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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506-AB38

Imposition of Special Measure against Bank of Dandong as a Financial Institution of Primary Money Laundering Concern

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

ACTION: Final rule.

SUMMARY: FinCEN is issuing this final rule to prohibit covered U.S. financial institutions from opening or maintaining a correspondent account for, or on behalf of, Bank of Dandong Co., Ltd. (Bank of Dandong) as a financial institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act (Section 311). The rule further requires covered U.S. financial institutions to take reasonable steps not to process transactions for the correspondent account of a foreign banking institution in the United States if such a transaction involves Bank of Dandong. It also requires covered institutions to apply special due diligence to their foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving Bank of Dandong.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

SUPPLEMENTARY INFORMATION:

I. Background

A. 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 protect 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

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.

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. 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 institution by U.S. financial institutions. Section 311 identifies factors for the Secretary to consider and requires consultations with certain 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 special measures.

II. Background on North Korea Sanctions Evasion and Bank of Dandong

A. North Korea’s Evasion of Sanctions

North Korea continues to advance its nuclear and ballistic missile programs despite international censure and U.S. and international sanctions. In response to North Korea’s continued actions to proliferate weapons of mass destruction (WMDs), the United Nations Security Council (UNSC) has issued a number of United Nations Security Council resolutions (UNSCRs), including 1718 (2006), 1874 (2009), 2087 (2013), 2094 (2013), 2270 (2016), 2321 (2016), 2371 (2017), and 2375 (2017) that restrict North Korea’s financial and operational activities related to its nuclear and ballistic missile programs. Additionally, Executive Orders 13466, 13551, 13570, 13687, 13722, and 13810 have been issued to impose economic sanctions on North Korea pursuant to the International Emergency Economic Powers Act, and the U.S. Department of the Treasury

has designated North Korean persons for asset freezes pursuant to other Executive Orders, such as Executive Order 13382, which targets WMD proliferators worldwide.

To further protect the United States from North Korea's illicit financial activity, FinCEN has issued multiple advisories since 2005 detailing its concerns surrounding the deceptive financial practices used by North Korea and North Korean entities and called on U.S. financial institutions to take appropriate risk mitigation measures. Moreover, on November 9, 2016, FinCEN finalized a rule under Section 311 prohibiting the opening or maintaining of correspondent accounts in the United States by covered financial institutions for, or on behalf of, North Korean banks.² The final rule also requires U.S. financial institutions to apply additional due diligence measures in order to prevent North Korean financial institutions from gaining improper indirect access to U.S. correspondent accounts. The notice of finding associated with the final rule highlighted North Korea's use of state-controlled financial institutions and front companies to conduct international financial transactions that, among other things, support the proliferation of its WMD and conventional weapons programs.³ As explained below, Bank of Dandong facilitates such activity through the U.S. financial system.

B. Bank of Dandong

Established in 1997, Bank of Dandong is a small commercial bank located in Dandong, China that offers domestic and international financial services to both individuals and businesses. According to commercial database research, Bank of Dandong is ranked as the 148th-largest financial institution out of a total of 196 financial institutions in China's banking sector. As discussed further below, FinCEN is concerned

² 81 FR 78715 (November 9, 2016).

³ 81 FR 35441 (June 2, 2016).

that Bank of Dandong serves as a financial conduit between North Korea and the U.S. and international financial systems in violation of U.S. and UN sanctions.

III. FinCEN's Section 311 Rulemaking Regarding Bank of Dandong

A. Finding Regarding Bank of Dandong

In a Notice of Proposed Rulemaking (NPRM) published in the Federal Register on July 7, 2017, FinCEN found that reasonable grounds exist for concluding that Bank of Dandong is a financial institution of primary money laundering concern pursuant to 31 U.S.C. 5318A.⁴

As described in the NPRM, FinCEN believes that Bank of Dandong serves as a gateway for North Korea to access the U.S. and international financial systems despite U.S. and UN sanctions. Increasing U.S. and international sanctions on North Korea have caused most banks worldwide to sever their ties with North Korean banks, impeding North Korea's ability to gain direct access to the global financial system. As a result, North Korea uses front companies and banks outside North Korea to conduct financial transactions, including transactions in support of its WMD and conventional weapons programs. For example, as of mid-February 2016, North Korea was using bank accounts under false names and conducting financial transactions through banks located in China, Hong Kong, and various Southeast Asian countries. The primary bank in China was Bank of Dandong.

