US Dramatically Increases Sanctions on North Korea

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On September 21, 2017, President Donald Trump issued Executive Order (E.O.) 13810, which broadly expanded U.S. sanctions against North Korea. E.O. 13810 targets, among others, individuals and entities that are part of certain key sectors of North Korea's economy, persons that trade with North Korea, aircraft and vessels that have traveled to North Korea and funds of North Korean persons. Significantly, E.O. 13810 authorizes the secretary of the treasury to impose so-called secondary sanctions on foreign financial institutions that engage in a range of transactions involving North Korea. These new measures could have a significant impact on individuals or entities in China and elsewhere that trade with North Korea and financial institutions that process related transactions.

E.O. 13810 builds on a string of successive efforts since 2016 by the United States to increase financial pressure on North Korea, including the blocking (*i.e.*, freezing) of all property belonging to the government of North Korea or the Workers' Party of Korea, and broad prohibitions on the export, re-export or transfer of any goods, services or technology from the United States or by a U.S. person to North Korea. Additionally, in June 2016, the Financial Crimes Enforcement Network (FinCEN) identified North Korea as a jurisdiction of "primary money laundering concern" under Section 311 of the Patriot Act. It imposed "special measures" that bar North Korean financial institutions from opening or maintaining correspondent accounts with U.S. financial institutions and require U.S. financial institutions to guard against indirect access by North Korean institutions through additional due diligence. In June 2017, FinCEN also found China's Bank of Dandong to be a bank of "primary money laundering concern," citing that bank's facilitation of transactions for companies involved in Pyongyang's weapons of mass destruction (WMD) and ballistic missile programs.

In addition, the United States appears to be galvanizing an international campaign to ratchet up global financial and commercial pressure on North Korea in a way that is reminiscent of the U.S.-led sanctions campaign against Iran due to that country's nuclear program. On August 5, 2017, and September 11, 2017, the United Nations Security Council (UNSC) adopted new resolutions broadening the UN's financial and economic sanctions on North Korea. The European Union also recently adopted new Council Regulation 2017/1509 transposing and reinforcing the UNSC sanctions regime. Additionally, China appears to be taking strong steps as the People's Bank of China, the country's central bank, reportedly directed Chinese banks to strictly implement UNSC sanctions.[1] These developments appear to be at least partly the result of U.S. efforts "to mobilize the international community and to deny funds to Kim Jong-Un's weapons programs" in a "campaign designed to impose maximum pressure on North Korea's finances and economy."[2]

On September 26, 2017, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) took its first actions under E.O. 13810 when it designated eight North Korean banks and 27 representatives of North Korea banks for operating in the financial services industry in the North Korean economy.

[1] *See, e.g.*, Reuters, "China's Central Bank Tells Banks to Stop Doing Business With North Korea: Sources" (Sept. 21, 2017).

[2] Testimony of Assistant Secretary Marshall S. Billingslea Before House Foreign Affairs Committee on Threat Posed by North Korea (Sept. 12, 2017).

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Secondary Sanctions Applicable to Foreign Financial Institutions

For the second time in only two months, the U.S. government has looked to the Iran sanctions playbook and added secondary sanctions as a tool in different sanctions programs, first with respect to Russia under the Countering America's Adversaries Through Sanctions Act and now with North Korea. Secondary sanctions are a set of measures that principally target foreign individuals and entities — often foreign financial institutions — for engaging in enumerated activities that may have no U.S. jurisdictional nexus. Unlike a violation of primary sanctions (*i.e.*, restrictions on activities with a U.S. nexus), secondary sanctions do not result in civil or criminal penalties. Rather, a party that engages in conduct that is subject to secondary sanctions can be sanctioned by the U.S. government, often resulting in the loss of access to the U.S. market.

E.O 13810 contains a provision specifically tailored to pressure foreign financial institutions to terminate any North Korean business. As Treasury Secretary Steven Mnuchin remarked, "[f]oreign financial institutions are now on notice that, going forward, they can choose to do business with the United States or with North Korea, but not both."[3] Under the order, the secretary of the treasury, in consultation with the secretary of state, is authorized to sanction a foreign financial institution that (i) knowingly conducts or facilitates any significant transaction on behalf of any person whose property has been blocked under executive orders imposing sanctions on North Korea (including E.O. 13810) or E.O. 13382 (which blocks the property of persons engaged in WMD proliferation) in connection with North-Korea related activities, or (ii) knowingly facilitates any significant transaction in connection with trade in North Korea.

