March 20, 2018

On March 5, 2018, the US Treasury Department’s Office of Foreign Assets Control (OFAC) amended and reissued the North Korean Sanctions Regulations, 31 CFR Part 510 (NKSR), in order to align the North Korea sanctions program with other sanctions programs by codifying the existing set of executive actions and legislative authorities establishing the US sanctions program against North Korea. These include Executive Orders (EOs) 13687, 13722 and 13810; the North Korea Sanctions and Policy Enhancement Act of 2016; and the Countering America’s Adversaries Through Sanctions Act (CAATSA). The amended NKSR also incorporate several existing general licenses and add new general licenses. In addition, OFAC published a new set of frequently asked questions on topics such as the applicable restrictions on trade and travel involving North Korea. The amended NKSR do not, however, expand the scope or substance of existing US sanctions against the DPRK.

Changes to the North Korea sanctions program

While North Korea has long been the subject of significant trade and economic restrictions, in contrast to other comprehensive sanctions programs like those involving Iran or Cuba, prior to the recent re-issuance, OFAC’s North Korea sanctions program was largely an amalgamation of executive orders incorporated by reference into a limited regulatory framework, general licenses and additional guidance. The reissued NKSR now more closely resemble in several respects the Iran and Cuba sanctions, at least from a structural and legal perspective.

When initially published in 2011, the NKSR, 31 CFR Part 510, incorporated by reference the executive orders then in effect imposing restrictions on North Korea:

- EO 13466 (June 26, 2008): blocking property and property interests of the Government of North Korea or certain North Korean nationals meeting specified criteria and transactions by a US Person
- EO 13551 (August 30, 2010): expanding the scope of EO 13466 to extend blocking authority to persons engaged transactions relating to arms, luxury goods or money laundering with respect to North Korea
- EO 13570 (April 18, 2011): imposing restrictions on the import of goods, services or technology from North Korea to the US

The NKSR, as issued in 2011, also contained a few definitions, interpretations and general licenses, but it was fairly skeletal in comparison to other comprehensive sanctions programs.

After the initial issuance of the NKSR, President Obama signed EOs 13687 and 13722. These EOs, involved additional blocking actions and prohibited exportation or re-exportation of goods to North Korea from the United States or by a US Person or new investment in North Korea. EO 13722 also included a general prohibition on facilitation by US Persons.
Most recently, President Trump signed EO 13810, aimed at disrupting North Korean shipping and trading companies and vessels to further isolate the North Korean regime. EO 13810, effective September 20, 2017, imposed a range of sanctions measures, including establishing several new designation criteria; prohibiting certain vessels and aircraft that enter North Korea or engage in a ship-to-ship transfer with such a vessel from entering the US; authorizing blocking of funds transiting, destined for or originating from North Korea–linked bank accounts; and authorizing sanctions against foreign financial institutions (FFIs) that knowingly conduct or facilitate “significant transactions” on behalf of blocked North Korean persons or in connection with trade with North Korea (discussed in more detail below).

You may read our alert on EO 13810 here.

The reissued NKSR do not contain new prohibitions. However, they do provide additional interpretation and guidance on the existing prohibitions, including the restrictions on FFIs and facilitation, and they provide additional general licenses, in alignment with other sanctions programs.

Implications for foreign financial institutions and the CAPTA List

The newly added § 510.210(b), which implements Section 4 of EO 13810, prescribes sanctions measures against an FFI determined to have engaged in sanctionable activity. Under § 510.210, sanctionable activity is defined as having knowingly engaged in or facilitated “significant transactions” with persons designated pursuant to North Korea–related executive orders, or in connection with trade with North Korea. FFIs deemed by OFAC to have engaged in sanctionable conduct are subject to asset-blocking, or they may be subjected to strict conditions on the opening or maintaining of correspondent accounts or payable-through accounts in the US.

While EO 13810 introduced this sanctions authority, it did not define "significant transactions" or otherwise provide guidance concerning how OFAC would interpret that term. In § 510.413, the NKSR provide guidance on the factors that OFAC may consider when determining whether to impose restrictive measures under the NKSR against an FFI. OFAC may consider the size, number and frequency of the transaction; the nature of the transaction; the level of awareness and pattern of conduct; nexus between the FFI engaging in the transaction and North Korea or a blocked person; the impact of the transaction; deceptive practices; and other discretionary relevant factors. These considerations are similar to those set forth in other US sanctions programs administered by OFAC.

Under § 510.210, the “strict conditions” imposed on an FFI may include any of the following measures: (i) a prohibition or restriction on any provision of trade finance through the correspondent account or payable-through account of the FFI; (ii) a restriction on the transactions that may be processed through the correspondent or payable-through account of the FFI to certain types of transactions, such as personal remittances; (iii) monetary limits on, or limits on the volume of, the transactions that may be processed through the correspondent account or payable-through account of the FFI; (iv) a requirement of pre-approval from the US financial institution for all transactions processed through the correspondent account or payable-through account of the FFI; or (v) a prohibition or restriction on the processing of foreign exchange transactions through the correspondent account or payable-through account of the FFI.

If, pursuant to § 510.210, OFAC decides to impose strict conditions on maintaining US correspondent accounts or US payable-through accounts for an FFI, or decides to prohibit the opening or maintaining of US correspondent accounts or US payable-through accounts for an FFI, OFAC will add the name of the FFI, together with the strict condition(s) to be imposed, to the newly announced List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions (CAPTA List). CAPTA-listed entities are not necessarily Specially Designated Nationals (SDNs).
The CAPTA List will be maintained on OFAC’s website, although as of the date of publication of this alert, it does not yet contain any FFIs. OFAC has advised that the CAPTA List will eventually be expanded to include FFIs subject to correspondent or payable-through account sanctions pursuant to other authorities, including the Iranian Financial Sanctions Regulations, 31 CFR Part 561 (IFSR), which are currently identified on OFAC’s Part 561 List, and the Hizballah International Financing Prevention Act of 2015, as identified on the Hizballah Financial Sanctions Regulations List.