In early 2016, accounts at Bank of Dandong were used to facilitate millions of dollars of transactions on behalf of companies involved in the procurement of ballistic missile technology. This includes facilitating financial activity for North Korean entities

⁴ 82 FR 31537 (July 7, 2017).

designated by the United States and listed by the United Nations (UN) for WMD proliferation, as well as for front companies acting on their behalf.

Bank of Dandong has, for example, facilitated financial activity for Korea Mining Development Trading Corporation (KOMID), a U.S.- and UN-designated entity. As of early 2016, a front company for KOMID maintained multiple bank accounts with Bank of Dandong. The President blocked KOMID by listing it in the Annex of Executive Order 13382 in 2005, and the Office of Foreign Assets Control (OFAC) designated KOMID pursuant to Executive Order 13687 in January 2015 for being North Korea's primary arms dealer and its main exporter of goods and equipment related to ballistic missiles and conventional weapons.

FinCEN is concerned that Bank of Dandong uses the U.S. financial system to facilitate financial activity for Korea Kwangson Banking Corporation (KKBC) and KOMID, as well as other entities connected to North Korea's WMD and ballistic missile programs. KKBC is a U.S.- and UN-designated North Korean bank that has provided financial services in support of WMD proliferators. For example, based on FinCEN's analysis of financial transactional data provided to FinCEN by U.S. financial institutions pursuant to the BSA as well as other information available to the agency, FinCEN assesses that at least 17 percent of Bank of Dandong customer transactions conducted through the Bank of Dandong's U.S. correspondent accounts from May 2012 to May 2015 were conducted by companies that have transacted with, or on behalf of, U.S.- and UN-sanctioned North Korean entities, including designated North Korean financial institutions and WMD proliferators. In addition, U.S. banks have identified a substantial amount of suspicious activity processed by Bank of Dandong, including: (i) transactions

that have no apparent economic, lawful, or business purpose and may be tied to sanctions evasion; (ii) transactions that have a possible North Korean nexus and include activity between unidentified companies and individuals and behavior indicative of shell company activity; and (iii) transactions that include transfers from offshore accounts with apparent shell companies that are domiciled in jurisdictions known for their financial secrecy and banking in another country.

FinCEN is also concerned that, until recently, an entity designated by OFAC for its ties to North Korea's WMD proliferation maintained an ownership stake in Bank of Dandong. Specifically, this entity, Dandong Hongxiang Industrial Development Co. Ltd. (DHID), maintained a minority ownership interest in Bank of Dandong until December 2016. The United States designated DHID in 2016 for acting for, or on behalf of, KKBC. KKBC maintained a direct relationship with Bank of Dandong since approximately 2013. FinCEN believes that DHID's ownership stake in Bank of Dandong allowed DHID to access the U.S. financial system through the bank. Based on FinCEN's analysis of financial transactional data provided to FinCEN by U.S. financial institutions pursuant to the BSA, Bank of Dandong processed approximately \$56 million through U.S. banks for DHID between October 2012 and December 2014. Even though DHID may no longer maintain an ownership stake in Bank of Dandong, FinCEN is concerned that the close relationship between the two entities helped establish Bank of Dandong as a prime conduit for North Korean activity.

B. Notice of Proposed Rulemaking

In the NPRM, FinCEN (1) proposed to prohibit covered financial institutions from opening or maintaining a correspondent account in the United States for, or on

behalf of, Bank of Dandong; (2) proposed to prohibit covered financial institutions from processing a transaction involving Bank of Dandong 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 Bank of Dandong.⁵ The comment period for the NPRM closed on September 5, 2017.

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

C. Subsequent Developments

FinCEN is not aware of any steps taken by Bank of Dandong or its relevant banking regulators to address the money laundering issues of concern at Bank of Dandong that were noted in the NPRM.

D. Consideration of Comments

Following the issuance of the NPRM on July 7, 2017, FinCEN opened a comment period that closed on September 5, 2017. FinCEN received two substantive comments; they are described below, along with FinCEN's response.