A foreign financial institution that is determined to facilitate these categories of transactions would be subject to one of two types of sanction. The secretary of the treasury may prohibit the opening — or impose strict conditions on the maintenance — of correspondent or payable-through accounts in the United States for the financial institution, effectively denying it access to the U.S. financial system. Or, the treasury secretary may impose a blocking on the financial institution, resulting not only in the financial institution's loss of U.S. market access but wide-ranging prohibitions on U.S. persons with respect to any dealings with the financial institution and the freezing of any assets the institution has subject to U.S. jurisdiction.

[3] Remarks by Secretary Mnuchin on President Trump's Executive Order on North Korea (Sept. 21, 2017).

Targeting Sectors of North Korea's Economy and Trade With North Korea

The order authorizes the blocking of any individual or entity the secretary of the treasury, in consultation with the secretary of state, determines to operate in the construction, energy, financial services, fishing, information technology, manufacturing, medical, mining, textiles or transportation industries in North Korea. E.O. 13810 also authorizes the treasury secretary, in consultation with the secretary of state, to designate individuals and entities engaging in any trade transactions with North Korea, going so far as to include one-off transactions, specifically "at least one significant importation from or exportation to North Korea of any goods, services, or technology." As is common in sanctions-related executive orders, E.O. 13810 authorizes the blocking of any person determined to have "materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked" under the order.

Restrictions on Transport and Travel Between the US and North Korea

The executive order authorizes the designation of any person that owns, controls or operates a port in North Korea, and additionally imposes new restrictions on aircraft and vessels that enter North Korea. No aircraft in which a foreign person has an interest that has landed in North Korea may land in the United States within 180 days after departure from North Korea. Similarly, no vessel in which a foreign person has an interest that has docked in North Korea within the previous 180 days, and no vessel in which a foreign person has an interest that has engaged in a ship-to-ship transfer with such a vessel within the previous 180 days, may port in the United States. General License 10, issued by OFAC concurrently with E.O. 13810, authorizes aircraft and vessels subject to these restrictions to enter the United States in emergency situations.

Separate from the order, on September 24, 2017, President Trump announced the suspension of entry into the United States of nationals of North Korea as immigrants or nonimmigrants, effective October 18, 2017.[4] The State Department had already imposed a geographical travel restriction for U.S. citizens' travel to North Korea effective September 1, 2017.[5]

[4] The White House, Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017).

[5] U.S. Department of State, North Korea Travel Warning.

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Expanded Sanctions Against North Korean Persons

E.O. 13810 requires the blocking by U.S. persons of all property or interests in property of any individual or entity the secretary of the treasury, in consultation with the secretary of state, determines to be a North Korean person. The executive order therefore explicitly makes blockable any North Korean person, even if they have no connection to the North Korean government or military, and even if they do not otherwise engage in any sanctionable activity. Unlike the Cuba sanctions where all Cuban persons were automatically blocked, E.O. 13810 requires an affirmative determination to designate a North Korean person.

In addition, all funds in the United States or in the possession or control of U.S. persons must be blocked if they "originate from, are destined for, or pass through a foreign bank account" that the secretary of the treasury determines is "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." As with the other blocking prongs in the executive order, this provision is not self-executing. An affirmative determination — in this case apparently with respect to a particular bank account — is required for the funds to become blockable.

Conclusion

Although U.S. sanctions on North Korea have been steadily increasing over the past several years, the secondary sanctions and wholesale sanctionability of trade with North Korea in E.O. 13810 mark a significant shift in the nature of the restrictions in place. The power and effect of the E.O. 13810 sanctions will, however, depend in large part on how aggressively the U.S. government implements the measures and the extent to which countries that trade with North Korea impose and enforce their own restrictions. The tenor of executive branch rhetoric on North Korea and the recent willingness of the U.S. government to sanction individuals and entities in China and elsewhere in the region may signal that we are entering a new era of North Korea sanctions targeting.

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