

ALERT

Secretary Pompeo's Announcement on Hong Kong Opens Export, Trade, and Sanctions Liabilities

May 29, 2020

**Note, this alert was updated on May 29, 2020, since being originally published.*

On May 29, 2020, President Trump held a press conference on China, addressing China's role in the development of coronavirus and the national security legislation related to Hong Kong. The President announced that he was directing the Administration to eliminate policy exemptions that provide Hong Kong separate treatment from China, and specifically mentioned that the actions would affect export controls, sanctions, visas, and customs. The President also announced the following:

1. The Administration will revoke Hong Kong's status as a separate customs territory.
2. The U.S. government plans to suspend the entry into the United States of certain foreign nationals from China identified as potential security risks.
3. The Administration will impose sanctions on Chinese and Hong Kong government officials involved in "eroding Hong Kong's autonomy."
4. President Trump directed the President's Working Group on Financial Markets to study Chinese companies listed on the U.S. financial markets.
5. President Trump announced that he was terminating the United States' membership in the World Health Organization.

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Practice Areas

Export Controls and Economic Sanctions
International Trade
National Security

Notably, Trump did not announce that he was planning on making any changes to the Phase One trade deal related to the Section 301 investigation into Chinese intellectual property practices commenced in August 2017, but did allude to intellectual property theft, mentioning that he was going to take steps to “better secure” research conducted at U.S. universities. As a part of the Phase One trade deal signed in January 2020, the United States agreed not to impose additional Section 301 tariffs on goods from China, but maintained most of the Section 301 tariffs already in place. If the Administration revokes Hong Kong's status as a separate customs territory, then goods from Hong Kong may start incurring the Section 301 tariffs currently in place on goods from China.

Wiley will continue to monitor developments and provide additional updates on this topic as events unfold.

On May 27, 2020, U.S. Secretary of State Michael Pompeo announced that he had certified to Congress that Hong Kong no longer warrants treatment under U.S. law as autonomous from the People's Republic of China. Pompeo's announcement has significant political and economic ramifications and indicates that the United States may be close to suspending the separate, more favorable treatment it has provided to Hong Kong under U.S. export control, tariff and trade, visa, and sanctions laws, among others. On May 28, 2020, the National People's Congress in Beijing passed the proposal to draft national security legislation that will allow Chinese security agencies to severely curtail civil liberties in Hong Kong.

Background

As background, under the Hong Kong Human Rights and Democracy Act of 2019 (the 2019 Hong Kong Act), the Secretary of State is required to submit an annual certification to Congress indicating whether Hong Kong continues to warrant separate treatment apart from China under U.S. law. Pompeo's certification came one week after Beijing announced that it plans to pass the national security legislation.

Currently, Hong Kong operates semi-autonomously under the “one country, two systems” framework that has been in place since the United Kingdom returned Hong Kong to Chinese sovereignty in 1997. In 1992, Congress passed the Hong Kong Policy Act, providing that the United States would continue to treat Hong Kong as an entity separate from mainland China for economic and trade matters after the 1997 transfer of power. The 2019 Hong Kong Act, enacted in November 2019 after months of media reports of violent clashes between Hong Kong civilians and the Hong Kong government, amended the Hong Kong Policy Act, adding the annual certification requirement whereby the Secretary of State must assess whether Hong Kong is maintaining autonomy and civil freedoms such that it continues to merit independent treatment. It also added the requirement that the Secretary of Commerce must submit an annual report on any violations of U.S. export control laws or United Nations sanctions occurring in Hong Kong.

Next Steps

Secretary Pompeo's announcement does not have any legal effect by itself, as the President or Congress—or any official or body to whom pertinent powers are delegated within the Administration—must take specific action to suspend Hong Kong's autonomous treatment as applied to a specific law, provision of law, or

regulation. The fastest way to suspend current treatment would be for the President to issue an Executive Order. Consequently, if the Administration wishes to take action against Hong Kong, the next step will likely be the publication of an Executive Order in the Federal Register.

Possible Implications

Export Controls

With regard to export controls, the effect of ending the favorable treatment that Hong Kong currently receives could include extending the restrictions and more stringent licensing requirements that currently apply to the export or transfer of goods and technology to China through regulations such as the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). China is a prohibited country under the ITAR, and expanding the arms embargo to include Hong Kong would effectively prohibit exports of U.S. military and satellite-related items to the region. Under the EAR, exports of commercial and dual-use goods and technology to China are subject to more restrictive licensing requirements and policies (including a presumption of denial for certain items) than exports to Hong Kong, and recently announced rules that go into effect on June 29, 2020 will significantly expand restrictions on the export of even low-level commercial items to Chinese military end users/end uses.

In short, if the United States suspends the separate customs treatment of Hong Kong, then U.S. companies will likely not be able to export or reexport certain items to Hong Kong.

Section 301 Duties on Goods from China

Goods from Hong Kong are currently not subject to the Section 301 tariffs on goods from China. However, if the Administration suspends the separate treatment of Hong Kong as an independent customs union, then goods from Hong Kong will incur these duties as well. Similarly, any tariffs applied to goods from China will apply to goods from Hong Kong.

Financial Actions

The 2019 Hong Kong Act added a provision to U.S. law allowing the President to impose sanctions on individuals who are found to undermine fundamental freedoms or autonomy in Hong Kong. These sanctions include asset blocking or imposing civil or criminal penalties through the International Emergency Economic Powers Act, denying visa or admission to the United States, or revoking visa status.

The Administration may also decide to extend any financial sanctions imposed on China, Chinese entities, or Chinese citizens, to Hong Kong, Hong Kong entities, or Hong Kong citizens.

At this point, the Administration has not made any formal announcements in terms of what trade or economic sanctions it plans to take. We will continue to monitor developments and provide additional updates on this topic as events unfold, including any statements that the President may make on these matters in the near future.

Wiley has unparalleled international trade and export control experience. Should you have any questions, please do not hesitate to contact one of the attorneys listed on this alert.