1. Comment Purporting to be from Bank of Dandong

In response to the NPRM, FinCEN received a comment from an anonymous submitter that was signed "Bank of Dandong." Because no further information was

⁵ 82 FR 31543 (July 7, 2017).

provided, FinCEN is unable to confirm whether the comment was, in fact, submitted by Bank of Dandong. The submitter disagreed with FinCEN's determination in the NPRM and stated "we do not believe that Bank of Dandong is being used to facilitate or promote money laundering, including by entities involved in the proliferation of weapons of mass destruction or missiles." The submitter claimed to take FinCEN's "allegations very seriously," and further stated that "we immediately began to research the relevant facts surrounding the allegations made in the NPRM." The submitter stated that it had found, "during our preliminary review that certain key aspects of the allegations do not match the reality of the situation." For these reasons, the submitter requested that FinCEN hold this matter "in abeyance and not act on the NPRM" until the "misunderstanding about our bank and our business have been corrected."

Regardless of the true identity of the commenter, the comment does not allay FinCEN's concerns about Bank of Dandong. As outlined in the NPRM, FinCEN has a reasonable basis for its concern that Bank of Dandong is being used for money laundering and proliferation financing. Although the submitter has claimed to have conducted a preliminary review that differs from FinCEN's findings in certain key aspects, the submitter has not provided any specific information or documentation regarding the review, or even identified any of the key aspects that it claims to have found to be contrary to the NPRM.

2. Comment from SIFMA

The Securities and Financial Markets Association (SIFMA) submitted a comment that requested several clarifications and modifications to the proposed rulemaking with respect to Bank of Dandong. In particular, SIFMA requested that FinCEN: (1) identify

all known subsidiaries, branches, and offices of Bank of Dandong; (2) modify the proposed rule text to explicitly provide that the reasonable, risk-based procedures apply to identifying branches, offices, and subsidiaries of Bank of Dandong; (3) eliminate the notice provision of the special due diligence requirement; and (4) eliminate a reference to “agent” from the definition of “Bank of Dandong.”

SIFMA requested that FinCEN amend the proposed regulatory text to explicitly provide that the reasonable, risk-based procedures apply to identifying branches, offices, and subsidiaries of Bank of Dandong. FinCEN believes that the current regulatory text is sufficient, as the definition of Bank of Dandong includes the branches, offices, and subsidiaries of Bank of Dandong. While FinCEN does not believe that it is necessary to amend the text of the rule, FinCEN agrees that covered financial institutions should use reasonable, risk-based procedures in identifying branches, offices, and subsidiaries of Bank of Dandong.

SIFMA has requested that FinCEN eliminate the requirement to provide notice to foreign correspondent accounts, arguing that compliance with the requirement would require substantial time and expense involved in providing notice to foreign banks. While providing the required notice does impose a cost on U.S. financial institutions, FinCEN assesses this burden at one hour per institution. Additionally, FinCEN notes that the requirement applies only to those covered financial institutions that know or have reason to believe that their foreign correspondents are transacting with Bank of Dandong. FinCEN does not consider this to be an undue burden. In the NPRM, FinCEN addressed the burden associated with the rule and determined that providing the notice to foreign institutions would not impose a significant additional economic burden upon small U.S.

financial institutions. FinCEN believes that the compliance burden associated with the rule is justified by the threat Bank of Dandong poses to the U.S. financial system.

Lastly, SIFMA argues that FinCEN has not previously identified “agents” in a special measure currently in effect against a financial institution, and that “agent” is a legal term with different meanings, and its intended use in the context of Bank of Dandong is unclear. Additionally, SIFMA argues that it is unclear how financial institutions should interpret this definition, or how an agent would be identified.

In connection with finalizing this rulemaking, and in light of the robust U.S. and international sanctions targeting illicit North Korean activity, FinCEN believes that the prohibitions set forth in the final rule are sufficient to protect the U.S. financial system from the threat posed by Bank of Dandong. In addition, the U.S. Department of the Treasury retains the ability to target any financial institution or others that might aid Bank of Dandong in evading the prohibitions set forth in the final rule. As such, in this final rule, FinCEN has removed “agents” from the definition of “Bank of Dandong.”

