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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: Notice of proposed rulemaking.

SUMMARY: In a finding, notice of which was published elsewhere in this issue of the *Federal Register* (“Notice of Finding”), the Director of FinCEN found that the Democratic People’s Republic of Korea (“North Korea”) is a jurisdiction of primary money laundering concern. FinCEN is issuing this notice of proposed rulemaking (“NPRM”) to propose to prohibit covered financial institutions from opening or maintaining a correspondent account in the United States for or on behalf of a North Korean banking institution and to prohibit the use of foreign banking institutions’ correspondent accounts at covered U.S. financial institutions to process transactions involving North Korean financial institutions.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by 1506-AB35, by any of the following methods:

- *Federal E-rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506-AB35 in the submission.
- *Mail:* The Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Include RIN 1506-AB35 in the body of the text. Please submit comments by one method only.
- Comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.
- *Inspection of comments:* FinCEN uses the electronic, Internet-accessible dockets at Regulations.gov as its complete, official-record docket; all hard copies of materials that should be in the docket, including public comments, are electronically scanned and placed there. *Federal Register* notices published by FinCEN are searchable by docket number, RIN, or document title, among other things, and the docket number, RIN, and title may be found at the beginning of such notices. In general, FinCEN will make all comments publicly available by posting them on <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at (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 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 the Director of 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.

II. Imposition of a Special Measure against North Korea as a Jurisdiction of Primary Money Laundering Concern

A. Proposed Imposition of Special Measure Five

As noticed in the June 2, 2016 *Federal Register*, on May 27, 2016, the Director of FinCEN found that North Korea is a jurisdiction of primary money laundering concern (the “Finding”).² Based upon that Finding, the Director of FinCEN is authorized to impose one or more special measures. Following the consideration of all factors relevant

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.

² Classified information used in support of a section 311 finding and special measure(s) may be submitted by FinCEN to a reviewing court *ex parte* and *in camera*. See section 376 of the Intelligence Authorization Act for fiscal year 2004, Public Law 108-177 (amending U.S.C. 5318A by adding new paragraph (f)).

to the Finding and to selecting the special measure proposed in this NPRM, the Director of FinCEN proposes to impose the fifth special measure authorized by section 5318A(b)(5), (the “fifth special measure”). This special measure would prohibit covered financial institutions from opening or maintaining a correspondent account in the United States for or on behalf of a North Korean banking institution. Covered financial institutions would also be prohibited from processing a transaction involving a North Korean financial institution through the United States correspondent account of a foreign banking institution.

In addition, covered financial institutions would be required under the BSA 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. These proposed requirements are discussed in more detail below. In connection with this action, FinCEN consulted with the Federal Reserve, representatives of the Federal functional regulators, the Department of Justice, and the Department of State, among others.

FinCEN requests comments on all aspects of its proposal to impose the fifth special measure, to include comments on the proposed 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.

B. Discussion of Section 311 Factors

In determining which special measures to implement to address the primary money laundering concern described in the associated Notice of Finding, FinCEN considered the following factors.

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

The international community has taken steps to address North Korea's illicit financial activity. Between 2006 and 2016 the United Nations Security Council has adopted multiple resolutions, 1718,³ 1874,⁴ 2087,⁵ 2094,⁶ and 2270⁷ which generally restrict North Korea's financial and operational activities related to its nuclear and missile programs and conventional arms sales. Most recently, in March 2016, the United Nations adopted United Nations Security Council Resolution (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: (i) prohibit North Korean banks from opening branches in their territory or engaging in certain correspondent relationships with these banks; (ii) terminate existing representative offices or subsidiaries, branches, and correspondent accounts with North Korean financial institutions; (iii) prohibit their financial institutions from opening new representative offices or subsidiaries, branches, or bank accounts in North Korea; and (iv) to 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.

³ See United Nations Security Council Resolution ("UNSCR") 1718 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1718\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1718(2006))).

⁴ See UNSCR 1874 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1874\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1874(2009))).

