



U.S. Tightens Sanctions on North Korea

In the wake of a recent nuclear test and rocket launch by North Korea, on February 18, 2016, President Obama signed into law the North Korea Sanctions and Policy Enhancement Act of 2016 (the “Act”), which enhances existing U.S. sanctions against North Korea and imposes secondary sanctions on non-U.S. persons that engage in certain types of activities relating to North Korea. The impact of the Act on U.S. companies, which already were prohibited from engaging in most business involving North Korea, will pale in comparison to the impact on non-U.S. companies that do business involving North Korea. This is particularly the case for companies in China, which is North Korea’s most important trading partner, although China has reportedly agreed to a draft United Nations resolution imposing new sanctions against North Korea. While the Act is complex, provided below are discussions of certain of its key aspects.

Mandatory Sanctions

The Act makes application of certain specified sanctions mandatory, rather than discretionary. Under the Act, the President is required to designate any person, including both U.S. and non-U.S. persons, who knowingly:

- Imports, exports, or reexports to, into, or, in some cases, from North Korea: (i) luxury goods; (ii) arms or related material; or (iii) any goods, services, or technology controlled for export by the United States because of the use of such goods, services, or technology for weapons of mass destruction or delivery systems of such weapons and materially contributes to the use, development, production, possession, or acquisition by any person of a nuclear, radiological, chemical, or biological weapon or any device or system designed in whole or in part to deliver such a weapon;
- Provides training, advice, or other services or assistance, or engages in significant financial transactions, relating to the manufacture, maintenance, or use of any weapon of mass destruction, including any device or system for such weapons, to be imported, exported, or reexported to, into, or from North Korea;
- Engages in, is responsible for, or facilitates: (i) censorship by the Government of North Korea; or (ii) serious human rights abuses by the Government of North Korea;
- Engages in: (i) money laundering, the counterfeiting of goods or currency, bulk cash smuggling,

or narcotics trafficking that supports the Government of North Korea or any senior official acting for or on behalf of the Government of North Korea; or (ii) significant activities that undermine cybersecurity through the use of computer networks or systems against foreign persons, governments, or other entities on behalf of the Government of North Korea; or

- Sells, supplies, or transfers to or from the Government of North Korea or any person acting for or on behalf of the Government of North Korea, a significant amount of precious metal, graphite, raw or semi-finished metals or aluminum, steel, coal, or software, for use by or in industrial processes directly related to weapons of mass destruction and delivery systems for such weapons, other proliferation activities, the Korean Workers' Party, armed forces, internal security, or intelligence activities, or the operation and maintenance of political prison camps or forced labor camps, including outside of North Korea.

Sanctions also must be imposed on parties that knowingly attempt to engage in any of the above-described conduct.

Discretionary Sanctions

In addition to mandatory sanctions, the President has discretionary authority under the Act to designate any person, including both U.S. and non-U.S. persons, who knowingly:

- Engages in, contributes to, assists, sponsors, or provides financial, material, or technological support for, or goods and services in support of, any person designated pursuant to an applicable United Nations Security Council resolution;
- Contributes to: (i) the bribery of an official of the Government of North Korea or any person acting for or on behalf of that official; (ii) the misappropriation, theft, or embezzlement of public funds by, or for the benefit of, an official of the Government of North Korea or any person acting for or on behalf of that official; or (iii) the use of any proceeds of any activity described in (i) or (ii); or
- Materially assists, sponsors, or provides significant financial, material, or technological support for, or goods or services to or in support of, the activities described in the two bullet points above.

Effect of Designation

Both U.S. and non-U.S. persons determined to have engaged in any of the above-described conduct are subject to sanctions, including asset blocking, forfeiture of property, denial of government contracts, and visa denials to designated persons and corporate officers of, or principal shareholders with a controlling interest in, designated persons. The Act also purports to apply civil and criminal penalties to both U.S. and non-U.S. persons who violate the Act, but currently the jurisdictional basis for the extraterritorial application of these penalties is unclear. U.S. and non-U.S. persons subject to discretionary sanctions also may be penalized further through sanctions that limit or prohibit such persons' access to the U.S. financial system.

Blocking of North Korean Government

In addition to imposing sanctions on parties for engaging in certain conduct, the property or interests in property of the Government of North Korea, the Workers' Party of Korea, or a person acting on their behalf must be blocked, if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a U.S. person.

Application to Subsidiaries and Agents

The designation of a party under the mandatory or discretionary sanctions and the above-described blocking of property and interests in property apply with respect to parties that are determined to be owned or controlled by, or have acted or purported to have acted for or on behalf of, any party whose property and interests in property are blocked pursuant to the Act.

Government Procurement

The Act requires that prospective government contractors certify that they do not engage in any activity leading to mandatory sanctions. Also under the Act, if a prospective contractor submits a false certification, any government contracts with such person shall be terminated and the person shall be debarred or suspended from federal contracts for up to two years.

Money Laundering

The Act urges the President to designate North Korea as a jurisdiction of primary money laundering concern and requires the U.S. Department of the Treasury to determine within 180 days whether reasonable grounds exist for such a designation. If North Korea is so designated, U.S. financial institutions would be required to implement additional due diligence measures to prevent improper access to U.S. correspondent accounts by North Korean financial institutions.

Enhanced Inspections

The Act requires that the President submit a report within 180 days that identifies foreign ports or airports at which inspections of ships, aircraft, and conveyances originating in North Korea, carrying North Korean property, or operated by North Korea are not sufficient to prevent facilitation of activities leading to mandatory sanctions. The Secretary of Homeland Security may require enhanced inspections of any goods entering the United States that have been transported through a port or airport identified in the President's report. A vessel, aircraft, or conveyance used to facilitate any activity leading to mandatory sanctions under the jurisdiction of the United States may be seized or forfeited.

Suspension and Termination of the Act

The Act sets forth various ways in which the sanctions may be suspended or terminated.

The conditions for suspension include the Government of North Korea making progress toward: (i) ceasing to counterfeit U.S. currency; (ii) financial transparency; (iii) verifying compliance with United Nations Security Council resolutions; (iv) accounting for and repatriating the citizens of other countries who have been abducted, unlawfully held captive, or detained;

(v) accepting and beginning to abide by internationally recognized standards for distributing humanitarian aid; and (vi) improving living conditions in political prison camps.

For the sanctions to be terminated, North Korea must satisfy additional conditions, including making significant progress toward: (i) completely, verifiably, and irreversibly dismantling all of its nuclear, chemical, biological, and radiological weapons programs, including all programs for the development of systems designed in whole or in part for the delivery of such weapons; (ii) releasing all political prisoners; (iii) ceasing censorship of peaceful political activity; (iv) establishing an open, transparent, and representative society; and (v) fully accounting for and repatriating U.S. citizens who have been abducted, unlawfully held captive, or detained.

These suspension and termination provisions could be considered an attempt by Congress to limit the President's ability to enter into agreements like the Joint Comprehensive Plan of Action, which provided sanctions relief to Iran following Iran's implementation of certain measures to limit its ability to develop nuclear weapons.

As noted above, U.S. companies likely will not be significantly affected by the Act due to significant restrictions on U.S. companies' business with North Korea that predate the Act. Nonetheless, such companies should ensure that none of their trading partners is designated under the Act. Also, non-U.S. companies that engage in any of the above-described conduct must now decide whether to continue to engage in such conduct and risk being cut off from the U.S. market. We will continue to monitor developments associated with the Act, including any actions undertaken by the President and/or the U.S. Department of the Treasury, Office of Foreign Assets Control to implement and clarify the Act's provisions.

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