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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506-AB35

Imposition of Special Measure Against North Korea as a Jurisdiction of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Final rule.

SUMMARY: FinCEN is issuing this final rule to prohibit U.S. financial institutions from opening or maintaining a correspondent account for, or on behalf of, North Korean banking institutions. The rule further prohibits U.S. financial institutions from processing transactions for the correspondent account of a foreign bank in the United States if such a transaction involves a North Korean financial institution, and requires institutions to apply special due diligence to guard against such use by North Korean financial institutions.

DATES: This final rule is effective [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION].

FOR FUTHER INFORMATION CONTACT: The FinCEN Resource Center, (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Statutory Provisions

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56 (the USA PATRIOT Act). Title III of the USA PATRIOT Act amended the anti-money laundering (AML) provisions of the Bank Secrecy Act (BSA), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314, 5316-5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR Chapter X. The authority of the Secretary of the Treasury (the Secretary) to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.[1]

Section 311 of the USA PATRIOT Act (Section 311), codified at 31 U.S.C. 5318A, grants FinCEN the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, financial institution, class of transactions, or type of account is of "primary money laundering concern," to require domestic financial institutions and financial agencies to take certain "special measures" to address the primary money laundering concern. The special measures enumerated under Section 311 are prophylactic safeguards that defend the U.S. financial system from money laundering and terrorist financing. FinCEN may impose one or more of these special measures in order to protect the U.S. financial system from these threats. Special measures one through four, codified at 31 U.S.C. 5318A(b)(1)–(b)(4), impose additional recordkeeping, information collection, and reporting requirements on covered U.S. financial institutions.

[1] Therefore, references to the authority of the Secretary of the Treasury under Section 311 of the USA PATRIOT Act apply equally to the Director of FinCEN.

The fifth special measure, codified at 31 U.S.C. 5318A(b)(5), allows FinCEN to prohibit or impose conditions on the opening or maintaining of correspondent or payable-through accounts for the identified jurisdiction by U.S. financial institutions. Section 311 identifies factors for the Secretary to consider and requires consultations with Federal agencies before making a finding that reasonable grounds exist for concluding that a jurisdiction, institution, class of transactions or type of account is of primary money laundering concern. The statute also provides similar procedures, including factors to consider and consultation requirements for selecting and imposing the fifth special measure.

II. FinCEN's Section 311 Rulemaking Regarding North Korea

A. Notice of Finding Regarding North Korea

In a Notice of Finding (NOF) published in the **Federal Register** on June 2, 2016, FinCEN found that reasonable grounds exist for concluding that the Democratic People's Republic of Korea (DPRK or North Korea) is a jurisdiction of primary money laundering concern pursuant to 31 U.S.C. 5318A.[2] FinCEN's NOF noted four main areas of concern: North Korea (1) uses state-controlled financial institutions and front companies to conduct international financial transactions that support the proliferation of weapons of mass destruction (WMD) and the development of ballistic missiles in violation of international and U.S. sanctions; (2) is subject to little or no bank supervision or anti-money laundering or combating the financing of terrorism ("AML/CFT") controls; (3) has no mutual legal assistance treaty with the United States; and (4) relies on the illicit and corrupt activity of high-level officials to support its government.

[2] 81 FR 35441 (June 2, 2016).

In the NOF, FinCEN also noted that the North Korean government continues to access the international financial system to support its WMD and conventional weapons programs through its use of aliases, agents, foreign individuals in multiple jurisdictions, and a long-standing network of front companies and North Korean embassy personnel which support illicit activities through banking, bulk cash, and trade. Front company transactions originating in foreign-based banks have been processed through correspondent bank accounts in the United States and Europe. Further, the enhanced due diligence required by United Nations Security Council Resolutions (UNSCRs) related to North Korea is undermined by North Korean-linked front companies, which are often registered by non-North Korean citizens, and which conceal their activity through the use of indirect payment methods and circuitous transactions disassociated from the movement of goods or services.

