

U.S. Sanctions Against North Korea: Implications for Chinese Banks

美国制裁朝鲜：对中资银行的影响

This Dorsey Alert is an update of our earlier Alert from September 19, 2017. In our original Alert, we noted the possibility that the Trump Administration might impose additional sanctions against North Korea and related parties—including the possibility that it might impose “secondary sanctions” on Chinese banks and other foreign banks that continue to conduct banking transactions with North Korea.

本德汇律师事务所客户提示是对我们此前 2017 年 9 月 19 日的提示的更新。在上次的客户提示中，我们指出，特朗普政府可能会针对朝鲜及相关方实施进一步制裁，包括可能针对继续与朝鲜进行银行交易的中资银行和其他外国银行实施“二级制裁”。

On September 21, 2017, the Trump Administration announced wide-ranging new sanctions against North Korea, and it laid the groundwork for potentially imposing secondary sanctions on Chinese and other foreign banks.

2017 年 9 月 21 日，特朗普政府宣布将对朝鲜实施范围广泛的一系列新制裁，而且为潜在地向中国和其他外国银行施加二级制裁奠定了基础。

This updated Alert summarizes the amended U.S. sanctions in effect against North Korea and related persons and entities. In addition, this updated Alert provides recommendations for anticipating and responding to possible investigations by the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) and other U.S. governmental agencies. Importantly, our recommendations remain unchanged from our original alert.

本次更新后的客户提示概述了当前美国针对朝鲜以及相关人士和实体的修订后的制裁措施，包括联合国安理会 2017 年 9 月 11 日通过的升级制裁措施。此外，本客户提示就如何预见美国财政部海外资产控制办公室及其他美国政府机构可能发起的调查，以及如何应对这些调查，提出了我们的建议。重要的是，我们的建议和上次提示相比并未发生任何变化。

1. Introduction

引言

As a result of North Korea’s ongoing efforts to develop nuclear weapons, the United States has formally enhanced and expanded its sanctions program against the North Korean government and specially designated North Korean persons and entities. Of particular relevance to foreign banks, the Trump Administration has indicated that it does not intend to stop with primary sanctions. Instead, the Trump Administration has indicated its intention to impose what are known as “secondary sanctions” against foreign persons and entities engaged in otherwise lawful transactional activity with North Korean-related parties, similar to the secondary sanctions that the U.S. imposed on non-U.S. persons doing business with Iran.

由于朝鲜不断努力发展核武器，美国已经正式加强和扩大对朝鲜政府以及特别指定的朝鲜人士及实体的制裁。特别值得外国银行关注的是，特朗普政府表示，其制裁手段将不仅限于已经实施的主要制裁。相反，特朗普政府已经表态，打算另行针对与朝鲜相关各方从事其他方面均为合法的交易活动的外国人士及实体实施所谓“二级制裁”，这些制裁类似于美国此前针对与伊朗有业务往来的非美国人士实施的二级制裁。

By an Executive Order dated September 21, 2017, the Trump Administration issued new sanctions against North Korea and related persons and entities. Section 4 of the Executive Order states that secondary sanctions, discussed below, can be imposed by the U.S. government on non-U.S. financial institutions that continue to conduct banking relationships with North Korea and related parties in a manner that violates the amended U.S. sanctions. The Executive Order may be found [here](#).

通过 2017 年 9 月 21 日的一项行政命令，特朗普政府发布了针对朝鲜及其相关人士和实体的新制裁措施。该行政命令的第四条规定，如果非美国的金融机构以违反修订后的美国制裁措施的方式继续与朝鲜及其相关方维持银行业务关系，美国政府可以向其施加下述的二级制裁。该行政命令的全文请见[这里](#)。

The Trump Administration's Executive Order could result in significant problems for foreign banks with operations in the U.S. and elsewhere. Foreign banks based in countries—especially China—that have diplomatic relations with North Korea may soon find themselves caught in a difficult situation, trying to balance the competing foreign policy objectives of countries that have differing diplomatic approaches to North Korea. Specifically, Chinese banks that become subject to secondary sanctions will not only risk the loss of access to the U.S. banking and payments systems, but also the loss of international correspondent relationships with other foreign banks that will terminate those relationships.

