

International Trade Alert

September 25, 2017

Key Points

- New “secondary” sanctions broadly target non-U.S. individuals and entities that do business or otherwise engage in trade with North Korea.
- Aircraft that have landed in North Korea and vessels that have called at a North Korean port within the last six months are, with limited exceptions for emergencies, barred from entering the United States.
- Foreign financial institutions that conduct or facilitate significant transactions for or with blocked persons, or involving trade with North Korea, could lose correspondent banking privileges or be subject to asset-blocking measures.
- Based on the foregoing restrictions, U.S. and non-U.S. companies should assess the financial and trade activity of their business partners vis-à-vis North Korea, to evaluate potential sanctions risks associated with those relationships.



Trump Administration Significantly Expands Sanctions Against North Korea

On September 21, 2017, the White House announced additional sanctions against North Korea, following a new round of sanctions imposed by the United Nations on September 11 and an escalation of U.S. sanctions previously enacted into law in August. The new sanctions, imposed through Executive Order (EO) 13810, come amidst rising political tensions between the United States and North Korea, over Pyongyang's development of its nuclear program and continued testing of ballistic missiles in the region. According to the White House, the sanctions aim to cut off all means used by North Korea to earn, access, and transfer funds for its weapons of mass destruction programs. Notably, while the new sanctions target North Korea, they have an extraterritorial focus that will impact individuals and entities in countries that continue to do business with Pyongyang, including trading partners in China, Russia, and India.

Overview of the New Sanctions

The scope and substance of the new sanctions go well beyond prior U.S. actions to penalize North Korea and pressure the regime's trading partners to discontinue their commercial ties to the country. Specifically, the EO establishes new categories of sanctions in the four key areas discussed below. The EO does not

include a list of entities or individuals subject to sanctions under the new law, but rather provides a basis for the Executive to designate parties that it determines have engaged in sanctionable conduct.

Broad Designation Criteria. The EO establishes extensive new designation criteria, authorizing the Secretary of the Treasury, in consultation with the Secretary of State, to impose sanctions broadly on persons for their activities in or with North Korea, with no nexus to the United States, or on the basis of being a “North Korean person.” Specifically, the following activities constitute a basis for designation:

- Operating in the construction, energy, financial services, fishing, information technology, manufacturing, medical, mining, textiles, or transportation industries in North Korea
- Owning, controlling, or operating any port in North Korea, including any seaport, airport, or land port of entry
- Having engaged in at least one significant importation from or exportation to North Korea of any goods, services, or technology (without defining what constitutes a “significant” import or export) or
- Being a North Korean person¹, including a North Korean person that has engaged in commercial activity that generates revenue for the government of North Korea or the Workers’ Party of Korea.

Furthermore, the EO authorizes sanctions against persons that have materially assisted or supported entities or individuals designated under EO 13810, as well as those owned or controlled by, or acting on behalf of any such designated person.

Aircraft / Vessel Restrictions. In addition, in an effort to pressure companies to choose between doing business with the United States or North Korea, the EO prohibits vessels and aircraft that have called or landed at a port or place in North Korea in the previous 180 days from entering the United States. It also prohibits entry of vessels that have participated in a ship-to-ship transfer with such a vessel in the previous 180 days. Concurrently with the EO, the Office of Foreign Assets Control (OFAC) issued General License (GL) 10, which exempts ships and aircraft from the 180-day ban to the extent that they called at a port or land in North Korea due to an emergency. The new GL also allows otherwise banned vessels that are in distress to seek refuge in the United States.

Blocking of Funds Transiting North Korea-Linked Accounts. The EO authorizes the Secretary of the Treasury to block all funds subject to U.S. jurisdiction that originate from, are destined for, or pass through a foreign bank account owned or controlled by a North Korean person, or used to transfer funds in which a North Korean person has an interest. OFAC has updated GL 3—which authorizes U.S. financial institutions to charge blocked accounts for normal service charges owed—to account for the new EO. In a published Frequently Asked Questions (FAQ), OFAC has made clear that it will provide additional guidance to clarify its expectations for implementation of this provision and that, absent notice from Treasury, U.S. persons do not have any corresponding compliance obligations at this time.

Sanctions Related to Foreign Financial Institutions. Finally, pursuant to the EO, the Secretary of the Treasury has the authority to impose sanctions on any foreign financial institution that, on or after

September 21, 2017, knowingly conducts or facilitates: (i) any significant transaction on behalf of certain blocked persons, or (ii) any significant transaction in connection with trade with North Korea. Sanctions may include prohibitions or restrictions on correspondent or payable-through accounts in the United States or blocks on U.S. property.

Importantly, the EO does not define the term “significant transaction,” and OFAC is unlikely to define what constitutes a “significant transaction.” In the context of other sanctions programs, OFAC has instead opted to provide a non-exhaustive, non-binding list of factors that it may consider when determining whether a transaction is a significant transaction. OFAC has stated it may consider factors such as the size, frequency, and nature of the transaction(s) at issue; whether management is aware of a pattern of transactions; and whether the transaction(s) involve any deceptive practices, among others.

Implications for Companies and Financial Institutions

While many U.S. companies and financial institutions were already prohibited from dealing with North Korean persons and businesses, these sanctions require U.S. and non-U.S. entities alike to more carefully scrutinize the companies with which they do business for potential links to North Korea. To avoid potential sanctions liability and future business interruptions, U.S. companies should evaluate the activities of their non-U.S. business partners to determine whether they engage in activities that may subject them to potential designation under this EO.

While the Trump administration claims that the sanctions are directed at all countries, North Korea typically does business with a limited number of countries, including China, Russia, and India. Firms from such countries should be especially cognizant of the new sanctions and should consider conducting internal evaluations to determine if they or their subsidiaries engage in trade or finance with North Korea. If a company determines it may be subject to sanctions, it should carefully evaluate whether it wants to continue doing business with North Korea or risk designation by the United States.

Contact Information

If you have any questions concerning this alert, please contact:

Mahmoud Baki Fadlallah
Partner
mfadlallah@akingump.com
+971 4.317.3030
Dubai

Tatman R. Savio
Partner
tatman.savio@akingump.com
+852 3694.3015
Hong Kong

Jonathan C. Poling
Partner
jpoling@akingump.com
+1 202.887.4029
Washington, D.C.

Wynn H. Segall
Partner
wsegall@akingump.com
+1 202.887.4573
Washington, D.C.

Rebekah M. Jones
Counsel
rjones@akingump.com
+1 202.887.4489
Washington, D.C.

Chris Chamberlain
Law Clerk (not admitted to practice)
cchamberlain@akingump.com
+1 202.887.4308
Washington, D.C.

Thor Petersen
Law Clerk (not admitted to practice)
tpetersen@akingump.com
+1 202.887.4307
Washington, D.C.

¹ The EO defines the term “North Korean person” as “any North Korean citizen, North Korean permanent resident, or entity organized under the laws of North Korea or any jurisdiction under the laws of North Korea or any jurisdiction within North Korea.” It does not include any U.S. citizens, any permanent resident alien of the United States, any alien lawfully admitted to the United States, or any alien holding a valid United States visa.