⁵ See UNSCR 2087 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2087\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2087(2013))).

⁶ See UNSCR 2094 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2094\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2094(2013))).

⁷ See UNSCR 2270 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2270\(2016\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2270(2016))).

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, 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 protect their financial sectors from the money laundering and financing of terrorism risks emanating from North Korea.⁸

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 fifth special measure proposed by this rulemaking would, after the effective date of the final rule, prohibit 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 would also prohibit the use of a foreign banking institution’s U.S. correspondent account to process a transaction involving a North Korean financial institution. As noted in FinCEN’s Notice of Finding, 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

⁸ See “FATF Public Statement – 19 February 2016,” Financial Action Task Force (<http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-february-2016.html>).

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.

Covered financial institutions would also potentially be 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. For direct correspondent relationships, this would involve a minimal burden in transmitting a one-time notice to certain foreign correspondent account holders concerning the prohibition on processing transactions involving a North Korean financial institution 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”) of the Department of the Treasury and to detect potential suspicious activity. To ensure that U.S. financial institutions are not being used unwittingly to process payments for, or on behalf of, a North Korean financial institution, directly or indirectly, some marginal additional burden will be incurred by U.S. financial institutions to be vigilant in their suspicious activity monitoring procedures. As explained in more detail in the section-by-section analysis below, 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 Proposed 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 generally 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 calls for countermeasures to address North Korea's AML/CFT deficiencies, it is unlikely that the imposition of the fifth special measure against North Korea would have a significant adverse systemic impact on the international payment, clearance, and settlement system. In light of the reasons for imposing this special measure, and based on available information, FinCEN does not believe that it would impose an undue burden on legitimate business activities.

4. The Effect of the Proposed 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 weapons of mass destruction or their delivery systems, and for other financial crimes enhances national security by making it more difficult for terrorists, 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, the proposed action would support and uphold U.S. national security and foreign policy goals. The imposition of the fifth special measure also would complement the U.S. Government's worldwide efforts to expose and disrupt international money laundering.

Therefore, pursuant to the Finding that North Korea is a jurisdiction of primary money laundering concern, and after conducting the required consultations and weighing the relevant factors, the Director of FinCEN proposes to impose the fifth special measure.

C. Consideration of Alternative Special Measures

As noted above, and in FinCEN's Notice of Finding, North Korea is subject to numerous United Nations Security Council Resolutions⁹ and U.S. sanctions authorities,¹⁰ and it has been consistently identified by the FATF for its AML deficiencies.¹¹ The U.N. has specifically called for enhanced monitoring of financial transactions to prevent the financing of North Korea's nuclear and ballistic missile programs and the freezing of any assets suspected of supporting these illicit programs. Additionally, 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. 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 Notice of Finding.

The special measures enumerated under Section 311 are prophylactic safeguards that defend the U.S. financial system from money laundering and terrorist financing.

⁹ See UNSCRs 1718, 1874, 2087, 2094, and 2270.

¹⁰ 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>).

¹¹ See "FATF Public Statement – 19 February 2016," Financial Action Task Force (<http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-february-2016.html>)

FinCEN may impose a range of these special measures in order to protect the U.S. financial system from these threats. To that end, special measures one through four impose additional recordkeeping, information collection, and information reporting requirements on covered U.S. financial institutions. The fifth special measure establishes prohibitions or conditions on opening or maintaining certain correspondent or payable-through accounts. North Korea's complicity in money laundering and illicit financial activity, and flagrant disregard for multiple UN resolutions related to the proliferation of weapons of mass destruction, constitute a threat to the integrity of the U.S. financial system. Further, in light of existing sanctions on North Korea, FinCEN is concerned that any condition, additional recordkeeping, or reporting requirement would not be an effective measure to safeguard the U.S. financial system. In the case of the jurisdiction of North Korea, FinCEN views the fifth special measure, with its prohibitions on the opening or maintenance of a correspondent account for or on behalf of a North Korean banking institution, and on the use of a foreign correspondent account to process a transaction involving a North Korean financial institution, as the special measure that can adequately protect the U.S. financial system from North Korean illicit financial activity.

