Davis Polk

Additional Sanctions with Respect to North Korea

September 22, 2017 | Client Update | 6-minute read

On September 21, 2017, President Trump issued a new Executive Order ("E.O."), "Imposing Additional Sanctions With Respect to North Korea." According to **Treasury Secretary Mnuchin**, the new E.O. expands the "Treasury's authorities to target those who enable [the North Korean] regime's economic activity." In particular, Secretary Mnuchin noted that "no bank – in any country – should be used to facilitate Kim Jong-Un's destructive behavior," and that "foreign 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." Secretary's Mnuchin's stark language suggests that foreign companies that continue to engage in trade or financial transactions with North Korea going forward will face real exposure to targeted sanctions, and suggests that the U.S. government intends to make a sustained and comprehensive effort, backed by the threat of these sanctions, to push other countries to isolate North Korea economically with the end goal of denuclearization of the Korean peninsula.

Among other provisions, the new E.O. authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to impose sanctions on persons determined to:

- operate in the construction, energy, financial services, fishing, information technology, manufacturing, medical, mining, textiles, or transportation industries in North Korea;
- own, control, or operate any port in North Korea;
- have engaged in at least one significant importation or exportation to North Korea of any goods, services, or technology;
- be a North Korean person, including a North Korean person that has engaged in commercial activity that generates revenue for the Government of North Korea or the Workers' Party of Korea;
- have materially assisted 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 pursuant to the order; or
- be owned or controlled by, or to have acted or purported to act for or on behalf of any person whose property and interests in property are blocked pursuant to the order.The property and interests in property of designated persons 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 will be blocked, and U.S. persons will generally be prohibited from engaging in transactions with such designated persons.

In addition, the E.O.:

- prohibits vessels and aircraft in which a foreign person has an interest that have called or landed at a port or place in North Korea in the previous 180 days, and vessels that have engaged in a ship-to-ship transfer with such a vessel in the previous 180 days, from entering the United States;
- blocks any funds in the United States or the possession or control of a U.S. person 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, and prohibits U.S. persons from approving, financing, facilitating, approving or guaranteeing a transaction by a foreign person involving such funds that would be prohibited if performed by a U.S. person or within the United

Copyright 2017 Davis Polk & Wardwell LLP

States; and

- authorizes the Secretary of the Treasury, in consultation with the Secretary of State to impose sanctions, such as restrictions on correspondent or payable-through accounts or full blocking sanctions, on a foreign financial institution determined to have knowingly conducted or facilitated, on or after September 21, 2017 (i) any significant transaction on behalf of certain blocked persons or (ii) any significant transaction in connection with trade with North Korea.

Notably, the E.O. does not define what constitutes a "significant" trade or financial transaction that would justify the imposition of sanctions. In other contexts, the Treasury Department has indicated that it may consider a number of factors in determining whether transactions are significant, including the nature, size, number, and frequency of transactions, the transaction's nexus to sanctioned persons or sanctionable activity, the impact of the transaction on the objectives of the relevant sanctions program, the benefit conveyed to a sanctioned person or government by the transaction, whether the transaction is performed with the involvement or approval of management or is part of a pattern of conduct, whether the transaction involves deceptive practices, and any other factor deemed to be relevant in a particular case.

The new E.O. became effective on September 21, 2017 at 12:01 a.m. Eastern Daylight Time. Secretary Mnuchin has stated that sanctions authorized by the new E.O. will be applied only to behavior that occurs following the order's effective date.

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") has also issued both new and updated North Korea-related General Licenses ("GL").

- **GL10**, *"Calling of Certain Vessels and Landing of Certain Aircraft Authorized,"* authorizes vessels and aircraft in which a foreign person has an interest that are subject to the new E.O.'s prohibitions on entry into the United States to call at a port or place in the United States if: (1) the vessel is in distress and seeks refuge in the United States; (2) the vessel's prior call at a port in North Korea was due solely to its distress and the resulting need to seek refuge; (3) the aircraft is engaging in a nontraffic stop or emergency landing in the United States; or (4) the aircraft's prior landing in North Korea was due solely to an emergency.
- **GL3-A**, *"Entities in Certain Accounts for Normal Service Charges,"* has been updated to include authorizations for accounts blocked pursuant to E.O. 13466, E.O. 13551, the new E.O., and any further E.O.'s relating to the national emergency declared in E.O. 13466. GL3-A replaces and supersedes in its entirety GL 3, which was issued on March 24, 2016.

Also on September 21, OFAC released new and updated **Frequently Asked Questions** ("FAQs") relating to the new E.O. Among other things, the updated FAQs:

- note that OFAC will provide appropriate notice and additional guidance, as necessary, to clarify its expectations for implementation of the new E.O.'s provision blocking funds that originate from, are destined for, or pass through a foreign account determined by the Secretary of the Treasury to be owned, controlled, or used by a North Korean person. Absent such a determination and notice from the Treasury Department, this provision does not create any immediate compliance obligations on U.S. persons (FAQ 526);
- note that the general licenses previously issued with E.O. 13722 do not apply to transactions prohibited by the new E.O. except for General Licenses 2 and 9 with respect to legal services and emergency medical services, respectively. New and amended General Licenses 3-A and 10 also apply to transactions prohibited by the new E.O. (FAQ 525); and
- explain that while OFAC sanctions do not prohibit U.S. persons from traveling to or from North Korea, the **Department of State** imposed a Geographical Travel Restriction for U.S. citizens' travel to North Korea on September 1, 2017 (FAQ 464).

Copyright 2017 Davis Polk & Wardwell LLP

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

John B. Reynolds III
+1 202 962 7143
john.reynolds@davispolk.com

Will Schisa
+1 202 962 7129
will.schisa@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

Copyright 2017 Davis Polk & Wardwell LLP