Therefore, it is not necessary for FinCEN to address the points that SIFMA has raised with regard to the use of this term. Regarding SIFMA’s request that FinCEN provide a list of known subsidiaries, branches, and offices of Bank of Dandong, FinCEN notes that commercially available information listing the known subsidiaries, branches, and offices of Bank of Dandong was provided and posted along with the NPRM for public consideration during the comment period. This information appears as Exhibits 2 and 41 posted on www.regulations.gov concerning the Bank of Dandong NPRM.

E. Summary of FinCEN's Ongoing Concerns Regarding Bank of Dandong

After considering comments received from the public, as well as other information available to the agency, including both public and non-public information, FinCEN is issuing this rule imposing a prohibition on U.S. financial institutions from opening or maintaining a correspondent account for, or on behalf of, Bank of Dandong. The information available to FinCEN provides reason to conclude that the money laundering risks posed by Bank of Dandong have not been mitigated, and that Bank of Dandong has not addressed FinCEN's concerns as described in the NPRM. FinCEN thus finds that Bank of Dandong continues to be a financial institution of primary money laundering concern.

IV. Imposition of a Special Measure Against Bank of Dandong as a Financial Institution of Primary Money Laundering Concern

Based upon this finding, FinCEN is authorized to impose one or more special measures. Following the required consultations and the consideration of all relevant factors discussed in the NPRM, FinCEN proposed a prohibition under the fifth special measure.⁶

After the comment period closed, FinCEN considered all of the special measures, as well as measures short of a prohibition, and has concluded that a prohibition under the fifth special measure is still the appropriate choice. Consistent with the finding that Bank of Dandong is a financial institution of primary money laundering concern, and in consideration of additional relevant factors, this final rule imposes a prohibition on the opening or maintaining of correspondent accounts by covered financial institutions for, or

⁶ Throughout the rulemaking process, including in the issuance of this final rule, FinCEN has consulted with relevant departments and agencies in accordance with 31 U.S.C. 5318A.

on behalf of, Bank of Dandong. This prohibition will help guard against the money laundering and WMD proliferation finance risks to the U.S. financial system posed by Bank of Dandong, as identified in the NPRM and this final rule.

A. Discussion of Section 311 Factors

In determining which special measure to implement to address the finding that Bank of Dandong is of primary money laundering concern described in the NPRM, FinCEN considered the following factors:

1. Whether Similar Action Has Been or Will Be Taken by Other Nations or Multilateral Groups Against Bank of Dandong

Subsequent to FinCEN's finding on July 7, 2017, the Government of Japan designated Bank of Dandong on July 28, 2017. Additionally, the Government of South Korea issued an advisory on August 28, 2017, warning South Korean firms about the dangers of doing business with Bank of Dandong, and that conducting business with the bank may restrict their access to the U.S. financial system.

Furthermore, FinCEN's action is consistent with steps taken by the international community to address illicit financial activity tied to North Korea. Between 2006 and 2017, the United Nations Security Council has adopted multiple resolutions, 1718,⁷ 1874,⁸ 2087,⁹ 2094,¹⁰ 2270,¹¹ 2321,¹² 2371,¹³ and 2375¹⁴ which generally restrict North Korea's financial and operational activities related to its nuclear and missile programs

⁷ 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))).

⁸ 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))).

⁹ 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))).

¹⁰ 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))).

¹¹ 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))).

¹² See UNSCR 2321 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2321\(2016\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2321(2016))).

¹³ See UNSCR 2371 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2371\(2017\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2371(2017))).

¹⁴ See UNSCR 2375 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2375\(2017\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2375(2017))).

and conventional arms sales. In particular, 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, 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.¹⁵ Additionally, UNSCR 2321, unanimously adopted by the UNSC in November 2016, requires, among other things, nations to close existing representative offices or subsidiaries, branches, or bank accounts in North Korea within 90 days, and expel individuals working on behalf of, or at the direction of, a North Korean bank or financial institution.¹⁶ UNSCR 2371, unanimously adopted by the UNSC in August 2017, requires, among other things, nations to prohibit the clearing of funds on behalf of North Korea through their territories.¹⁷ UNSCR 2375, unanimously adopted by the UNSC in September 2017, prohibits, among other things, the opening, maintenance, and operation of all joint ventures or cooperative entities, new and existing, with DPRK entities.¹⁸

¹⁵ See UNSCR 2270.

