Overview
On July 14, President Trump issued an Executive Order (EO) strengthening and expanding sanctions mandated by Congress under the Hong Kong Autonomy Act (HKAA), which the president also signed into law on July 14. In particular, the EO introduces blocking sanctions against foreign persons pursuant to the International Emergency Economic Powers Act (IEEPA) in response to recent developments in Hong Kong.

The EO also directs US agencies to undertake steps to suspend or eliminate different and preferential treatment for Hong Kong pursuant to section 2020 of the United States-Hong Kong Policy Act of 1992.[1]

This client alert summarizes the background of the EO, sanctions provisions of the HKAA, and open questions that may be addressed by the US government in the coming weeks.

Recent Developments
The HKAA’s enactment and the adoption of the EO represent the culmination of a rapid escalation of tensions over several weeks between the United States and China over the Hong Kong Special Administrative Region (HKSAR).

On May 21, a spokesperson for the PRC’s National People’s Congress (NPC) announced the body would consider a resolution authorizing the adoption of national security legislation for the HKSAR.

The same day, US Senators Pat Toomey (R-PA) and Chris Van Hollen (D-MD) introduced the HKAA, which would, among other things, authorize sanctions against foreign persons (individuals and entities) who materially contribute to “the failure of the Government of China to meet its obligations” under the 1984 Joint Sino-British Declaration or the Basic Law of the HKSAR and foreign financial institutions (FFIs) that “knowingly conduct a significant transaction” with such persons.

One week later, on May 28, Secretary of State Mike Pompeo submitted the 2020 Hong Kong Policy Act Report to Congress, certifying that the HKSAR “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.” The secretary’s certification was pursuant to section 301 of the United States-Hong Kong Policy Act of 1992, as amended, which requires the Department of State to certify to Congress annually whether Hong Kong continues to warrant differential treatment under US law.

On May 29, the president announced that his administration would “begin the process” of revoking the HKSAR’s separate treatment from mainland China under US laws, a status afforded to the HKSAR under the Hong Kong Policy Act of 1992. Furthermore, he said that his administration would sanction Chinese and Hong Kong officials “directly or indirectly involved in eroding” the HKSAR’s autonomy.

On June 25, the US Senate passed the HKAA by unanimous consent. A slightly revised companion bill passed the House of Representatives on July 1, also by unanimous consent. On July 2, the US Senate passed the revised version, sending it to the president for his signature. On July 14, the president signed the bill into law, issuing a statement that the HKAA
Summary of the Sanctions Provisions of the EO

Section 4 of the EO incorporates the major sanctions requirements of the HKAA and the Hong Kong Human Rights and Democracy Act (HRDA), authorizing both the secretaries of state and treasury to impose blocking sanctions on foreign persons who are determined to be or have been "involved, directly or indirectly, in the coercing, arresting, detaining, or imprisoning of individuals under the authority of, or to be or have been responsible for or involved in developing, adopting, or implementing, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Administrative Region" (4(a)(i)) or "responsible for or complicit in, to have engaged in, directly or indirectly:"

- Actions or policies that undermine democratic processes or institutions in Hong Kong (4(a)(ii)(A));
- Actions or policies that threaten the peace, security, stability, or autonomy of the HKSAR (4(a)(ii)(B));
- Censorship or other activities with respect to the HKSAR that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of the HKSAR, or that limit access to free and independent print, online or broadcast media (4(a)(ii)(C)); or
- The extrajudicial rendition, arbitrary detention, or torture of any person in the HKSAR or other gross violations of internationally recognized human rights or serious human rights abuse in Hong Kong (4(a)(ii)(D)).

Section 4(a)(iii) authorizes blocking sanctions on any leader or official of "an entity, including any government entity, that has engaged in, or whose members have engaged in" the activities described above or any entity blocked pursuant to the EO.

As with other sanctions EOs, the new EO, at section 4(a)(iv) and (v), targets persons determined to 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 section 4, as well as persons owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person sanctioned under section 4.

Last, at section 4(a)(vi), the EO authorizes blocking sanctions against any "member of the board of directors or a senior executive office" of an entity blocked under the EO.

Individuals sanctioned under the EO, as well as their immediate family members, will also be subject to US visa restrictions.

