrity of these investigations, as well as the ability of United States law enforcement to develop and maintain good working relationships with our foreign counterparts, persons charged with implementing the bill's anticorruption goals should not interfere in such investigations.

Section 3: Definitions

Section 3(6) of the bill would define "public corruption" as "the unlawful exercise of entrusted public power for private gain, including by bribery, nepotism, fraud, or embezzlement." The non-exhaustive list of examples in this definition is necessarily under-inclusive. It omits extortion, for example.

We believe that the United Nations Convention Against Corruption (referenced in section 4(1) of the bill) takes a superior approach to defining "public corruption" and we recommend that the bill take this this approach. Specifically, we recommend deleting section 3(6) of the bill because to do so would simplify the definition to encompass the international standards set forth in section 4, including the convention. The definition in the convention was formulated and vetted by multiple parties to the treaty, ensuring a broadly applicable definition that has proven free from technical vulnerabilities. Following this approach would avoid the necessity of

providing an exhaustive list of activities and would match accepted international definitions of corruption more closely. We believe that the *existing* reference to the convention in section 4(1) of the bill is sufficient to incorporate its approach.

Section 5: Statement of Policy

As stated above, section 5 of the bill would declare the policy of the United States in matters of international public corruption. We recommend deleting in section 5(5) the word "and" and inserting in its place the following: ", prosecute, adjudicate, and more generally".

In section 5(7), the drafters reference the Global Magnitsky Act as one of the tools available to the United States to combat corruption. We note that, subsequent to the passage of the Global Magnitsky Act, the President signed Executive Order No. 13,818 (December 20, 2017) ("Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption"). The drafters may wish to include in section 5(7) a reference to this executive order.

Section 6: Anticorruption Action Fund

Section 6 of the bill would establish an "Anti-Corruption [*sic*] Action Fund" to be administered by the Department of State "to aid foreign states to prevent and fight public corruption and develop rule of law based governance structures." Pursuant to section 6(b), the fund would receive the proceeds of a new $5 million "prevention payment" added to criminal fines and penalties in excess of $50 million under the Foreign Corrupt Practices Act ("FCPA") or sections 13, 30A, or 32 of the Securities and Exchange Act (Exchange Act). The bill would require the Attorney General to assess the new prevention payment.

We have significant concerns about using the proposed "prevention payment" to support the Anti-Corruption Action Fund. Foremost, we are profoundly concerned that the use of fines and penalties — or an additional prevention payment — for this purpose might provide a basis for arguments that our prosecutions are politically motived, *i.e.*, that we would be seeking criminal penalties simply to fund the activities authorized in section 6(a). In addition, FCPA cases typically involve an agreed settlement rather than a unilaterally-imposed fine. This new $5 million prevention payment for an anticorruption fund for the State Department risks skewing the discussions between the target company and the prosecutor. Moreover, the additional prevention payment could discourage companies from making voluntary disclosures about such conduct, which the United States Government encourages companies to do in order to promote cooperation in detecting and preventing this conduct going forward. Finally, we believe that existing fines and penalties are sufficient and we do not regard this additional fine as necessary from a law enforcement perspective. We respectfully suggest that any Anti-Corruption Action Fund be funded by an appropriation.

We also have concerns about the very limited involvement of the Department of Justice in the administration of the fund. Indeed, other than assessing the payment, the drafters seem to have contemplated no role even for the Department's specialists in public corruption investigations and litigation.

Section 8: Designation of Embassy Anticorruption Points of Contact

Section 8 of the bill would require the chief of mission at each United States embassy to designate an anticorruption point of contact to "coordinate an interagency approach within United States embassies to combat public corruption in the foreign states in which such embassies are located." We believe that, where personnel are available, Department of Justice legal advisors, FBI legal attachés, and certain other Department personnel are the appropriate individuals to lead any task forces on foreign public corruption. These individuals are more experienced than diplomatic staff in identifying, investigating, and prosecuting the public corruption, financial crimes, and criminal organizations that the bill targets. We note that section 8 would require the inclusion of USAID in these task forces, notwithstanding the legal restrictions on USAID activities.

Likewise, section 8(c) would direct the Secretary of State to develop training for embassy points of contact. We recommend inserting ", in consultation with the Department of Justice," after the word "Secretary of State" in section 8(c).

Section 9: Reporting Requirements

Section 9(a) of the bill would require "the Secretary of State, in consultation with the Administrator of the USAID and the Secretary of the Treasury" to submit a report to the Congress on "promoting international standards in combating corruption, kleptocracy, and illicit finance." We recommend amending this provision to provide for consultation with the Attorney General. The Department of Justice has responsibilities related to the Organization for Economic Co-operation and Development's anti-corruption efforts, and the U.N. Convention Against Corruption. (For example, the primary responsibility for the criminalization and enforcement aspects of the convention lies with the Department of Justice.) Specifically, we recommend inserting ", the Attorney General," after "USAID" and before "and".

Finally, the reporting requirements in section 9 are quite broad, e.g., "any progress made by foreign partners" on implementing international standards on corruption, etc. as well as details of United States Government efforts to promote those standards. We recommend that the drafters consider narrowing these requests for information to facilitate a more tailored report and that the drafters include a provision exempting the reporting of ongoing criminal, civil, or administrative investigations because such reporting might adversely affect an investigation. We also recommend inserting "and the Attorney General" after "USAID," in section 9(b).

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Michael McCaul
Ranking Member
Committee on Foreign Affairs

The Honorable Patrick McHenry
Ranking Member
Committee on Financial Services