B. Notice of Proposed Rulemaking

In light of this Finding, in a Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on June 3, 2016, FinCEN (1) proposed a prohibition on covered financial institutions from opening or maintaining a correspondent account in the United States for, or on behalf of, a North Korean banking institution; (2) proposed a prohibition on covered financial institutions from processing a transaction involving a North Korean financial institution through the United States correspondent account of a foreign banking institution; and (3) proposed a requirement for covered financial institutions to apply special due diligence to their foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving North Korean financial

institutions.[3] The comment period for the NPRM closed on August 2, 2016. The final rule is largely identical to that found in the June 2016 notice, except that the term "North Korean banking institution" has been defined in order to clarify the types of institutions subject to the prohibition, and the term "foreign banking institution" has been replaced by "foreign bank," with a corresponding change in the term's definition to conform with the definition of "foreign bank" under 31 CFR 1010.100(u). The final rule also explicitly incorporates the special due diligence concepts into the prohibition on processing transactions involving North Korean financial institutions. By incorporating these due diligence requirements into the prohibition, the final rule clarifies that if a covered financial institution suspects transactions involve a North Korean financial institution, then the covered financial institution shall take steps to further investigate and prevent such transactions, including steps that do not necessarily lead to the closing of the account.

As further described below, FinCEN is adopting this proposal as a final rule. In so doing, FinCEN considered public comment and the relevant statutory factors, and engaged in the required consultations prescribed by 31 U.S.C. 5318A.

III. Consideration of Comment

In response to the NPRM and NOF, FinCEN received only one comment. The comment agreed with FinCEN's proposal of a prohibition under the fifth special measure, but recommended that FinCEN also impose an additional special measure under 31 U.S.C. 5318A(b)(2) to require domestic financial institutions to obtain beneficial ownership information of "property" held by nationals of North Korea or their

[3] 81 FR 35665 (June 3, 2016).

representatives that is located in North Korea or that otherwise involves North Korea. The comment explained that such a requirement would help identify and expose networks of non-bank institutions and agents that establish and manage shell or front companies on behalf of the North Korean government.

As described above and in the NOF, FinCEN shares the concerns raised by the comment regarding North Korea's extensive use of deceptive financial practices, including the use of shell and front companies to obfuscate the true originator, beneficiary, and purpose behind its transactions. However, FinCEN's authority, as granted by Congress in 31 U.S.C. 5318A(b)(2), applies only to information concerning the beneficial ownership of "account[s] opened or maintained in the United States" and thus would not extend to information relating to the beneficial ownership of property writ large, or to property outside the United States as the comment suggested. Nonetheless, FinCEN believes that the risks to the U.S. financial system posed by North Korea can be addressed through the prohibition on correspondent accounts and the related due diligence. Taken together, these requirements should, by and large, help prevent the flow of illicit funds from North Korea from entering the U.S. financial system. Accordingly, FinCEN believes that the prohibition and due diligence requirements imposed under the fifth special measure sufficiently address both FinCEN's concerns and the concerns raised by the comment.

IV. Imposition of a Special Measure Against North Korea as a Jurisdiction of Primary Money Laundering Concern

In light of the Finding as detailed in the NOF, and based upon additional consultations with required Federal agencies and departments, and the consideration of public comments, the statutory factors discussed below, and all relevant factors, FinCEN

has concluded that the prohibition under the fifth special measure as proposed in the NPRM is the appropriate course of action.[4]

The prohibition on the opening or maintaining of correspondent accounts imposed by the fifth special measure will help guard against the money laundering and WMD proliferation finance risks to the U.S. financial system posed by North Korean financial institutions and their front companies. Imposing a prohibition under the fifth special measure also complements U.S. efforts to satisfy the requirement under UNSCR 2270 Paragraph 33, discussed in section IV.A.1 below, for all UN member states to sever correspondent relationships with North Korean banks.

A. Discussion of Section 311 Factors

In determining which special measures to implement to address the finding that DPRK is of primary money laundering concern described in the NOF, FinCEN considered the following factors:

1. Whether Similar Action Has Been or Will Be Taken by Other Nations or Multilateral Groups Against North Korea

FinCEN's action is consistent with steps taken by the international community to address North Korea's illicit financial activity. Between 2006 and 2016, the United Nations Security Council has adopted multiple resolutions, 1718,[5] 1874,[6] 2087,[7] 2094,[8] and 2270,[9] which generally restrict North Korea's financial and operational activities related to its nuclear and missile programs and conventional arms sales. Most recently, in

[4] Throughout the rulemaking process, FinCEN has consulted with relevant departments and agencies in accordance with 5318A.
[5] *See* United Nations Security Council Resolution ("UNSCR") 1718 (http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1718(2006)).
[6] *See* UNSCR 1874 (http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1874(2009).
[7] *See* UNSCR 2087 (http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2087(2013)).
[8] *See* UNSCR 2094 (http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2094(2013)).
[9] *See* UNSCR 2270 (http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2270(2016)).