特朗普政府的行政命令可能给在美国和其他国家经营的外资银行带来重大问题。总部位于与朝鲜有外交关系的国家的银行—尤其是中资银行—可能很快会发现自己陷入困境，因为相关各国针对朝鲜采取不同的外交立场，其相互抵触的外交政策目标导致这些银行左右为难、进退维谷。具体来说，成为二级制裁对象的中资银行不仅面临失去接入美国银行和支付系统的风险，而且可能丧失与某些其他外国银行之间的国际代理行关系。

2. An Overview of the U.S. Sanctions Regime

美国制裁制度概览

Before proceeding to our recommendations, it is useful to provide a brief overview of the U.S. sanctions regime. OFAC administers most of the U.S. economic sanctions programs. OFAC sanctions programs can range from those that are comprehensive in nature, such as a program that blocks a country's entire government and includes broad, geographically-based trade restrictions, to programs whose scope is fairly limited, such as one that targets only specific individuals and entities. Some programs target both particular individuals and entities as well as prohibit select categories of transactions, and hence it is important to review the details of any given sanctions program to understand its scope.

在我们提出建议之前，有必要简要介绍一下美国的制裁制度。美国财政部海外资产控制办公室负责管理大多数的美国经济制裁方案。该办公室负责管理的制裁方案覆盖范围各有不同，既有切断某个国家的政府与美国经济的所有往来并包括基于地理位置的广泛贸易限制的综合方案，也有仅针对特定个人和实体的范围相当有限的方案。某些方案既针对特定的个人及实体，又禁止某些指定的交易类别。因此，审阅任何既定制裁方案的具体细节以了解该方案的范围，是至关重要的。

Even though a sanctions program may be targeted, its prohibitions on dealings with individuals and entities whose property is blocked can be very broad, and they apply regardless of the targeted person's location. The names of individuals and entities that are designated or identified as blocked by OFAC are incorporated into OFAC's list of "Specially Designated Nationals and Blocked Persons" ("SDN List"), which includes over 5,000 names of persons whose property and interests in property must be blocked.¹

尽管某项制裁方案可能具有针对性，但是其针对与受制裁个人和实体之间的业务往来实施的限制性措施可能非常广泛，而且无论制裁对象位于何处，制裁方案均适用。美国财政部海外资产控制办公室指定或确认为制裁对象的个人姓名及实体名称，会纳入该办公室的“特别指定国民和禁止往来人士”名单（“SDN名单”），该名单包括其财产及财产权益必须被封锁的5000多名个人和实体的姓名和名称。

With regard to U.S. sanctions applicable to North Korea, the restrictions are voluminous. While beyond the scope of this Alert, there are dozens of restrictions applicable to U.S. persons, which apply to virtually every component of the North Korean economy.

适用于朝鲜的美国制裁可谓不胜枚举。虽然其超出本文的范围，但适用于美国人士的限制措施有几十项，而这些措施基本上适用于朝鲜经济的每个方面。

In addition to these sanctions programs, OFAC maintains other sanctions lists that may have different prohibitions associated with them. Because the sources of authority for U.S. sanctions are numerous, the parameters of OFAC's programs are constantly changing, which means that maintaining a current understanding of the requirements of U.S. sanctions programs and the SDN List is critically important. Indeed, in light of the issuance of the new Executive Order, Chinese banks should take care to adequately understand the significantly expanded scope of U.S. sanctions against North Korea.

¹ Note, however, that the SDN List is not a comprehensive list of all such entities and individuals. The property and interests in property of a corporate entity that is 50 percent or more owned, whether individually or in the aggregate, directly or indirectly, by one or more sanctioned persons are also sanctioned, regardless of whether the entity itself is on the SDN List.

请注意，SDN名单并不是涵盖所有该类实体及个人的全面清单。无论某一公司实体本身是否在SDN名单之列，只要一个或多个受制裁人士直接或间接、单独或合计拥有其财产或财产权益达到或超过50%，则该公司实体也会受到制裁。

除了前述制裁方案外，美国财政部海外资产控制办公室还有其他制裁名单，与之相关有着不同的禁止内容。由于美国制裁的权力来源众多，美国财政部海外资产控制办公室制裁方案的范围不断变化。这意味着，保持对美国制裁方案的规定以及SDN名单的实时了解至关重要。鉴于新行政命令刚刚颁布，中资银行应着手充分了解美国对朝制裁措施范围的重大扩展。

3. The Role of Secondary Sanctions

二级制裁的作用

Secondary sanctions prohibit any U.S. person from doing business with a foreign person or entity doing business with any country, person, or entity already targeted by U.S. primary sanctions. David S. Cohen explained what he believed to be the benefits of secondary sanctions targeting foreign banks as follows:

二级制裁禁止任何美国人士与已成为美国主要制裁对象的任何国家、人士或实体有业务往来的外籍人士或实体进行业务往来。大卫●科恩认为，针对外国银行的二级制裁有如下好处：

Secondary sanctions are both simple and enormously powerful. They work by presenting a stark choice to a foreign bank: It can process transactions for a bank already facing sanctions (for example, one of the many North Korean banks that have been listed by the United States) or it can maintain its access to the U.S. financial system, but it cannot do both.

