
Trump Administration Imposes Broad New Sanctions Against North Korea

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Over the past several years, as North Korea has increased the capability of its nuclear and ballistic missile program, there has been a steady increase in sanctions pressure against North Korea by the United States and the broader international community. In response to the latest provocations from North Korea, late last week President Trump declared that it was time to “maximize pressure” on North Korea and signed a new Executive Order (13810, “Imposing Additional Sanctions with Respect to North Korea”) that significantly expands the Secretary of the Treasury’s authority to impose powerful sanctions against North Korean and non-North Korean entities—including financial institutions—that do business with North Korea.

The new North Korea Executive Order is unusually far-reaching, going well beyond existing United Nations Security Council Resolutions, and provides the Treasury Secretary abundant new authority to impose both conduct-based and status-based sanctions against persons and entities in North Korea and elsewhere around the world. It draws heavily on the Russia and Iran sanctions programs, authorizing the Secretary to impose sanctions on actors in identified sectors of the North Korean economy—akin to the sectoral sanctions imposed on Russia¹—and secondary sanctions against foreign banks that transact with designated North Korean entities²—echoing the secondary sanctions imposed against designated Iranian entities. As the administration continues to expand the reach, strength and complexity of sanctions against North Korea, and does so in ways that diverge from the international community’s sanctions programs adopted by the UN Security Council, the compliance obligations and complications for U.S. and foreign businesses will continue to multiply.

Blocking Sanctions

The first section of the Executive Order establishes a traditional, albeit very broad, grant of authority to the Secretary to impose blocking sanctions against any “person”³ that:

- (a) “operate[s]” in almost any of North Korea’s industrial sectors—namely, “construction, energy, financial services, fishing, information technology, manufacturing, medical, mining, textiles, or

transportation industries in North Korea;”

(b) “own[s], control[s] or operate[s] any port in North Korea;” or

(c) “engage[s]” in at least one “significant” importation from, or exportation to, North Korea.

Notably, the authority to designate under these criteria is not limited to North Korean persons. Any person, wherever located, who “operates” in these sectors or “engages” in any “significant” trade with North Korea, is at risk of designation.⁴

Moreover, although the Executive Order only authorizes blocking sanctions, global firms should closely monitor the implementation of the Executive Order by OFAC. U.S. sectoral sanctions against Russia, which impose prohibitions on U.S. persons with respect to certain debt and equity transactions by designated firms in identified Russian industrial sectors, are based on comparable blocking authority under Executive Order 13662. As such, OFAC may simply identify new North Korean targets in the identified industrial sectors as Specially Designated Nationals and Blocked Persons (SDNs), or it may develop a more nuanced sanctions regime comparable to the Russian sectoral sanctions.

The new blocking authority also includes an unusually expansive authority for the Secretary to designate any “North Korean person,” regardless of that person’s position in the North Korean government or whether that person has engaged in any illicit conduct⁵—a broad, status-based sanctions authority that finds precedent only in the Cuba sanctions. The Executive Order goes on to offer, as an example, that the designation criteria “include[s] a North Korean person that . . . generates revenue” for the North Korean government or the ruling party, but by its plain terms the simple status of being “a North Korean person” is sufficient for blocking sanctions to be imposed.

Finally, as is typical, the Secretary is authorized to impose derivative sanctions on any person who provides material, financial, or technological support to, or is owned or controlled by, any person whose property is blocked under the Executive Order.

Transportation Sanctions

Section 2 of the Executive Order expands existing authority to impede trade and interaction with North Korea by targeting aircraft that land in North Korea and ships that pull into North Korean ports. It prohibits any aircraft in which a foreign person has an interest that has landed in North Korea from landing in the United States “within 180 days of its departure from North Korea.” Likewise, no vessel in which a foreign person has an interest that has called at a North Korean port “within the previous 180 days” or that has engaged in a ship-to-ship transfer with such a vessel “within the previous 180 days”⁶ may call at a U.S. port.⁷

As a practical matter, it is unlikely that this provision, standing alone, will have much impact because it applies only to aircraft and vessels that both visit North Korea and the United States; few, if any, vessels or aircraft that enter North Korea come to the United States on a routine basis.

Nonetheless, this provision, read in conjunction with the authority to impose blocking sanctions on any person that engages in “significant” trade with North Korea (described above) and the new

secondary sanctions authority (described below), creates risk for any global business that might be involved with an entity trading with North Korea.

Financial Sanctions – Funds Freeze and Secondary Sanctions

The Executive Order introduces two new authorities designed to increase the financial pressure on North Korea.

Section 3 of the Executive Order seeks to identify and freeze North Korean funds, especially in dollar-denominated accounts. It blocks all funds in the United States or that are within the possession or control of a U.S. person and that “originate from, are destined for, or pass through a foreign bank account” that the Secretary determines “any North Korean person” owns, controls, or uses.⁸ Notably again, this provision targets “any” North Korean person, not only those who rule North Korea or are otherwise involved in its illicit activities.

Moreover, this provision prohibits U.S. persons, “wherever located,” from approving, financing, facilitating, or guaranteeing a transaction by a foreign person where the transaction would be prohibited if performed by a U.S. person or within the United States. While this prohibition mirrors OFAC’s existing facilitation prohibition, its specific application here means that neither a U.S. bank nor a U.S. natural person, in the United States or abroad, can play any affirmative role in transactions related to accounts the Secretary determines are linked to North Koreans. This puts a special compliance burden on U.S. persons (not only citizens but also Green Card holders) working for foreign financial institutions, and for the institutions themselves.