¹⁶ See UNSCR 2321.

¹⁷ See UNSCR 2371.

¹⁸ See UNSCR 2375.

Similarly, the Financial Action Task Force (FATF) has emphasized its concerns regarding the threat posed by North Korea's illicit activities related to the proliferation of WMDs and related financing. Reiterating the UNSCR requirements, the FATF called upon its members and urged all jurisdictions to take the necessary measures to close existing branches, subsidiaries, and representative offices of North Korean banks within their territories and terminate correspondent relationships with North Korean banks, where required by relevant UNSCRs.

Despite these actions, North Korea continues to access the U.S. and international financial systems through front companies and other surreptitious means. It is necessary to protect the U.S. financial system, directly and indirectly, from banks like Bank of Dandong that facilitate such access. Moreover, given the interconnectedness of the global financial system, the potential for Bank of Dandong to access the U.S. financial system indirectly, including through the use of nested correspondent accounts, exposes the U.S. financial system to the risks associated with conducting transactions with entities operating for, or on behalf of, North Korea.

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

A prohibition under the fifth special measure should not cause a significant competitive disadvantage or place an undue cost or burden on U.S. financial institutions. Pursuant to sanctions administered by OFAC, U.S. financial institutions are currently subject to a range of prohibitions related to financial activity involving North Korea. Accordingly, a prohibition on covered financial institutions from opening or maintaining

correspondent accounts for, or on behalf of, a bank that facilitates North Korean financial activity should not create any competitive disadvantage for U.S. financial institutions.

Similarly, the final rule's due diligence obligations should not create any undue costs or burden on U.S. financial institutions. U.S. financial institutions already generally have systems in place to screen transactions in order to identify and report suspicious activity and comply with the sanctions programs administered by OFAC. Institutions can modify these systems to detect transactions involving Bank of Dandong. While there may be some additional burden in conducting due diligence on foreign correspondent account holders and notifying them of the prohibition (as described below), any such burden will likely be minimal, and certainly not undue, given the national security threat posed by Bank of Dandong's facilitation of activity for front companies associated with North Korea, some of which are involved in activities that support the proliferation of WMD or missiles.

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 Bank of Dandong

Bank of Dandong is a relatively small financial institution in China's banking sector, is not a major participant in the international payment system, and is not relied upon by the international banking community for clearance or settlement services. Therefore, a prohibition under the fifth special measure with respect to Bank of Dandong will not have an adverse systemic impact on the international payment, clearance, and settlement system.

FinCEN also considered the extent to which this action could have an impact on the legitimate business activities of Bank of Dandong and has concluded that the need to

protect the U.S. financial system from banks that facilitate North Korea's illicit financial activity strongly outweighs any such impact. Financial transactional data provided to FinCEN by U.S. financial institutions pursuant to the BSA indicates that Bank of Dandong's financial activity conducted through its U.S. correspondent accounts has consisted largely of letters of credit satisfaction, invoice payments, currency exchange activity, and transfers between individuals, which could be indicative of legitimate business activity. Nonetheless, FinCEN assesses that this financial activity also includes transactions conducted by companies that have transacted with, or on behalf of, entities that threaten the national security of the United States.

The NPRM stated that Bank of Dandong maintained euro, Japanese yen, Hong Kong dollar, pound sterling, and Australian dollar correspondent accounts. Subsequent to the publication of the NPRM, commercially available databases indicate that Bank of Dandong may no longer have correspondent accounts in any currency. While these accounts may no longer continue to exist, the fifth special measure would not prevent Bank of Dandong from conducting legitimate business activities in foreign currencies so long as such activity does not involve a correspondent account maintained in the United States.

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

Excluding from the U.S. financial system foreign banks that serve as conduits for significant money laundering activity, for the financing of WMDs 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.