March 2016, the United Nations adopted UNSCR 2270, which imposes additional sanctions on North Korea in response to a January 6, 2016 nuclear test and February 7, 2016 launch using ballistic missile technology. This UNSCR contains provisions that generally require nations to: (1) prohibit North Korean banks from opening branches in their territory or engaging in certain correspondent relationships with these banks; (2) terminate existing representative offices or subsidiaries, branches, and correspondent accounts with North Korean banks; (3) prohibit their financial institutions from opening new representative offices or subsidiaries, branches, or bank accounts in North Korea; and (4) close existing representative offices or subsidiaries, branches, or bank accounts in North Korea if reasonable grounds exist to believe such financial services could contribute to North Korea's nuclear or missile programs, or UNSCR violations.[10]

The Financial Action Task Force (FATF) has issued a series of public statements expressing its concern that North Korea's lack of a comprehensive AML/CFT regime represents a significant vulnerability within the international financial system. The statements further called upon North Korea to address those deficiencies with urgency, and called upon FATF members and urged all jurisdictions to advise their financial institutions to give special attention to business relationships and transactions with North Korea in order to protect their correspondent accounts from being used to evade countermeasures and risk mitigation practices. Starting in February 2011, the FATF called upon its members and urged all jurisdictions to apply effective counter-measures to

[10] *See* UNSCR 2270.

protect their financial sectors from the money laundering and financing of terrorism risks emanating from North Korea.[11]

2. Whether the Imposition of the Fifth Special Measure Would Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated with Compliance, for Financial Institutions Organized or Licensed in the United States

The prohibition under the fifth special measure imposed by this rulemaking prohibits covered financial institutions from opening or maintaining a correspondent account in the United States for, or on behalf of, a North Korean banking institution. It also prohibits the use of a foreign bank's U.S. correspondent account to process a transaction involving a North Korean financial institution. As noted in FinCEN's NOF, none of North Korea's financial institutions currently maintain correspondent accounts directly with U.S. banks. Further, as noted above, U.S. financial institutions are currently subject to a range of prohibitions related to sanctions concerning North Korea, which has generally limited their direct exposure to the North Korean financial system. Therefore, FinCEN believes this action will not present an undue regulatory burden on U.S. financial institutions.

Under this final rule, covered financial institutions are also required to apply special due diligence to their foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving North Korean financial institutions. U.S. financial institutions may satisfy their due diligence requirement by transmitting a notice to certain foreign correspondent account holders concerning the prohibition on processing transactions involving a North Korean financial institution

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[11] *See* "Public Statement – 21 October 2016," Financial Action Task Force (http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-october-2016.html).

through the U.S. correspondent account. U.S. financial institutions generally apply some level of screening and, when required, conduct some level of reporting of their transactions and accounts, often through the use of commercially available software such as that used for compliance with the economic sanctions programs administered by the Office of Foreign Assets Control (OFAC) and to detect potential suspicious activity. FinCEN believes financial institutions should be able to leverage these current screening and reporting procedures to detect transactions involving a North Korean financial institution.

3. The Extent to Which the Action or Timing of the Action Will Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities of North Korea

Financial institutions in North Korea are not major participants in the international payment system and are not relied upon by the international banking community for clearance or settlement services. In addition, given existing domestic and multilateral sanctions, coupled with the FATF's calls for countermeasures to address North Korea's AML/CFT deficiencies, it is unlikely that the imposition of a prohibition under the fifth special measure with respect to North Korea would have a significant adverse systemic impact on the international payment, clearance, and settlement system. In light of the reasons described in this rulemaking for imposing the fifth special measure, and based on available information, FinCEN believes that the need to protect the U.S. financial system outweighs any burden on legitimate North Korean business activity, and, therefore, the imposition of a prohibition under the fifth special measure would not impose an undue burden on such activities.

4. The Effect of the Action on United States National Security and Foreign Policy

The exclusion from the U.S. financial system of jurisdictions that serve as conduits for significant money laundering activity, for the financing of WMD or their delivery systems, and for other financial crimes enhances national security by making it more difficult for proliferators and money launderers to access the U.S. financial system. To the extent that this action serves as an additional tool in preventing North Korea from accessing the U.S. financial system, this action supports and upholds U.S. national security and foreign policy goals. Further, imposing a prohibition under the fifth special measure both complements the U.S. Government's worldwide efforts to expose and disrupt international money laundering, and satisfies the requirement under UNSCR 2270 Paragraph 33 for all UN member states to sever correspondent relationships with North Korean banks.

