



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 11 2017

The Honorable Bob Corker
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (Department) on H.R. 3898, the “Impeding North Korea’s Access to Finance Act of 2017,” as passed by the House of Representatives. As to the general desirability of the bill, the Department defers to other agencies. However, as we discuss below, the bill raises constitutional and policy concerns.

I. Constitutional Concerns

Sections 4(a) and 5(c) of the bill would intrude on the President’s authority to conduct diplomacy by dictating positions that the Executive Branch must take before international bodies. We recommend making these provisions precatory.

Section 4(a) would require that “[t]he Secretary of the Treasury shall instruct the United States Executive Director at the international financial institutions . . . to use the voice and vote of the United States to oppose the provision of financial assistance to a foreign government . . . if the President determines that . . . the government has knowingly failed to prevent the provision of financial services” to covered persons. Section 5(c) would require that “[t]he Secretary of the Treasury shall instruct the United States Executive Director at the International Monetary Fund to support the use of the administrative budget of the Fund for technical assistance that strengthens the capacity of Fund members to prevent money laundering and the financing of terrorism.”

These provisions would infringe on the President’s authority over United States diplomacy. The Constitution commits to the President the responsibility for formulating the position of the United States in international fora. *See United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is “the constitutional representative of the United States in its dealings with

foreign nations”). The President thus has “exclusive authority to determine the time, scope, and objectives’ of international negotiations or discussions.” *Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act*, 33 Op. O.L.C. __, at *8 (June 1, 2009) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990)), <https://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/section7054.pdf>. Sections 4(a) and 5(c) would intrude on that authority by requiring the Executive Branch to take certain positions before international bodies. Accordingly, we recommend making these provisions precatory by changing the requirements that the Secretary “shall” instruct the United States Executive Directors to a proposal that the Secretary “should” make these instructions.

II. Policy Concerns

Section 3(a)(1) of the bill would direct the Secretary of the Treasury to issue regulations “to prohibit, or impose strict conditions on, the opening or maintaining in the United States of a correspondent account or a payable-through account by a foreign financial institution that the Secretary finds knowingly facilitates a significant transaction or transactions or provides significant financial services for a covered person.” Violation of these regulations would be punishable by civil penalties, and, if the violation was willful, criminal fines of up to \$1 million, and imprisonment of up to 20 years.

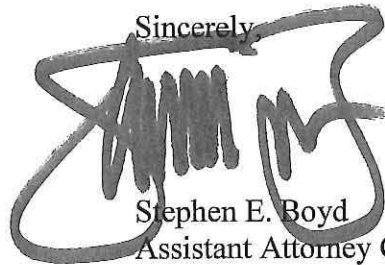
It is unclear why the standard of intent for a criminal violation of this provision would “willfully” rather than “knowingly.” Indeed, we believe that the proper standard for intent in section 3(a)(1) would be “knowingly.” We note that some of the existing general money laundering offenses require only a “knowing” violation rather than the more exacting “willful” standard. Indeed, some of these offenses require no intent at all. *See* 18 U.S.C. §§ 1956, 1957. And, of course, even under a “knowingly” standard, the Government would have to prove the offense beyond a reasonable doubt (by comparison, the assessment of the civil penalties would need to be proved only by a preponderance of the evidence in an administrative proceeding). In light of the grave national security concerns that have compelled this legislation, the heightened mens rea burden of “willfully” should be removed in order to facilitate, and not hobble, critically important and effective criminal enforcement.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this

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or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in dark ink, appearing to read "S. Boyd", written over the word "Sincerely,".

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Benjamin L. Cardin
Ranking Member