The good news for financial institutions is that OFAC issued an FAQ along with the new Executive Order that makes clear that this provision is not self-executing. Until the Secretary identifies specific North Korean-linked accounts and OFAC issues “appropriate notice and additional guidance, as necessary,” this provision “does not create any immediate compliance obligations” for U.S. financial institutions.

Section 4 of the Executive Order provides new authority for the imposition of secondary sanctions against North Korea—or, more precisely, against foreign financial institutions and other businesses that facilitate transactions with North Korea. It empowers the Treasury Secretary, in consultation with the Secretary of State, to impose one or more sanctions on any foreign financial institution that “knowingly conduct[s] or facilitate[s] any significant transaction” (i) on behalf of “blocked”⁹ North Korean parties, or (ii) “in connection with trade with North Korea.” The Secretary may impose sanctions ranging from prohibiting or strictly limiting a foreign financial institution’s U.S. correspondent or payable-through accounts to the outright blocking of a foreign financial institution’s property or property interest. In either case, sanctions under this provision would severely impair, if not preclude, a foreign financial institution’s access to the U.S. dollar, thereby effectively extinguishing its ability to transact internationally.

This model of imposing restrictions on access to U.S. financial services by third-country financial institutions that engage in conduct inconsistent with U.S. national security and foreign policy interests is comparable to previous U.S. secondary sanctions imposed against Iran.¹⁰ Indeed, using talking points that are identical to those used in the Iran secondary sanctions effort, the White

House explained that “[f]oreign financial institutions must choose between doing business with the United States or facilitating trade with North Korea or its designated supporters,”¹¹ with the expectation that financial institutions in particular will decide that access to the United States is far preferable, if not essential to their continued ability to operate.

Echoing the secondary sanctions imposed to restrict Iran’s ability to benefit from its sale of oil, this provision targets not only transactions with blocked persons but also any “significant transaction in connection with trade with North Korea,” irrespective of whether the North Korean trading partner is blocked. As noted above, a third-country bank would be exposed to U.S. sanctions if it “knowingly” engages in transactions tied to “significant” trade with North Korea. In this context, the term “knowingly” includes not only actual knowledge, but also reason to know, of a violative transaction. Accordingly, these new secondary sanctions are likely to further hamper North Korea’s ability to engage in any trade as it increases the due diligence requirements on third-country financial institutions to avoid facilitating any significant trade with North Korea.

Finally, in light of the concentration of trade relations between China and North Korea, Chinese banks that facilitate that trade are most at risk of secondary sanctions under this provision. In an apparent effort to protect Chinese banks from getting caught in this new secondary sanction provision, China’s central bank reportedly responded to the Executive Order by instructing the country’s banks to avoid conducting business with new North Korean customers and to wind down loans with existing customers.

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Escalating U.S. and international sanctions imposed against North Korea create significant compliance challenges and enforcement risks with respect to transactions that have any possible connection to North Korea. Firms should use this opportunity to assess their potential exposure to new requirements set forth under the Executive Order and to monitor OFAC’s implementation of such sanctions over the coming months.

¹ E.g., Executive Orders 13661 and 13662 and Countering America’s Adversaries Through Sanctions Act of 2017 sec. 223, H.R. 3364.

² Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 22 U.S.C. 8501-8551; See also National Defense Authorization Act for Fiscal Year 2012 sec. 1244; Iran Threat Reduction and Syria Human Rights Act of 2012 sec. 216; National Defense Authorization Act of 2013 secs. 1244-45; Executive Order 13622; Executive Order 13608.

³ The “term ‘person’ means an individual or entity.” See Executive Order sec. 8(a).

⁴ None of the key operative terms, e.g., “operates,” “engages” or “significant,” are defined in the Executive Order. It is expected that U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) will adopt a definition of the term “significant” similar to that in the implementing Iran sanctions, see 31 CFR 561.404, but OFAC has not indicated whether it intends to define the other

key terms.

⁵ See Executive Order sec. 8(d), defining “North Korean person” in relevant part to mean “any North Korean citizen, North Korean permanent resident alien, or entity organized under the laws of North Korea or any jurisdiction within North Korea (including foreign branches).”

⁶ The Executive Order is not clear whether “within the previous 180 days” means “within the previous 180 days” from its effective date, September 21, 2017, or “within the previous 180 days” of a theoretical U.S. port visit. The intent is likely the latter, consistent with the provision related to aircraft, though the differing language is worth monitoring for U.S. firms in the transportation, insurance, and related industries.

⁷ Pursuant to a new General License No. 10, OFAC is allowing vessels in distress to call at a port, and for aircraft to make emergency landings, regardless of their past sojourn to North Korea.

⁸ The precise language in the Executive Order, in relevant part, is “(a) All funds that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person and that originate from, are destined for, or pass through a foreign bank account that has been determined by the Secretary of the Treasury to be owned or controlled by a North Korean person, or to have been used to transfer funds in which any North Korean person has an interest, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.”

⁹ “Blocked” in this context means any person whose property or interests in property have previously been blocked under any of the North Korea-specific executive orders, i.e., Executive Orders 13551, 13687, 13722 or this Order, or under Executive Order 13382, the counter-proliferation order, “in connection with North Korea-related activities.”

¹⁰ Under the Iran nuclear deal, most of these U.S. secondary sanctions against Iran are not currently applicable.

¹¹ The White House Press Office, “Fact Sheet: President Donald J. Trump Increases Pressure to Cut off Funding for North Korea” (Sept. 21, 2017).

Authors



Ronald I. Meltzer

SENIOR COUNSEL

✉ ronald.meltzer@wilmerhale.com

☎ +1 202 663 6389