B. Consideration of Alternative Special Measures

FinCEN concludes that a prohibition under the fifth special measure is the only viable measure to protect the U.S. financial system against the money laundering threats posed by the DPRK. In making this determination, FinCEN considered alternatives to a prohibition under the fifth special measure, including the first four special measures and imposing conditions on the opening or maintaining of correspondent accounts. For the reasons explained below, FinCEN believes that a prohibition under the fifth special measure would be the most effective and practical measure to employ to safeguard the U.S. financial system from the risks of illicit finance involving the DPRK.

As noted above, and in the NOF, North Korea is subject to numerous UNSCRs[12] and U.S. sanctions authorities,[13] and it has been consistently identified by the FATF for its AML deficiencies.[14] Additionally, the UN has specifically called for enhanced monitoring of financial transactions to prevent the financing of North Korea's nuclear and ballistic missile programs and for the freezing of any assets suspected of supporting these illicit programs. Further, as noted in the NOF and NPRM, FinCEN has issued three advisories since 2005 detailing specific concerns of the deceptive financial practices used by North Korea and North Korean entities and calling on U.S. financial institutions to take appropriate risk mitigation measures.[15] However, North Korea has not taken any substantial action to address the range of concerns and continues to be involved in an array of illicit activities, as reflected in the NOF. Although North Korea is subject to wide-ranging bilateral and multilateral sanctions, it continues to access the international financial system to support its WMD and conventional weapons programs through its use of aliases, agents, foreign individuals in multiple jurisdictions, and a long-standing

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[12] *See* UNSCRs 1718, 1874, 2087, 2094, and 2270.

[13] *See, e.g.*, Executive Order ("E.O.") 13382 "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters" (2005) (https://www.federalregister.gov/articles/2005/07/01/05-13214/blocking-property-of-weapons-of-mass-destruction-proliferators-and-their-supporters); E.O. 13551 "Blocking Property of Certain Persons with Respect to North Korea" (2010) (https://www.gpo.gov/fdsys/pkg/FR-2010-09-01/pdf/X10-10901.pdf); E.O. 13687 "Imposing Additional Sanctions with Respect to North Korea" (2015) (https://www.federalregister.gov/articles/2015/01/06/2015-00058/imposing-additional-sanctions-with-respect-to-north-korea); E.O. 13722 "Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions with Respect to North Korea," (2016) (https://www.gpo.gov/fdsys/pkg/FR-2016-03-18/pdf/FR-2016-03-18.pdf).

[14] *See* "Public Statement – 21 October 2016," Financial Action Task Force (http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-october-2016.html)

[15] *See* "Guidance to Financial Institutions on the Provision of Banking Services to North Korean Government Agencies and Associated Front Companies Engaged in Illicit Activities," FinCEN (2005) (https://www.fincen.gov/statutes_regs/guidance/pdf/advisory.pdf); "North Korea Government Agencies' and Front Companies' Involvement in Illicit Financial Activities," FinCEN (2009) (https://www.fincen.gov/statutes_regs/guidance/pdf/fin-2009-a002.pdf); "Update on the Continuing Illicit Finance Threat Emanating from North Korea," FinCEN (2013) (https://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-A005.pdf).

network of front companies. As such, FinCEN believes that only the most stringent measure – a prohibition under the fifth special measure – would be effective in mitigating the illicit finance risks associated with North Korea.

Special measures one through four enable FinCEN to impose additional recordkeeping, information collection, and information reporting requirements on covered U.S. financial institutions. Special measure five enables FinCEN to impose conditions as an alternative to a prohibition on the opening or maintaining of correspondent accounts. Given North Korea's flagrant disregard for multiple UN resolutions related to the proliferation of WMD, FinCEN does not believe that any condition, additional recordkeeping, or reporting requirement would be an effective measure to safeguard the U.S. financial system. Such measures would not prevent North Korea from accessing directly or indirectly the correspondent accounts of U.S. financial institutions, thus leaving the U.S. financial system vulnerable to processing the types of illicit transfers described in the NOF. Moreover, as OFAC sanctions prohibit a variety of financial transactions with the DPRK, recordkeeping related to transactions with the DPRK would be impractical as would conditioning the opening or maintaining of correspondent accounts. As noted above, because North Korea has a history of engaging in deceptive financial practices to evade international sanctions and is known to utilize networks of front companies to engage in illicit activity, any conditions that would continue to allow the opening or maintaining of correspondent accounts for North Korean banks would not sufficiently protect the U.S. financial system. Therefore, in the case of the jurisdiction of North Korea, FinCEN views a prohibition under the fifth special

measure as the only special measure that can adequately protect the U.S. financial system from North Korean illicit financial activity.