III. Section-by-Section Analysis for Imposition of the Fifth Special Measure

The proposed rule would prohibit 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 would also prohibit the use of a foreign banking institution's U.S. correspondent account to process a transaction involving a North Korean financial institution. As a corollary to this prohibition, covered financial institutions would be required to screen their correspondents in a manner that is

reasonably designed to guard against use by foreign banking institutions to process transactions on behalf of a North Korean financial institution, including access through the use of indirect correspondent accounts held by those foreign institutions. A violation of the special measure could result in the imposition of civil monetary or criminal penalties.

1010.659(a) – Definitions

1. North Korean financial institution

A North Korean financial institution would mean any branch, office, or subsidiary of any foreign financial institution, as defined at 31 CFR 1010.605(f), chartered or licensed by North Korea, including any branches, offices, or subsidiaries of such financial institution operating in any jurisdiction, and any branch or office within North Korea of any foreign financial institution.

2. Foreign banking institution

Foreign banking institution has the same meaning as provided in 31 CFR § 1010.100(u).

3. Correspondent account

Section 1010.659(a)(3) of the proposed rule would define 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 proposed 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.¹²

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 proposed 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.¹³

4. Covered financial institution

Section 1010.659(a)(4) of the proposed rule would define “covered financial institution” with the same definition used in the final rule implementing the provisions of section 312 of the USA PATRIOT Act,¹⁴ which in general includes the following:

¹² See 31 CFR 1010.605(c)(2)(i).

¹³ See 31 CFR 1010.605(c)(2)(ii)-(iv).

¹⁴ See 31 CFR 1010.605(e)(1).

- 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.

5. Subsidiary

Section 1010.659(a)(5) of the proposed rule would define “subsidiary” as a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

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 the proposed rule would prohibit covered financial institutions from establishing, maintaining, administering, or managing in the United States any correspondent account for or on behalf of a North Korean banking institution. It would also prohibit processing of a transaction involving a North Korean

financial institution through the U.S. correspondent account of a foreign banking institution. These prohibitions would not supersede the blocking of property under any Executive order issued pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA) or 31 CFR Chapter V.

2. Special Due Diligence for Correspondent Accounts to Prohibit Use

As a corollary to the prohibitions set forth in section 1010.659(b)(1) and (2), section 1010.659(b)(3) of the proposed rule would require 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 establishing, maintaining, administering, or managing a correspondent account for, or on behalf of, a North Korean financial 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 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 would 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 one-time 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. FinCEN specifically solicits comments on the form and scope of the notice that would be required under the rule.

The special due diligence would also include implementing risk-based procedures designed to identify any use of correspondent accounts to process transactions involving North Korean financial institutions. A covered financial institution would be 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 would also be 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. Specifically, FinCEN is concerned that a North Korean financial institution may attempt to disguise its transactions by relying on types of payments and accounts, including 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 the proposed rule, a covered financial institution that suspects or has reason to suspect use of a correspondent account to process a transaction involving a North Korean financial institution must take all appropriate steps to attempt to verify and prevent such use, including 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. A covered financial institution may re-establish an account closed under the rule if it determines that the account will not be used to process transactions involving North Korean financial institutions. FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions take reasonable steps to prevent any processing of transactions involving North Korean financial institutions.

3. Recordkeeping and Reporting

Section 1010.659(b)(4) of the proposed rule would clarify 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).

IV. Request for Comments

FinCEN invites comments on all aspects of the proposal to impose the fifth special measure against North Korea and specifically invites comments on the following matters:

1. The finding that North Korea is a jurisdiction of primary money laundering concern;
2. The form and scope of the notice to certain correspondent account holders that would be required under the rule;
3. The appropriate scope of the proposed requirement for a covered financial institution to take reasonable steps to identify any use of its foreign correspondent accounts to process transactions involving North Korean financial institutions; and
4. The appropriate steps a covered financial institution should take once it identifies use of one of its foreign correspondent accounts to process transactions involving a North Korean financial institution.

V. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, 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 proposed 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 proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

A. Proposal to Prohibit Covered Financial Institutions from Opening or Maintaining Correspondent Accounts with Certain Foreign Banks under the Fifth Special Measure

1. 1. Estimate of the Number of Small Entities to Whom the Proposed 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.¹⁵ Of the estimated 6,192 banks, 80 percent have less than \$550,000,000 in assets and are considered small entities.¹⁶ Of the estimated 6,021 credit unions, 92.5 percent have less than \$550,000,000 in assets.¹⁷

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

¹⁵ *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)

¹⁶ 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.

¹⁷ 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.

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 as defined in this release.¹⁸ Based on SEC estimates, 17 percent of broker-dealers are classified as small entities for purposes of the RFA.¹⁹

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.²⁰ 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.²¹ Based on information provided by the National Futures Association (NFA), 95 percent of introducing brokers-

¹⁸ 17 CFR 240.0-10(c).

¹⁹ 76 FR 37572, 37602 (June 27, 2011) (the SEC estimates 871 small broker-dealers of the 5,063 total registered broker-dealers).

²⁰ 47 FR 18618, 18619 (Apr. 30, 1982).

²¹ SBA Size Standards at 28.

commodities dealers have less than \$35.5 million in adjusted net capital and are considered to be small entities.

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."²² Based on SEC estimates, seven percent of mutual funds are classified as "small entities" for purposes of the RFA under this definition.²³

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.

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

The proposed fifth special measure would require 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 would also

²² 17 CFR 270.0-10.

²³ 78 FR 23637, 23658 (April 19, 2013).

be required to take reasonable measures to detect use of their correspondent accounts to process transactions involving North Korean financial institutions.

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.²⁴ 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 called out by the FATF for its AML deficiencies. This has limited the number of foreign banking institutions that maintain ties or accounts with North Korean banks. Thus, the special due diligence that would be required under the BSA by the imposition of the fifth special measure – *i.e.*, the one-time 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 – would not impose a significant additional economic burden upon small U.S. financial institutions.

²⁴ 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>).

B. Certification:

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

FinCEN invites comments from members of the public who believe there would be a significant economic impact on small entities from the imposition of the fifth special measure regarding North Korea.

VI. Paperwork Reduction Act

The collection of information contained in this proposed 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)). Comments on the collection of information should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, D.C. 20503 (or by e-mail to oir_submission@omb.eop.gov) with a copy to FinCEN by mail or e-mail at the addresses previously specified. Comments should be submitted by one method only. Comments on the collection of information should be received by [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. In accordance with the requirements of the Paperwork Reduction Act and its implementing regulations, 5 CFR 1320, the following information concerning the collection of information as required by 31 CFR 1010.659 is presented to assist those persons wishing to comment on the information collection.

A. Proposed Information Collection Under the Fifth Special Measure

The notification requirement in section 1010.659(b)(3)(i) 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) would 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 would be 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 proposed rule is one hour per affected financial institution.

Estimated Total Annual Burden: 5,000 hours.

FinCEN specifically invites comments on: (a) whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information would have practical utility; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology; and

(e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to report the information.

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.

VII. 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 the proposed 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 proposed to be amended as follows:

PART 1010—GENERAL PROVISIONS

1. The authority citation for part 1010 is revised 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.

2. Add § 1010.659 to read as follows:

§ 1010.659 Special measures against North Korea.

(a) Definitions. For purposes of this section:

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

(2) Foreign banking institution has the same meaning as provided in § 1010.100(u).

(3) Correspondent account has the same meaning as provided in § 1010.605(c)(1)(i).

(4) Covered financial institution has the same meaning as provided in § 1010.605(e)(1).

(5) 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. 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. A covered financial institution shall not process a transaction for the correspondent account of a foreign banking institution in the United States if such 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 banking institution'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.

Jamal El-Hindi
Acting Director
Financial Crimes Enforcement Network

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