FFI Sanctions

As described below, the HKAA creates a process for identifying, and ultimately imposing sanctions against, FFIs that "knowingly" engage in "significant" transactions with parties that have contributed to the current situation in Hong Kong. The EO does not specifically address FFI sanctions. Accordingly, the HKAA's framework for FFI sanctions appears to remain in place, pending further action by President Trump or the Treasury Department.

Specifically, Section 5(a) of the HKAA requires the secretary of state, in consultation with the secretary of the treasury, to submit a report to Congress within 90 days of the law's enactment identifying any foreign person who "is materially contributing to, has materially contributed to, or attempts to materially contribute to the failure" of the Government of China to meet its obligations under the Joint Declaration or the Basic Law. Under Section 5(b) of the HKAA, between 30 and 60 days later, the secretary of the treasury, in consultation with the secretary of state, must submit a report identifying any FFI that knowingly conducts a significant transaction with a foreign person identified under section 4 of the EO and subsequent reporting to Congress under the HKAA. Section 5(d) of the HKAA allows the secretary of state to exclude a foreign person or FFI from a report and subsequent sanctions, if its activities (i) do not "have a significant and lasting negative effect that contravenes the obligations of China under the Joint Declaration and the Basic Law;" (ii) are not likely to be repeated; and (iii) have "reversed or otherwise mitigated through positive countermeasures."

Section 7(b) of the HKAA directs that the president impose sanctions from a "menu" of 10 sanctions on FFIs identified in a report under Section 5(b) that include:

1. A prohibition on lending by US financial institutions
2. A prohibition on acting as a primary dealer of US government debt
3. A prohibition on serving as a repository of US government funds
4. Restrictions on foreign exchange transactions
5. Restrictions on banking transactions
6. A prohibition or restrictions on property transactions under US jurisdiction
7. Restrictions on the export of US goods, technology, or services from the United States to the FFI
8. Restrictions on US persons investing in debt or equity of the FFI
9. A prohibition or restrictions on foreign financial institutions providing financial services
10. Prohibition on US persons providing financial services to the FFI
9. US travel bans against corporate officers, principals, or significant shareholders

10. Sanctions against officers of the FFI

The president must apply at least five of the sanctions described in Section 7(b) against an FFI within one year of its identification in a Section 5(b) report. After two years, the president must apply all ten of the sanctions listed in Section 7(b).

Open Questions

As with most sanctions statutes, which rely on the Executive Branch for their implementation, the HKAA raises a number of questions that will be clarified in the weeks and months to come. The most pressing is the identities of the foreign persons to be sanctioned under the EO, and the implementation of the reporting and sanctions requirements on FFIs under the HKAA.

Although Section 5(a) of the HKAA requires the identification of foreign persons who have materially contributed to events in Hong Kong in a congressional report within 90 days of the law’s enactment, the sanctions under the EO could be imposed immediately, even before a congressional report has been filed.

The timing and implementation of the FFI sanctions in the HKAA remains unclear. For example, it is unclear whether FFIs are at risk of sanctions immediately, or whether they do not face potential sanctions until after the administration files its first report under Section 5(a) of the HKAA. The president may also issue another EO addressing FFI sanctions at a later date.

Financial institutions, in particular, will likely seek guidance on the meaning of “significant transaction” for the purposes of the HKAA. The Treasury Department has provided a list of factors that it considers in defining the term in the context of the Iran, Russia, and other programs, but it may adopt other standards with respect to Hong Kong. Given that the HKAA is likely to be used to target Chinese and HKSAR government officials, the Treasury Department may be asked to clarify whether quotidian services – deposit accounts, credit cards, mortgages, lending, brokerage accounts, and private banking, among others – will be excluded.

It also remains to be seen how the State and Treasury Departments will interpret Section 5(d) in evaluating whether a foreign person or financial institution should be excluded from a report to Congress for having “reversed or otherwise mitigated through positive countermeasures” actions leading to their identification, and the extent to which a financial institution’s transactions must be related to the issue of Hong Kong’s autonomy to qualify as significant for the purposes of the HKAA.

[1] These measures will be the subject of a separate publication.

Practices

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