V. Section-by-Section Analysis for Imposition of a Prohibition Under the Fifth Special Measure

A. 1010.659(a) – Definitions

1. North Korean banking institution

Section 1010.659(a)(1) of the rule defines a "North Korean banking institution" as any bank organized under North Korean law, or any agency, branch, or office located outside the United States of such a bank. This definition is consistent with the definition of "foreign bank" at 31 CFR 1010.100(u).

2. North Korean financial institution

Section 1010.659(a)(2) of this rule defines a "North Korean financial institution" as all branches, offices, or subsidiaries of any foreign financial institution, as defined at 31 CFR 1010.605(f), chartered or licensed by North Korea, wherever located, including any branches, offices, or subsidiaries of such a financial institution operating in any jurisdiction, and any branch or office within North Korea of any foreign financial institution.

3. Foreign bank

Section 1010.659(a)(3) of this rule states that "foreign bank" has the same meaning as provided in 31 CFR 1010.100(u).

4. Correspondent account

Section 1010.659(a)(4) of this rule defines the term "correspondent account" by reference to the definition contained in 31 CFR 1010.605(c)(1)(i). Section 1010.605(c)(1)(i) defines a correspondent account to mean an account established to

receive deposits from, or make payments or other disbursements on behalf of, a foreign financial institution, or to handle other financial transactions related to the foreign financial institution. Under this definition, "payable through accounts" are a type of correspondent account.

In the case of a U.S. depository institution, this broad definition includes most types of banking relationships between a U.S. depository institution and a foreign bank that are established to provide regular services, dealings, and other financial transactions, including a demand deposit, savings deposit, or other transaction or asset account, and a credit account or other extension of credit. FinCEN is using the same definition of "account" for purposes of this rule as was established for depository institutions in the final rule implementing the provisions of section 312 of the USA PATRIOT Act requiring enhanced due diligence for correspondent accounts maintained for certain foreign banks.[16]

In the case of securities broker-dealers, futures commission merchants, introducing brokers-commodities, and investment companies that are open-end companies ("mutual funds"), FinCEN is also using the same definition of "account" for purposes of this rule as was established for these entities in the final rule implementing the provisions of section 312 of the USA PATRIOT Act requiring enhanced due diligence for correspondent accounts maintained for certain foreign banks.[17]

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[16] *See* 31 CFR 1010.605(c)(2)(i).
[17] *See* 31 CFR 1010.605(c)(2)(ii)-(iv).

5. Covered financial institution

Section 1010.659(a)(5) of this rule defines "covered financial institution" with the same definition used in the final rule implementing the provisions of section 312 of the USA PATRIOT Act,[18] which in general includes the following:

- An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));
- a commercial bank;
- an agency or branch of a foreign bank in the United States;
- a Federally insured credit union;
- a savings association;
- a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611);
- a trust bank or trust company;
- a broker or dealer in securities;
- a futures commission merchant or an introducing broker-commodities; and
- a mutual fund.

6. Subsidiary

Section 1010.659(a)(6) of this rule defines "subsidiary" as a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

[18] *See* 31 CFR 1010.605(e)(1).

B. 1010.659(b) – Prohibition on Accounts and Due Diligence Requirements for Covered Financial Institutions

1. Prohibition on Opening or Maintaining Correspondent Accounts

Section 1010.659(b)(1) and (2) of this rule prohibits covered financial institutions from opening or maintaining in the United States a correspondent account for, or on behalf of, a North Korean banking institution. It also requires covered financial institutions to take reasonable steps to not process a transaction for the correspondent account of a foreign bank in the United States if such a transaction involves a North Korean financial institution. Such reasonable steps are described in 1010.659(b)(3), which sets forth the special due diligence requirements a covered financial institution must take when it knows or has reason to believe a transaction involves a North Korean financial institution. By expressly incorporating these due diligence requirements into the prohibition, the final rule clarifies that if a covered financial institution suspects transactions involve a North Korean financial institution, then the covered financial institution shall take steps to further investigate and prevent such transactions, including steps that do not necessarily lead to the closing of the account.