Incorporation of existing and new general licenses

A general license authorizes the activity described in the general license without the need for a specific license from OFAC, provided the activity conforms to the terms and restrictions contained in the general license.

OFAC incorporated into the NKSR, and in certain cases amended, 10 existing general licenses that were previously posted only on OFAC’s website. These existing general licenses provide authorization for transactions such as the provision of legal services, entries in certain accounts for normal service charges, provision and receipt of nonscheduled emergency medical services, and certain transactions related to telecommunications and mail.

In addition, OFAC also incorporated several general new licenses. These new general licenses authorize transactions relating to investment and reinvestment of certain funds, payments for legal services from funds originating outside the United States, the official business of the US federal government, official activities of international organizations and closing a correspondent or payable-through account.

Alignment with other US sanctions programs

The amendments to the NKSR incorporate certain additional interpretations and restrictions common to other US sanctions programs. While not new to the North Korea sanctions program, these include:

- Facilitation: Under Section 510.211, the NKSR incorporate EO 13722’s prohibition on US Persons of “approving, financing, facilitating, or guaranteeing a transaction by a foreign person where the transaction by that foreign person would be prohibited . . . if performed by a US Person or within the United States.”

As with the Iranian Transactions and Sanctions Regulations, 31 CFR Part 560 (ITSR) and certain other sanctions programs, § 510.412, which is also new to the NKSR, provides examples of prohibited facilitation, such as the following:

1. When a US Person alters its operating policies or procedures, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific engage involving North Korea where such transaction would be prohibited for a US Person or from the US
2. When a US Person refers to a foreign person purchase orders, requests for bids or similar business opportunities involving North Korea to which the US Person is prohibited from directly responding
3. When a US Person changes the operating policies and procedures of a particular affiliate with the specific purpose of facilitating transactions that would be prohibited for US Persons or from the United States

- “Evasion, attempts, causing violations, conspiracies”: The NKSR incorporate prior Executive Orders’ prohibitions on transactions that evade or avoid, have the purpose of evading or avoiding, cause a violation of, or attempt to violate any of the prohibitions set forth in the NKSR.
Other implications for non-US companies

The NKSR, like other sanctions programs, contain a prohibition on direct or indirect re-exportation of US-origin goods. The Export Administration Regulations (EAR) has long contained licensing requirements detailing the circumstances under which the Bureau of Industry and Security (BIS) requires a license for exports or re-exports to North Korea, including with respect to foreign-produced items containing US-origin content. The ITSR and Syrian Sanctions Regulations, 31 CFR Part 542 (SSR), each contain a provision that apportions licensing authority for exports either to OFAC or BIS in order to avoid dual-licensing issues.6 The NKSR do not contain such a provision, although OFAC has issued guidance noting that BIS retains licensing authority for exports and re-exports to North Korea of items subject to the EAR, while OFAC will require a separate license where such transactions involve blocked persons.7 The NKSR and accompanying guidance are less clear with regard to OFAC’s position on licensing requirements for foreign-produced items that are not subject to BIS licensing requirements to North Korea but that nevertheless contain US-origin content.

Conclusion

The March 5, 2018 update to the NKSR does not introduce new substantive changes to the US’s North Korea sanctions program, but rather largely collects OFAC’s North Korea–related prohibitions and authorizations in one place. The updated NKSR also provide additional definitions and guidance on the prohibitions, in alignment with other sanctions programs.

This is the second North Korea–related action that OFAC has taken in the past 30 days. On February 23, 2018, OFAC announced new North Korea designations on the SDN List, and published a global shipping advisory to highlight the sanctions risks related to shipments of goods to and from North Korea. You may read our alert about the February 23, 2018 action here. The rapid sequential release of these actions underscores the intense focus by the current administration on implementing and enforcing sanctions against North Korea. Combined with the recent news about potential diplomatic engagement with North Korea, they also highlight the extent to which US policy toward North Korea has the potential to rapidly change.

In light of these recent changes and events, any person, including non-US persons, who may have business activity—or customers or counterparts who have business activity—that involves North Korea should promptly conduct a risk assessment, monitor changes to the North Korea sanctions program (including new designations and guidance) and consider implementing appropriate compliance improvements.

1. President Trump implemented the North Korea–related prohibitions and designation criteria authorized by CAATSA in EO 13810.↩
2. "US Persons" are defined as US citizens, permanent residents, entities organized in the US (including foreign branches) and any person in the US.↩
3. Prior to the issuance of EO 13722 in 2016, the exportation or re-exportation of items from the United States to North Korea was already largely subject to licensing requirements under the Export Administration Regulations, 15 CFR § 746.4.↩
4. These 10 general licenses have been codified in the NKSR as Sections 510.505, 510.507, 510.509, 510.510, 510.511, 510.512, 510.515, 510.516, 510.517 and 510.518.↩
5. These new general licenses have been codified in the NKSR as Sections 510.506, 510.508, 510.513, 510.514 and 510.519.↩
6. For instance, the SSR defers licensing authority to BIS (31 CFR § 542.510) with regard to exports and re-exports of US-origin goods. With respect to Iran, BIS defers licensing authority to OFAC in most instances (see 15 CFR § 746.7), and OFAC has its own rules regarding licensing requirements for foreign-produced items containing US-origin content (31 CFR § 560.205).↩
7. See FAQ #459.↩
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