

# North Korea Sanctions Update

The North Korea Sanctions and Policy Enhancement Act of 2016 (the "**NKSPEA**"), signed by President Obama on February 18, 2016, authorizes imposition of additional US economic sanctions in response to recent long-range missile tests by the Democratic People's Republic of Korea ("**North Korea**"). The enhanced US economic sanctions would target North Korea's access to resources necessary to carry out further arms tests and cyber attacks. Although not as comprehensive as the Iran, Sudan, or Syria sanctions, the NKSPEA's targeted measures will further tighten the sanctions on North Korea.<sup>1</sup>

## Existing Sanctions against North Korea

Under the North Korea Sanctions Regulations currently imposed by the US Department of Treasury's Office of Foreign Assets Control ("**OFAC**"), "**US Persons**"<sup>2</sup> must block the assets of and cannot do business with or provide services to North Korean Specially Designated Nationals ("**SDNs**"), including entities 50% or more owned by such SDNs; North Korean-origin goods cannot be imported into the United States; and US Persons cannot lease, operate or insure a North Korean-flagged vessel or register a vessel in North Korea.

Moreover, the US Department of Commerce restricts exports of commercial and dual-use products and bans exports of arms, military equipment, and luxury goods to North Korea.

In response to the cyber attack of Sony Pictures, Executive Order ("**EO**") 13687 authorized, but did not impose, a blocking requirement on the Government of North Korea and the Workers' Party of Korea in June 2015. EO 13687 did, however, designate 3 entities and 10 individuals for being agencies or officials of the Government of North Korea and authorized designation of persons that have "materially assisted, sponsored or provided financial, material or technological

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<sup>1</sup> See *US Sanctions Against North Korea: Turning Into a Country of Mushrooms*, by Wendy Wysong and Ali Burney (April 22, 2015), available at <http://corporatecomplianceinsights.com/us-sanctions-against-north-korea-turning-into-a-country-of-mushrooms/>.

<sup>2</sup> "US Persons" means any US citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or anyone located in the United States.

support for, or goods or services to or in support of the Government, or acted on behalf of the Government or persons blocked" by EO 13687.

## North Korea Sanctions and Policy Enhancement Act of 2016

In response to recent reports of North Korean nuclear and ballistic missile tests, the NKSPEA passed Congress with bipartisan support and was duly signed by President Obama. The new sanctions would:

- impose a blocking requirement on the Government of North Korea and the Workers' Party of Korea;
- require designation of persons engaged in Section 104(a) Conduct (defined below);
- enhance licensing requirements for exports and reexports of certain US export-controlled goods to North Korea;
- potentially exclude persons from US government contracts if they have engaged in any Section 104(a) Conduct and require federal contractors to certify that they have not engaged in any such activity;
- impose travel restrictions on corporate officers and principal shareholders of designated entities;
- impose enhanced checks on cargo and vessels from non-US ports that do not implement sufficient controls for checking North Korean-origin shipments, and
- require periodic reports to Congress identifying (and then designating) persons knowingly engaged in Section 104(a) Conduct.

In addition, the US Department of the Treasury in consultation with the US Department of State ("**State**") must determine whether North Korea is a "jurisdiction of primary money laundering concern," thereby triggering application of the Patriot Act's broad financial restrictions.

### Designations

Although OFAC has not yet made any new designations nor provided any guidance as to how aggressively it will use the new designation authority, certain designations will be mandatory.<sup>3</sup>

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<sup>3</sup> Non-US firms do not automatically trigger a US sanctions designation by engaging in the type of activity that creates designation risk under Section 104 of the NKSPEA. Generally, State and OFAC apply secondary measures in a political and diplomatic context that typically

## Mandatory Designations

The NKSPEA requires designation and imposition of blocking sanctions on persons determined to be knowingly engaged or attempting to engage in "**Section 104(a) Conduct**," which includes:

- engaging in certain prohibited activities related to North Korea's Weapons of Mass Destruction ("**WMD**") and ballistic missile programs;
- importing, exporting, or reexporting "luxury goods"<sup>4</sup> to or from North Korea;
- importing, exporting, or reexporting arms and related materiel, services, training, or assistance to or from North Korea;
- engaging in or facilitating censorship by the Government of North Korea, including limiting access to electronic communications;
- engaging in or facilitating human rights abuses by the Government of North Korea;
- engaging in money laundering, goods or currency counterfeiting, bulk cash smuggling, or narcotics trafficking that supports the Government of North Korea or any official or person acting on behalf of the Government of North Korea;
- engaging in significant activities that undermine cyber security on behalf of the Government of North Korea;
- selling or supplying to or from the Government of North Korea or any person acting for or on behalf of that Government, 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 WMDs and WMD delivery systems and other proliferation activities,
  - the Workers' Party of Korea,
  - armed forces, internal security, or intelligence activities, or
  - the operation and maintenance of political prison camps.

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provides substantial opportunity for negotiation and compromise. We know of many other cases in which State and/or OFAC have threatened to designate a non-US firm under one or more secondary sanctions but have not actually imposed a designation either because the target ceased the sanctionable activity or broader diplomatic and geo-political considerations led State and/or OFAC to refrain from acting. More generally, State and OFAC have not designated any major industrial companies in countries of importance to US foreign policy but rather have focused on achieving a diplomatic resolution of the United States' concerns about or objections to any apparent sanctionable activity by such companies. To increase their negotiating leverage, adverse information has been leaked to the press about a non-US company's business with sanctions targets, thereby causing reputational harm and encouraging the company voluntarily to terminate such business.

<sup>4</sup> "Luxury goods" include luxury automobiles and yachts; gems; jewelry; other fashion accessories; cosmetics; perfumes; furs; designer clothing; luxury watches; rugs and tapestries; electronic entertainment software and equipment; recreational sports equipment; tobacco; wine and other alcoholic beverages; musical instruments; art; and antiques and collectible items, such as rare coins and stamps.

Despite the "mandatory" aspect of these sanctions, they operate only on the basis of a determination by the US Treasury and State departments of sanctionable activity by a particular person or entity. The need for such determination continues to provide the Obama Administration with broad discretionary authority over when and how to use designation to advance US foreign policy and national security objectives.

### Discretionary Designations

The NKSPEA authorizes (but does not require) designation of persons who knowingly:

- provide or contribute money, goods, or services in support of a person designated under UN resolutions relating to North Korea;
- contribute to bribery of Government of North Korea officials or misappropriate public funds for the benefit of such officials; or
- materially assist, sponsor, or provide significant financial material, or technological support for, or goods or services to or in support of such activities.

### Blocking Requirement

The NKSPEA's blocking requirement on (i) the Government of North Korea, (ii) the Workers' Party of Korea, and (iii) any persons designated under Section 104 is broader than OFAC's existing 50 Percent Rule (which only applies to entities that are 50% or more owned by SDNs). It applies to any *"person who is determined to be owned or controlled by, or to have acted or purported to have acted for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked."*

### Export Controls

Although North Korea has not been re-designated as a State Sponsor of Terrorism ("**SST**") and is not subject to a comprehensive embargo, the NKSPEA does reiterate that all items controlled for anti-terrorism purposes require a license for export or reexport to North Korea, essentially continuing to treat North Korea as an SST. However, the NKSPEA expressly exempts exports of goods or technology related to assistance for human rights, democracy, rule of law, or emergency humanitarian purposes.

### Cargo Inspections

A report must be submitted identifying any non-US ports and airports that do not conduct sufficient inspections of North Korean aircraft, vessels, and cargo to prevent facilitation of any

Section 104(a) Conduct. Cargo transported on vessels and aircrafts transiting through such ports or airports may be subject to enhanced inspection at US ports.

## Conclusion

The expansion of secondary financial and trade sanctions covering facilitation of North Korea's illicit activity, regardless of any US element, will impact North Korea's support from third countries and its access to foreign revenue and supply chains. Should North Korea make significant positive progress on issues relating to UN resolutions, human rights, and illicit activities, these sanctions can be waived, suspended, or terminated.

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