US to Take Steps to Revoke Hong Kong's Separate Status, Impose Sanctions, Enhance Export Controls

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Overview
On May 29, President Trump announced in a White House news conference the US government would “begin the process” to revoke the “full range of agreements” providing the Hong Kong Special Administrative Region of China separate treatment from mainland China under US law on topics including “export controls on dual use technologies,” among others, “with few exceptions.” The United States also plans to sanction Chinese and Hong Kong officials “directly or indirectly involved in eroding” Hong Kong’s autonomy.

The president’s announcement contained few specifics on the proposed measures or a timeline for their implementation. Similarly, no Executive Order has been issued by the president identifying any specific changes to be made. We anticipate additional guidance and actions from the White House and relevant agencies, including the US Departments of State, Treasury, and Commerce, in the coming days and weeks.

The decision follows Secretary of State Mike Pompeo’s report and certification to Congress, announced on May 27, that Hong Kong no longer enjoys a high degree of autonomy from the People’s Republic of China, for purposes of the Hong Kong Policy Act of 1992, as amended by the Hong Kong Human Rights and Democracy Act of 2019. As a result, he concluded, “Hong Kong does not continue to warrant treatment under United States laws in the same manner as US laws were applied to Hong Kong before July 1997.”

Among other actions previewed by the president, the United States will begin the process of revoking the US-Hong Kong extradition agreement and Hong Kong’s preferential customs treatment. The State Department is expected to issue an updated travel alert for Hong Kong citing surveillance and other risks to US nationals. A presidential working group will “study differing practices” of US-listed Chinese companies with the aim of protecting US investors and the US financial system.

Background
The president’s May 29 announcement and Secretary Pompeo’s certification follow China’s announcement that the National People’s Congress would consider a resolution authorizing the adoption of controversial national security legislation for Hong Kong. The resolution, which is aimed at prohibiting secession, subversion of state power, terrorism activities, and foreign interference, was approved on May 28. The week prior, Secretary Pompeo warned that the passage of the legislation would be a “death knell” for Hong Kong’s autonomy.
Last year, the US Congress passed and the president signed into law, the Hong Kong Human Rights and Democracy Act. Under that law, the secretary of state, is required to issue, in conjunction with the annual report that must be submitted to Congress no later than March 31, a certification that "indicates whether Hong Kong continues to warrant treatment under United States law in the same manner as United States laws were applied to Hong Kong before July 1, 1997."

Secretary Pompeo delayed submitting the annual report this year, "to account for any additional actions that Beijing may be contemplating in the run-up" to China's May 22 National People's Congress "that would further undermine the people of Hong Kong's autonomy." Then, on May 29, the State Department issued the 2020 Hong Kong Policy Act Report, finding "China has shed any pretense that the people of Hong Kong enjoy the high degree of autonomy, democratic institutions, and civil liberties guaranteed to them by the Sino-British Joint Declaration and the Basic Law."

Earlier in the week, on May 26, the White House issued its US Strategic Approach to the People’s Republic of China, which outlines the administration’s policies for "strategic competition" intended to "(1) protect the American people, homeland, and way of life; (2) promote American prosperity; (3) preserve peace through strength; and (4) advance American influence."

US Export Controls and Sanctions Implications

Hong Kong and mainland China are treated as separate destinations for purposes of the US Export Administration Regulations (EAR) administered by the Commerce Department's Bureau of Industry and Security (BIS).[1] Among other things, Hong Kong and mainland China are listed separately in the Commerce Country Chart at Supplement No. 1 to Part 738 of the EAR, providing Hong Kong preferential export licensing treatment. As a result, items subject to the EAR may be exported to Hong Kong (and re-exported to certain other jurisdictions) with fewer restrictions than if those same items were exported to, or for use in, mainland China.

The president’s announcement did not identify the specific degree to which Hong Kong’s current status under the EAR may change. For example, it is not clear whether licensing policies applicable to China will be fully applied to Hong Kong; whether recent changes to the EAR directed at restricting exports to China will also cover Hong Kong; or whether export control restrictions might be targeted to cover US-origin goods, technologies, and software in areas such as surveillance and telecommunications, which have been highlighted in previous BIS actions.

The president announced the United States would sanction Chinese and Hong Kong officials involved “directly or indirectly” in eroding Hong Kong’s autonomy and individual freedoms. He did not specify which officials would be targeted or whether the sanctions will include visa restrictions, blocking sanctions, or other measures, or whether action will be taken under existing authorizations, such as Section 7 of the Hong Kong Human Rights and Democracy Act, the Global Magnitsky sanctions, or a yet-to-be-issued Executive Order. According to reports, targeted officials could include those involved in implementing National Security measures in Hong Kong, including the Legislative Affairs Commission of China’s legislature, Beijing’s liaison office in Hong Kong, and the Hong Kong and Macau Affairs Office.

Additionally, on May 21, US Senators Pat Tooney (R-PA) and Chris Van Hollen (D-MD) introduced the Hong Kong Autonomy Act (S.3798) that would, among other things, authorize sanctions against individuals and entities that “materially contribute to the contravention” of Hong Kong’s Basic Law, including menu-based secondary sanctions against financial institutions that engage in significant transactions with such persons. The bill was referred to the Senate Committee on Banking, Housing, and Urban Affairs. No House companion has been introduced.

Shortly after the May 29 press conference, the president issued a proclamation on the Suspension of Entry as Nonimmigrants of Certain Students and Researchers from the People’s Republic of China, which restricts visas for Chinese graduate students seeking to study or conduct research in the United States, who have ties to any Chinese entity “that implements or supports the PRC’s ‘military-civil fusion strategy’ to develop advanced China’s military capabilities.”

Looking Forward

In the conclusion to the 2020 Hong Kong Policy Act Report, Secretary Pompeo stated that he hoped “someday in the future, I will be able to recertify” Hong Kong’s autonomy from China. In this regard, Section 202(d) of the Hong Kong Policy Act provides that an Executive Order suspending Hong Kong’s separate treatment “may be terminated by the President with respect to a particular law or provision of law whenever the President determines that Hong Kong has regained sufficient autonomy to justify different treatment.”

Steptoe will continue to monitor these developments closely. For more information on how the proposed export controls changes or sanctions may impact your business, contact a member of Steptoe’s Economic Sanctions practice in Hong Kong or Washington, or Steptoe’s Government Affairs & Public Policy practice in Washington.

[1] Hong Kong is also treated differently for purposes of the International Traffic in Arms Regulations (ITAR), administered by the State Department’s Directorate of Defense Trade Controls (DDTC), and certain other US regulations which are not discussed in this advisory.