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U.S. Authorizes Sanctions and Other Measures Affecting People's Republic of China (PRC)

July 20, 2020

On July 14, 2020, the President of the United States signed into law the Hong Kong Autonomy Act ("HKAA" or "Act") and issued a new Executive Order. Both authorize the imposition of sanctions on foreign persons, including foreign financial institutions, engaged in certain conduct relating to Hong Kong. Key provisions of the Act and Executive Order are summarized below, but it is important to note at this time that significant questions remain around how and when these restrictions may be imposed.[1]

Key Provisions of the HKAA

The HKAA:

- Requires that, within 90 days of enactment of the Act (specifically, October 13, 2020), the U.S. Secretary of State must submit to the U.S. Congress a report (Secretary of State Report) identifying any foreign person or entity (collectively referred to as "person") that has materially contributed to or has attempted to contribute materially to actions taken by the PRC government to reduce the autonomy of Hong Kong, including the ability of the people of Hong Kong to enjoy freedom of assembly, speech, press, or independent rule of law or participate in democratic outcomes. This report is required to be updated regularly.

- Allows, but does not require, the U.S. president to impose sanctions immediately on persons named in the Secretary of State Report that (1) prohibit any such person from dealing in property subject to the jurisdiction of the U.S. in which the sanctioned foreign person has an interest, and (2) in the case of individuals, deny visas to such person and exclude the individual from entry into the United States.

[1] The information in this paper is provided for general information only and is intended to assist companies with understanding the recent U.S. government actions. However, the information provided is not intended to be legal analysis or advice. Companies should seek the advice of legal counsel or other appropriate advisers on specific questions as they relate to their unique circumstances.

- The imposition of sanctions becomes mandatory one year after the foreign person's inclusion in the Secretary of State's Report or a subsequent update; however, the U.S. president has broad discretion to exclude persons whose actions are not deemed to have a significant and lasting negative effect, are not likely to be repeated, or have otherwise been reversed or mitigated, and may also exclude persons for national security purposes.

- Requires, not sooner than 30 days or later than 60 days from the submission of the Secretary of State Report, the U.S. Secretary of Treasury to submit a report (Secretary of Treasury Report) to the U.S. Congress identifying any foreign financial institution that knowingly conducts a significant transaction with a foreign person identified in the Secretary of State's Report. The period between the issuance of the two reports is intended to allow foreign financial institutions the option and time to unwind transactions with persons identified in the Secretary of State's Report. This report is also required to be updated regularly.

    - Within one year of the inclusion of a foreign financial institution in the Secretary of Treasury's Report or an update thereto, requires the U.S. president to impose at least five of the following sanctions:

        1. The U.S. government prohibits any U.S. financial institution from providing loans or credits to the foreign financial institution.

        2. The foreign financial institution is prohibited from being designated as a primary dealer in U.S. government debt instruments.

        3. The foreign financial institution is prohibited from serving as an agent of the U.S. government or as a repository for U.S. government funds.

        4. The U.S. president may prohibit any transactions in foreign exchange that are subject to U.S. jurisdiction and in which said foreign financial institution has an interest.

        5. The U.S. president may prohibit any transfers of credit or payments between financial institutions or by, through or to any financial institution, to the extent such transfers or payments are subject to U.S. jurisdiction and involve the foreign financial institution.

        6. The U.S. president may impose asset blocking sanctions.

7. Exports, reexports and transfers of commodities, software and technology may be restricted, as determined by the U.S. president and the U.S. Commerce Department.

8. The U.S. president may prohibit any U.S. person from investing in or purchasing significant amounts of equity or debt instruments of the foreign financial institution.

9. Visa restrictions may be imposed on corporate officers, principals or controlling shareholders of the foreign financial institution.

10. Any of the above sanctions may be imposed on the foreign financial institution's principal executive officers.

- Within two years of the inclusion of the foreign financial institution in the report, all 10 of the above sanctions must be imposed. However, as with the case of foreign persons, the U.S. president retains significant discretion regarding the imposition of these sanctions.

Key Provision of the Executive Order

The Executive Order ("Order"), which is effective immediately, expands existing PRC-related sanctions by requiring additional sanctions and imposing other measures.

Sanctions Provisions

The U.S. Secretary of State or the U.S. Secretary of Treasury, in consultation with each other, is authorized to impose asset blocking sanctions on foreign persons deemed to:

- Be or have been involved, directly or indirectly, in the coercing, arresting, detaining or imprisoning of individuals under the authority of Hong Kong, or to be or have been responsible for or involved in developing, adopting or implementing actions that impact the autonomy of the residents of Hong Kong;

- Be responsible for or complicit in, or to have engaged in, directly or indirectly: actions or policies that undermine democratic processes or institutions in Hong Kong; actions or policies that threaten the peace, security, stability or autonomy of Hong Kong; censorship or other activities with respect to Hong Kong that prohibit, limit or penalize the exercise of freedom of expression or assembly by citizens of Hong Kong, or that limit access to free and independent print, online or broadcast media; or the extrajudicial rendition, arbitrary detention or torture of any person in

Hong Kong or other gross violations of internationally recognized human rights or serious human rights abuse in Hong Kong;

- Be or have been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, certain of the above activities, or of an entity whose property and interests in property are blocked pursuant to the Order;
- Have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to the Order;
- Be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order; or;
- Be a member of the board of directors or a senior executive officer of any person whose property and interests in property are blocked pursuant to the Order.

The property and property interests in the U.S. or the possession or control of U.S. persons of persons determined to be subject to sanctions pursuant to the Order will be blocked, and U.S. persons will generally be prohibited from engaging in transactions with such persons, barring an OFAC license or exemption. The Order also provides for the imposition of visa sanctions on individuals sanctioned pursuant to the Order, as well as their immediate family members (spouses and children).

While the inclusion criteria for the Order do not align directly with that outlined for inclusion in the Secretary of State or Secretary of Treasury Reports summarized in the HKAA section above, they are sufficiently broad to at least provide the framework for implementing the sanctions required for parties appearing in the Secretary of State's Report, though they may not be comprehensive enough without the issuance of an additional executive order to impose the full menu of options available or required for foreign financial institutions that are included in the Secretary of Treasury's Report.

Other Measures

The Order states that it is policy of the U.S. to suspend or eliminate different and preferential treatment for Hong Kong to the extent permitted by law and in the national security, foreign policy and economic interests of the United States, and specially suspends the application of preferred treatment for Hong Kong under statutes relating to immigration, export controls, national security reviews of foreign investment, and customs rules of origin. This means, among other things, that financial institutions engaged in trade transactions with or through Hong Kong should review their activity to determine what transactions, e.g., transactions involving dual-use goods, may no longer be permissible or may require export licensing.

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