二级制裁既简单，又极其强大。这些制裁通过迫使外国银行在以下两者之间做出严酷的选择来实现其目的：该银行要么为已受制裁的银行（如已在美国制裁名单上的众多朝鲜银行）处理交易，要么可以继续接入美国的金融体系，但不能两者兼得。

The first use of secondary sanctions was directed at the government of Iran and its related persons and entities. As implemented by OFAC, all U.S. persons were banned from conducting otherwise lawful business with non-U.S. persons that were doing business with specified Iranian interests. The impact on foreign banks—both from a financial and reputational standpoint—would, of course, have been significant if those institutions elected not to comply. For example, not only would access to the U.S. payments system have been blocked, but numerous correspondent banking relationships between foreign banks in effect outside of the jurisdiction of the U.S. would have been foreclosed as well.

二级制裁的第一次运用是针对伊朗政府及其相关人士和实体。该等制裁由美国财政部海外资产控制办公室实施，禁止所有美籍人士与任何与指定的伊朗个人或实体有业务往来的非美籍人士进行任何其他方面均为合法的商业活动。当然，如果外国银行选择不遵守前述规定，其财务业绩和声誉均会受到重大影响。例如，这些银行不仅可能被禁止接入美国的支付系统，而且外国银行之间在美国司法管辖范围以外的无数代理行关系也会被切断。

The impact of prolonged secondary sanctions on Iran was significant, as Iran's international banking relationships became severely restricted as a result of the decision by numerous U.S. and foreign banks to cease conducting business with Iran or with any bank that was doing business with prohibited Iranian interests. Accordingly, should OFAC elect to impose secondary sanctions against non-U.S financial institutions doing business with North Korean entities, then Chinese banks might be significantly affected.

对伊朗的长期二级制裁影响是巨大的。由于无数美国及外国银行决定停止与伊朗或被制裁的伊朗个人和实体有业务往来的任何银行开展业务，伊朗的国际银行关系受到严重的制约。因此，如果美国财政部海外资产控制办公室选择针对与朝鲜实体有业务往来的非美国银行机构实施二级制裁，中资银行将可能受到重大影响。

4. Section 4 of the New Executive Order

新行政命令的第四条

The key language for the Chinese banks can be found in Section 4 of the Executive Order. It provides, in relevant part, as follows:

对于中资银行来说最关键的规定见于新行政命令的第四条。该条在相关部分做出如下规定：

The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to impose on a foreign financial institution the sanctions described in subsection (b) of this section upon determining that the foreign financial institution has, on or after the effective date of this order:

特此授权财政部长，经与国务卿磋商，一旦确定某外国金融机构在本命令生效日之时或之后有下列行为，即可针对该外国金融机构实施本条(b)款所描述的制裁措施：

- (i) knowingly conducted or facilitated any significant transaction on behalf of any person whose property and interests in property are blocked pursuant to Executive Order 13551 of August 30, 2010, Executive Order 13687 of January 2, 2015, Executive Order 13722 of March 15, 2016, or this order, or of any person whose property and interests in property are blocked pursuant to Executive Order 13382 in connection with North Korea-related activities; or

在明知的情況下，代表任何其財產或財產利益根據 2010 年 8 月 30 日的第 13551 號行政命令、2015 年 1 月 2 日的第 13687 號行政命令、2016 年 3 月 15 日的第 13722 號行政命令或本命令被封锁的人士，或者根據第 13382 號行政命令，其財產或財產利益因與朝鮮相關的活動有關而被封锁的人士，進行或促成任何重要交易；或者

- (ii) knowingly conducted or facilitated any significant transaction in connection with trade with North Korea.

在明知的情况下，进行或促成与朝鲜贸易有关的任何重要交易。

In other words, Section 4 “authorizes” the Secretary of Treasury to impose a series of sanctions in certain instances. Specifically, it gives the Secretary of Treasury discretion to impose secondary sanctions on foreign banks if a foreign bank engaged in the following types of activity: (i) knowingly conducted or facilitated any significant transaction on behalf of any person listed in a series of Executive Orders; or (ii) knowingly conducted or facilitated any significant transaction in connection with trade with North Korea. If any foreign banks engage in such activity, even if located outside the U.S., then the Secretary of Treasury has the discretion to impose a series of harsh sanctions, which essentially would mean cutting-off all access to the U.S. financial markets.