2. Special Due Diligence for Correspondent Accounts to Prohibit Use

As a corollary to the prohibition set forth in section 1010.659(b)(1) and (2), section 1010.659(b)(3) of this rule requires a covered financial institution to apply special due diligence to all of its foreign correspondent accounts that is reasonably designed to guard against processing transactions involving North Korean financial institutions. As part of that special due diligence, covered financial institutions must notify those foreign correspondent account holders that the covered financial institutions know or have reason to believe provide services to a North Korean financial institution that such

correspondents may not provide a North Korean financial institution with access to the correspondent account maintained at the covered financial institution. A covered financial institution may satisfy this notification requirement using the following notice:

> Notice: Pursuant to U.S. regulations issued under Section 311 of the USA PATRIOT Act, see 31 CFR 1010.659, we are prohibited from opening or maintaining in the United States a correspondent account for, or on behalf of, a North Korean banking institution. The regulations also require us to notify you that you may not provide a North Korean financial institution, including any of its branches, offices, or subsidiaries, with access to the correspondent account you hold at our financial institution. If we become aware that the correspondent account you hold at our financial institution has processed any transactions involving a North Korean financial institution, including any of its branches, offices, or subsidiaries, we will be required to take appropriate steps to prevent such access, including terminating your account.

Covered financial institutions should implement appropriate risk-based procedures to identify transactions involving a North Korean financial institution. A covered financial institution may, for example, have knowledge through transaction screening software that a correspondent account processes transactions for a North Korean financial institution. The purpose of the notice requirement is to aid cooperation with correspondent account holders in preventing transactions involving a North Korean financial institution from accessing the U.S. financial system. FinCEN does not require or expect a covered financial institution to obtain a certification from any of its correspondent account holders that access will not be provided to comply with this notice requirement.

Methods of compliance with the notice requirement could include, for example, transmitting a notice by mail, fax, or e-mail. The notice should be transmitted whenever

a covered financial institution knows or has reason to believe that a foreign correspondent account holder provides services to a North Korean financial institution.

Special due diligence also includes implementing risk-based procedures designed to identify any use of correspondent accounts to process transactions involving North Korean financial institutions. A covered financial institution is expected to apply an appropriate screening mechanism to identify a funds transfer order that on its face listed a North Korean financial institution as the financial institution of the originator or beneficiary, or otherwise referenced a North Korean financial institution in a manner detectable under the financial institution's normal screening mechanisms. An appropriate screening mechanism could be the mechanisms used by a covered financial institution to comply with various legal requirements, such as the commercially available software programs used to comply with the economic sanctions programs administered by OFAC.

A covered financial institution is also required to implement risk-based procedures to identify indirect use of its correspondent accounts, including through methods used to disguise the originator or originating institution of a transaction. As noted above, and in the NOF, FinCEN is concerned that a North Korean financial institution may attempt to disguise its transactions through the use of front companies, which would not explicitly identify the North Korean institution as an involved party in the transaction. A financial institution may develop a suspicion of such misuse based on other information in its possession, patterns of transactions, or any other method available to it based on its existing systems. Under this rule, a covered financial institution that knows or has reason to believe that a foreign bank's correspondent account is being used to process a transaction involving a North Korean financial institution must take all

appropriate steps to attempt to verify and prevent such use. Such steps may include a notification to its correspondent account holder requesting further information regarding a transaction, requesting corrective action to address the perceived risk, and, where necessary, terminating the correspondent account. If a covered financial institution deems it appropriate to terminate a correspondent account, it may re-establish such an account if it determines that the account will not be used to process transactions involving North Korean financial institutions.

3. Recordkeeping and Reporting

Section 1010.659(b)(4) of this rule clarifies that paragraph (b) of the rule does not impose any reporting requirement upon any covered financial institution that is not otherwise required by applicable law or regulation. A covered financial institution must, however, document its compliance with the notification requirement under section 1010.659(b)(3)(i)(A).

VI. Regulatory Flexibility Act

When an agency issues a final rule, the Regulatory Flexibility Act ("RFA") requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" that will "describe the impact of the final rule on small entities." (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the final rule is not expected to have a significant economic impact on a substantial number of small entities.

A. Prohibition on Covered Financial Institutions from Opening or Maintaining Correspondent Accounts with Certain Foreign Banks Under the Fifth Special Measure

1. Estimate of the Number of Small Entities to Whom the Fifth Special Measure Will Apply

For purposes of the RFA, both banks and credit unions are considered small entities if they have less than $550,000,000 in assets.[19] Of the estimated 6,192 banks, 80 percent have less than $550,000,000 in assets and are considered small entities.[20] Of the estimated 6,021 credit unions, 92.5 percent have less than $550,000,000 in assets.[21]

Broker-dealers are defined in 31 CFR 1010.100(h) as those broker-dealers required to register with the Securities and Exchange Commission (SEC). For the purposes of the RFA, FinCEN relies on the SEC's definition of small business as previously submitted to the Small Business Administration (SBA). The SEC has defined the term small entity to mean a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated debt) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization

[19] *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, Small Business Administration Size Standards (SBA Feb. 26, 2016) [hereinafter "*SBA Size Standards*"]. (https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf)
[20] Federal Deposit Insurance Corporation, *Find an Institution*, http://www2.fdic.gov/idasp/main.asp; *select* Size or Performance: Total Assets, *type* Equal or less than $: "550000" and *select* Find.
[21] National Credit Union Administration, *Credit Union Data*, http://webapps.ncua.gov/customquery/; *select* Search Fields: Total Assets, *select* Operator: Less than or equal to, *type* Field Values: "550000000" and *select* Go.

as defined in this release.[22] Based on SEC estimates, 17 percent of broker-dealers are classified as small entities for purposes of the RFA.[23]

Futures commission merchants (FCMs) are defined in 31 CFR 1010.100(x) as those FCMs that are registered or required to be registered as a FCM with the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), except persons who register pursuant to section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2). Because FinCEN and the CFTC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the CFTC's definition of small business as previously submitted to the SBA. In the CFTC's ''Policy Statement and Establishment of Definitions of 'Small Entities' for Purposes of the Regulatory Flexibility Act,'' the CFTC concluded that registered FCMs should not be considered to be small entities for purposes of the RFA.[24] The CFTC's determination in this regard was based, in part, upon the obligation of registered FCMs to meet the capital requirements established by the CFTC.

For purposes of the RFA, an introducing broker-commodities dealer is considered small if it has less than $35,500,000 in gross receipts annually.[25] Based on information provided by the National Futures Association, 95 percent of introducing brokers-commodities dealers have less than $35.5 million in adjusted net capital and are considered to be small entities.

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[22] 17 CFR 240.0-10(c).
[23] 76 FR 37572, 37602 (June 27, 2011) (the SEC estimates 871 small broker-dealers of the 5,063 total registered broker-dealers).
[24] 47 FR 18618, 18619 (Apr. 30, 1982).
[25] SBA Size Standards at 28.

Mutual funds are defined in 31 CFR 1010.100(gg) as those investment companies that are open-end investment companies that are registered or are required to register with the SEC. For the purposes of the RFA, FinCEN relies on the SEC's definition of small business as previously submitted to the SBA. The SEC has defined the term "small entity" under the Investment Company Act to mean "an investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year."[26] Based on SEC estimates, seven percent of mutual funds are classified as ''small entities'' for purposes of the RFA under this definition.[27]

As noted above, 80 percent of banks, 92.5 percent of credit unions, 17 percent of broker-dealers, 95 percent of introducing broker-commodities dealers, no FCMs, and seven percent of mutual funds are small entities.

B. Description of the Projected Reporting and Recordkeeping Requirements of the Fifth Special Measure

The imposition of the fifth special measure requires covered financial institutions to provide a notification intended to aid cooperation from foreign correspondent account holders in preventing transactions involving North Korean financial institutions from being processed by the U.S. financial system. FinCEN estimates that the burden on institutions providing this notice is one hour. Covered financial institutions are also required to take reasonable measures to detect use of their correspondent accounts to process transactions involving North Korean financial institutions.

[26] 17 CFR 270.0-10.
[27] 78 FR 23637, 23658 (April 19, 2013).

All U.S. persons, including U.S. financial institutions, currently must comply with OFAC sanctions, and U.S. financial institutions have suspicious activity reporting requirements. U.S. financial institutions are currently subject to a range of sanctions prohibitions related to North Korea, which has limited their direct exposure to the North Korean financial system. More recently, on March 15, 2016, the President issued Executive Order 13722, which places additional sanctions on North Korea and has the effect of generally prohibiting U.S. financial institutions from processing transactions involving persons located in North Korea and the North Korean government, unless authorized by OFAC or exempt.[28] Therefore, current transactional activity between U.S. financial institutions and North Korean banks is very constricted. Further, North Korea is subject to a range of United Nations sanctions resolutions and it has been consistently recognized by the FATF for its AML deficiencies. The special due diligence that is required under this rule – *i.e.*, the transmittal of notice to certain correspondent account holders, the screening of transactions to identify any use of correspondent accounts, and the implementation of risk-based measures to detect use of correspondent accounts – will not impose a significant additional economic burden upon small U.S. financial institutions.

C. Certification

For these reasons, FinCEN certifies that this final rulemaking would not have a significant impact on a substantial number of small businesses.

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[28] *See* E.O. 13722 "Blocking Property of the Government of North Korea and the Workers Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea" (2016) (https://www.gpo.gov/fdsys/pkg/FR-2016-03-18/pdf/FR-2016-03-18.pdf).