North Korea is a top national security concern, and Bank of Dandong has been used to

facilitate financial activity related to North Korean entities designated by the United States and United Nations for their involvement in WMD proliferation. Imposing this rule serves as an additional measure to prevent North Korea from accessing the U.S. financial system and will both support and uphold U.S. national security and foreign policy goals. A prohibition under the fifth special measure will also complement the U.S. Government's worldwide efforts to expose and disrupt international money laundering.

B. Consideration of Alternative Special Measures

Under Section 311, special measures one through four enable FinCEN to impose additional recordkeeping, information collection, and information reporting requirements on covered financial institutions. The fifth special measure enables FinCEN to impose conditions as an alternative to a prohibition on the opening or maintaining of correspondent accounts. FinCEN considered these alternatives to a prohibition under the fifth special measure, but FinCEN believes that a prohibition under the fifth special measure will most effectively safeguard the U.S. financial system from the illicit finance risks posed by Bank of Dandong.

North Korea is subject to numerous U.S. and UN sanctions, and it has also been consistently identified by the Financial Action Task Force for its anti-money laundering deficiencies. Furthermore, FinCEN has issued multiple advisories since 2005 detailing its concerns surrounding 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.

Despite these measures, North Korea 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. Given Bank of Dandong's apparent disregard for numerous international calls to prevent North Korean illicit financial activity, FinCEN does not believe that any condition, additional recordkeeping requirement, or reporting requirement would be an effective measure to safeguard the U.S. financial system. Such measures will not prevent Bank of Dandong from accessing, directly or indirectly, the correspondent accounts of U.S. financial institutions, thus leaving the U.S. financial system vulnerable to processing illicit transfers that pose a national security risk. In addition, no recordkeeping requirement or conditions on correspondent accounts would be sufficient to guard against the risks posed by a bank that processes transactions that are designed to obscure the involvement of North Korea, and are ultimately for the benefit of sanctioned entities. Therefore, a prohibition under the fifth special measure is the only special measure that can adequately protect the U.S. financial system from the illicit finance risks posed by Bank of Dandong.

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

1010.660(a) – Definitions

1. Bank of Dandong

The final rule defines “Bank of Dandong” to mean all subsidiaries, branches, and offices of Bank of Dandong Co., Ltd. operating in any jurisdiction.

2. Correspondent account

The final rule defines “Correspondent account” to have the same meaning as the definition contained in 31 CFR 1010.605(c)(1)(ii). 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 final 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.¹⁹ Under this definition, “payable through accounts” are a type of correspondent account.

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 final 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.²⁰

3. Covered financial institution

The final 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, 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;

¹⁹ See 31 CFR 1010.605(c)(2)(i).

²⁰ See 31 CFR 1010.605(c)(2)(ii)-(iv).

- 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.

4. Foreign banking institution

The final rule defines “foreign banking institution” to mean a bank organized under foreign law, or an agency, branch, or office located outside the United States of a bank. The term does not include an agent, agency, branch, or office within the United States of a bank organized under foreign law. This is consistent with the definition of “foreign bank” under 31 CFR 1010.100(u).

5. Subsidiary

The final rule defines “subsidiary” to mean a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

1010.660(b) – Prohibition on Accounts and Due Diligence Requirements for Covered Financial Institutions

1. Prohibition on Opening or Maintaining Correspondent Accounts

Section 1010.660(b)(1) and (2) of this final rule prohibits covered financial institutions from opening or maintaining in the United States a correspondent account for, or on behalf of, Bank of Dandong. It also requires covered financial institutions to take reasonable steps not to process a transaction for the correspondent account of a foreign banking institution in the United States if such a transaction involves Bank of Dandong. Such reasonable steps are described in § 1010.660(b)(3), which sets forth the special due diligence requirements a covered financial institution will be required to take when it knows or has reason to believe that a transaction involves Bank of Dandong.