易言之，第四条“授权”美国财政部长在某些情形下实施一系列的制裁措施。具体来说，如果某外国银行从事下列类型的活动，则该条赋予美国财政部长向该等外国银行施加二级制裁的自由裁量权：（1）在明知的情况下，代表任何在一系列的行政命令中列举的任何人士从事或促成任何重要交易；或者（2）在明知的情况下，进行或促成与朝鲜贸易有关的任何重要交易。如果任何外国银行从事上述活动，即使其位于美国境外，则美国财政部长可根据其自由裁量决定实施一系列严厉的制裁措施，这些措施将意味着切断该外国银行与美国金融市场的所有联系。

Section 4 is a significant step closer to the imposition of secondary sanctions. Presumably, the Trump Administration did not require mandatory secondary sanctions because it wanted to give the PRC and other countries time to address U.S. concerns about North Korea. However, the imposition of secondary sanctions is a distinct probability, creating some significant operational risks for the Chinese banks with branches or correspondent banking relationships in the U.S.

第四条是朝着二级制裁的实施迈出的重要一步。可以推断，特朗普政府尚未要求必须实施二级制裁的考量，是给中国及其他国家一些时间解决美国对于朝鲜的关切。然而，二级制裁的实施可谓箭在弦上。这给那些在美国有分支机构或代理行关系的中资银行造成了若干重大的经营风险。

5. The Operational Risks for Chinese Banks

中资银行的经营风险

If the Chinese banks elect not to comply with U.S. sanctions applicable to North Korea and related parties, several significant operational and legal risks will result.

如果选择不遵守适用于朝鲜及相关方的美国制裁，中资银行将面临若干重大的经营和法律风险。

First, due to the significance of the Trump Administration’s national security concerns regarding North Korea, merely being accused of sanctions violations—even without any evidence—may be tantamount to criminal behavior. It is highly possible that OFAC would elect to engage in one or several high-profile enforcement actions—the so-called “kill the chicken to scare the monkey” approach—that might include imposing penalties on identified Chinese banks prior to any judicial

or administrative evidentiary determination. Such an approach would signal the Trump Administration's resolve to crack down on perceived sanctions violators, and would be aimed at scaring others into compliance.

首先，由于特朗普政府对与朝鲜有关的国家安全极为关切，仅仅被指控违反制裁—即使没有任何证据—也可能等同于犯罪行为。美国财政部海外资产控制办公室很有可能会选择采取一项或多项的高调执法行为（所谓“杀鸡儆猴”的方式），这些措施可能包括在做出任何基于证据的司法或行政裁决之前针对特定中资银行实施处罚。这种做法将传达特朗普政府打击违反制裁者的决心，其目的是通过由此产生的威慑效果促使其他机构采取合规行动。

Second, even in the circumstance where a Chinese bank is accused of violating U.S. secondary sanctions against North Korea, but where an administrative or judicial penalty has not immediately been imposed, numerous international commercial relationships could suffer direct effects. The mere possibility of the imposition of such penalties on a Chinese bank could cause other international banks to limit or terminate their banking relationships, including correspondent banking relationships, with the Chinese bank.

其次，一旦中资银行被指控违反美国针对朝鲜的二级制裁，即使并没有立即实施任何行政或司法处罚，这些银行的众多国际商业关系也会受到直接影响。某家中资银行会受到该等处罚的可能性本身，就可能会导致其他国际银行限制或终止其与该中资银行的银行关系，包括代理行关系。

Third, the identification of a Chinese bank as an SDN subject to secondary sanctions carries with it the requirement that the Chinese bank's assets may become subject to an asset freeze by a U.S. bank as well as non-U.S. banks conducting business in the U.S. In addition, because many other countries have adopted sanctions regimes similar to that of the U.S., a Chinese bank may quickly find itself in growing legal peril should it be targeted by OFAC for allegedly violating secondary sanctions.

第三，一旦某家中资银行被认定为特别指定实体，从而成为二级制裁的对象，根据相关法规要求，该中资银行的资产可能就会被美国银行以及在美开展业务的非美国银行冻结。此外，由于许多其他国家已采取类似于美国的制裁制度，一旦被美国财政部海外资产控制办公室指控违反二级制裁，中资银行可能很快就会发现其陷入越来越多的法律风险之中。

6. Anticipating OFAC Inquiries and Investigations

预见美国财政部海外资产控制办公室的询问与调查

We recommend that Chinese banks with U.S. operations undertake the following action items:

我们建议在美经营的中资银行采取如下行动：

First, they should review and update their compliance programs to ensure that they are reflective of both the enhanced sanctions imposed by the Executive Order as well as those recently adopted by the United Nations.