VII. Paperwork Reduction Act

The collection of information contained in this rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and has been assigned OMB Control Number 1506-0071. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

A. Information Collection Under the Fifth Special Measure

The notification requirement in section 1010.659(b)(3)(i)(A) is intended to aid cooperation from correspondent account holders in denying North Korea access to the U.S. financial system. The information required to be maintained by section 1010.659(b)(4)(i) will be used by federal agencies and certain self-regulatory organizations to verify compliance by covered financial institutions with the provisions of 31 CFR 1010.659. The collection of information is mandatory.

Description of Affected Financial Institutions: Banks, broker-dealers in securities, futures commission merchants and introducing brokers-commodities, money services businesses, and mutual funds.

Estimated Number of Affected Financial Institutions: 5,000.

Estimated Average Annual Burden in Hours Per Affected Financial Institution: The estimated average burden associated with the collection of information in this rule is one hour per affected financial institution.

Estimated Total Annual Burden: 5,000 hours.

VIII. Executive Order 12866

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this rule is not a "significant regulatory action" for purposes of Executive Order 12866.

List of Subjects in 31 CFR Part 1010

Administrative practice and procedure, banks and banking, brokers, counter-money laundering, counter-terrorism, foreign banking.

Authority and Issuance

For the reasons set forth in the preamble, part 1010, chapter X of title 31 of the Code of Federal Regulations, is amended as follows:

PART 1010—GENERAL PROVISIONS

1. The authority citation for part 1010 continues to read as follows:

   Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314, 5316-5332; Title III, sec. 314 Pub. L. 107-56, 115 Stat. 307; sec. 701 Pub. L. 114-74, 129 Stat. 599.

2. Subpart F of chapter X is amended by adding § 1010.659 to read as follows:

§ 1010.659 Special measures against North Korea

(a) Definitions. For purposes of this section:

(1) North Korean banking institution means any bank organized under North Korean law, or any agency, branch, or office located outside the United States of such a bank.

(2) North Korean financial institution means all branches, offices, or subsidiaries of any foreign financial institution, as defined at 31 CFR 1010.605(f), chartered or licensed by North Korea, wherever located, including any branches, offices, or subsidiaries of such a financial institution operating in any jurisdiction, and any branch or office within North Korea of any foreign financial institution.

(3) Foreign bank has the same meaning as provided in 31 CFR 1010.100(u).

(4) Correspondent account has the same meaning as provided in 31 CFR 1010.605(c)(1)(i).

(5) Covered financial institution has the same meaning as provided in 31 CFR 1010.605(e)(1).

(6) Subsidiary means a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

(b) Prohibition on accounts and due diligence requirements for covered financial institutions—(1) Opening or maintenance of correspondent accounts for a North Korean banking institution. A covered financial institution shall not open or maintain in the United States a correspondent account for, or on behalf of, a North Korean banking institution.

(2) Prohibition on use of correspondent accounts involving North Korean financial institutions. A covered financial institution shall take reasonable steps to not process a transaction for the correspondent account of a foreign bank in the United States if such a transaction involves a North Korean financial institution.

(3) Special due diligence of correspondent accounts to prohibit use. (i) A covered financial institution shall apply special due diligence to its foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving North Korean financial institutions. At a minimum, that special due diligence must include:

(A) Notifying those foreign correspondent account holders that the covered financial institution knows or has reason to believe provide services to a North Korean financial institution that such correspondents may not provide a North Korean financial institution with access to the correspondent account maintained at the covered financial institution; and

(B) Taking reasonable steps to identify any use of its foreign correspondent accounts by a North Korean financial institution, to the extent that such use can be determined from transactional records maintained in the covered financial institution's normal course of business.

(ii) A covered financial institution shall take a risk-based approach when deciding what, if any, other due diligence measures it reasonably must adopt to guard against the use of its foreign correspondent accounts to process transactions involving North Korean financial institutions.

(iii) A covered financial institution that knows or has reason to believe that a foreign bank's correspondent account has been or is being used to process transactions involving a North Korean financial institution shall take all appropriate steps to further investigate and prevent such access, including the notification of its correspondent account holder

under paragraph (b)(3)(i)(A) of this section and, where necessary, termination of the correspondent account.

(4) Recordkeeping and reporting. (i) A covered financial institution is required to document its compliance with the notice requirement set forth in paragraph (b)(3)(i)(A) of this section.

(ii) Nothing in this paragraph (b) shall require a covered financial institution to report any information not otherwise required to be reported by law or regulation.

Dated: November 4, 2016

/s /

Jamal El-Hindi
Acting Director
Financial Crimes Enforcement Network