2. Special Due Diligence for Correspondent Accounts

As a corollary to the prohibition set forth in § 1010.660(b)(1) and (2), § 1010.660(b)(3) of the final rule requires covered financial institutions to apply special due diligence to all of their foreign correspondent accounts that is reasonably designed to guard against such accounts being used to process transactions involving Bank of Dandong. As part of that special due diligence, covered financial institutions are required to notify those foreign correspondent account holders that the covered financial institutions know or have reason to believe provide services to Bank of Dandong that such correspondents may not provide Bank of Dandong 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 1010.660, we are prohibited

from opening or maintaining in the United States a correspondent account for, or on behalf of, Bank of Dandong. The regulations also require us to notify you that you may not provide Bank of Dandong, including any of its subsidiaries, branches, and offices 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 Bank of Dandong, including any of its subsidiaries, branches, and offices we will be required to take appropriate steps to prevent such access, including terminating your account.

The purpose of the notice requirement is to aid cooperation with correspondent account holders in preventing transactions involving Bank of Dandong 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 Bank of Dandong.

Special due diligence also includes implementing risk-based procedures designed to identify any use of correspondent accounts to process transactions involving Bank of Dandong. A covered financial institution is expected to apply an appropriate screening mechanism to identify a funds transfer order that on its face listed Bank of Dandong as the financial institution of the originator or beneficiary, or otherwise referenced Bank of Dandong 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.

3. Recordkeeping and Reporting

Section 1010.660(b)(4) of the final rule clarifies that 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 described above.

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.²¹ Of the estimated 5,787 banks, 99 percent of institutions have less than \$550,000,000 in assets and are considered small

²¹ *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)

entities.²² Of the estimated 5,696 credit unions, 91 percent have less than \$550,000,000 in assets.²³

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 as defined in this release.²⁴ Based on SEC estimates, 17 percent of broker-dealers are classified as small entities for purposes of the RFA.²⁵

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.

²² Federal Deposit Insurance Corporation, *Find an Institution*, <http://www5.fdic.gov/idasp/advSearchLanding.asp>; *select* Status Dates Financials: Total Assets, *type* Equal or less than \$: "550000,000" and *select* Find.

²³ 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.

²⁴ 17 CFR 240.0-10(c).

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

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.²⁶ 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.²⁷ 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.

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

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

²⁷ SBA Size Standards at 28.

year.”²⁸ Based on SEC estimates, seven percent of mutual funds are classified as “small entities” for purposes of the RFA under this definition.²⁹

As noted above, 99 percent of banks, 91 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 prohibition under the fifth special measure could require covered financial institutions to provide a notification intended to aid cooperation from foreign correspondent account holders in preventing transactions involving Bank of Dandong 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 Bank of Dandong. 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. The systems that U.S. financial institutions have in place to comply with these requirements can easily be modified to adapt to this final rule. Thus, the special due diligence that is required under the final rule – *i.e.*, preventing the processing of transactions involving Bank of Dandong and the transmittal of notice to certain correspondent account holders – does not impose a significant additional economic burden upon small U.S. financial institutions.

²⁸ 17 CFR 270.0-10.

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

B. Certification:

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

VII. Paperwork Reduction Act

The collection of information contained in this rule is being submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and has been assigned OMB Control Number 1506-0072. 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 § 1010.660(b)(3)(i)(A) is intended to aid cooperation from correspondent account holders in denying Bank of Dandong access to the U.S. financial system. The information required to be maintained by § 1010.660(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 1010.660. 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: 5,787.

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: 5,787 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 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; sec. 701, Pub. L. 114-74, 129 Stat. 599.

2. Add § 1010.660 to read as follows:

§ 1010.660 Special measures against Bank of Dandong.

- (a) Definitions. For purposes of this section:

(1) Bank of Dandong means all subsidiaries, branches, and offices of Bank of Dandong Co., Ltd. operating in any jurisdiction.

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

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

(4) Foreign banking institution means a bank organized under foreign law, or an agency, branch, or office located outside the United States of a bank. The term does not include an agent, agency, branch, or office within the United States of a bank organized under foreign law.

(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 maintaining correspondent accounts for Bank of Dandong. A covered financial institution shall not open or maintain in the United States a correspondent account for, or on behalf of, Bank of Dandong.

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

(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 Bank of Dandong. 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 Bank of Dandong that such correspondents may not provide Bank of Dandong 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 Bank of Dandong, 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 Bank of Dandong.

(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 Bank of Dandong 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 2, 2017.

Jamal El-Hindi,
Acting Director,
Financial Crimes Enforcement Network.

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