首先，审阅和更新银行的合规计划，确保该计划反映了新行政命令施加的以及联合国最近通过的升级制裁措施。

Second, a Chinese bank with relationships with North Korean parties will be faced with a difficult choice: either terminate relationships that are subject to U.S. sanctions (including North Korean corresponding banking relationships) or risk the imposition of U.S. sanctions against its own operations (including the termination of non-North Korean correspondent banking relationships with both U.S. and other foreign banks). As noted above, the mere possibility of the imposition of such penalties on a Chinese bank could cause other international banks to limit or terminate their correspondent and other banking relationships with a targeted Chinese bank.

第二，与朝鲜人士或实体有业务关系的中资银行将面临一个两难选择：要么终止受制于美国制裁的这些业务关系（包括与朝鲜银行的代理行关系），要么面临其自身业务受到美国制裁的风险（包括被迫终止与美国银行和其他外国银行之间的代理行关系）。（如上所述，某家中资银行会受到该等处罚的可能性本身，就可能会导致其他国际银行限制或终止其与该被指控的中资银行的代理行和其他银行关系。）

We understand from press reports that the PBOC has recently instructed the Chinese banks to strictly comply with the enhanced sanctions adopted by the United Nations Security Council on September 11, 2017. However, those instructions may not be enough, as the U.S. sanctions go further than the UN sanctions.

我们从新闻报道中了解到，中国人民银行最近已经要求各中资银行严格遵守联合国安理会于2017年9月11日通过的升级制裁措施。但是上述指令可能不够充分，因为美国的制裁措施比联合国的制裁措施更为严苛。

Third, with respect to compliance with existing U.S. primary sanctions and secondary sanctions, we recommend adopting a proactive approach as there is the potential for significant legal risk merely by being targeted as a potential violator of U.S. sanctions against North Korea. Thus, in order to avoid the imposition of secondary sanctions, Chinese banks should begin gathering evidence of their compliance with U.S. primary sanctions. Any delay presenting evidence of full compliance could expose a Chinese bank to significant risk, particularly if OFAC and other U.S. government entities intend either to impose secondary sanctions or initiate a high-profile enforcement action against it. Accordingly, we suggest that Chinese banks anticipate possible OFAC investigations and prepare materials in advance to be submitted to refute allegations of U.S. sanctions violations.

第三，就遵守现有的美国主要制裁及二级制裁而言，我们建议采用积极主动的应对方式，因为一家银行只要被认定为可能违反针对朝鲜的美国制裁，就有可能面临重大法律风险。因此，为避免成为二级制裁的实施对象，中资银行应立即开始收集证明其遵守美国主要制裁的各种证据。提交全面的合规证据如果发生任何延迟，都有可能给中资银行带来重大风险，尤其是如果美国财政部海外资产控制办公室及其他美国政府机构有意施加针对该银行的二级制裁，或者启动针对该银行的高调执法行为。有鉴于此，我们建议中资银行提前预见美国财政部海外资产控制办公室可能展开的调查，并事先准备好届时需要提交的材料，用以反驳其违反美国制裁的指控。

Finally, the use by North Korean persons and entities of anonymous shell companies presents a particularly difficult compliance challenge. Because of the threat presented by the imposition of secondary sanctions, Chinese banks likely will need to conduct enhanced due diligence to determine the true ownership and control structure of corporate entities. Among other things, it would be prudent for Chinese banks to require contractual warranties and representations that a company or a correspondent bank doing business with it is not subject to applicable U.S. sanctions.

最后，朝鲜人士及实体对匿名壳公司的使用对于银行的合规造成特别的困难。鉴于二级制裁的可能实施所造成的威胁，中资银行可能需要加强其尽职调查的力度，以确定公司实体的真实所有权和控制权结构。比较审慎的做法之一是，中资银行可以要求与之有业务往来的公司或代理行做出其不受制于适用美国制裁的合同陈述和保证。

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We trust this updated Alert is useful to our Chinese clients and friends. Of course, we are available to assist in providing advice regarding U.S. sanctions compliance, including the latest developments with regard to the new Executive Order and the possible imposition of secondary sanctions against North Korea.

我们希望本更新后的客户提示对我们的中国客户和朋友有所帮助。当然，我们可以随时就美国制裁合规，包括有关上述新行政命令和可能针对朝鲜实施的二级制裁的最新进展，提供法律咨询。

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