

July 19, 2021

Hong Kong Business Advisory

U.S. Executive Agencies Publish Advisory Discussing Risks and Considerations for Businesses and Individuals Operating in Hong Kong

SUMMARY

On July 16, the U.S. Departments of State, the Treasury, Commerce, and Homeland Security (collectively, the “Departments”) issued an advisory (the “Advisory”) highlighting what the Departments consider to be the increasing risks businesses, individuals, and other persons face in operating in the Hong Kong Special Administrative Region (“Hong Kong”) of the People’s Republic of China (“PRC”). In light of recent changes to Hong Kong’s laws and regulations, the Advisory seeks to make such persons aware of “potential reputational, regulatory, financial, and, in certain instances, legal risks associated with their Hong Kong operations.”¹

CATEGORIES OF RISKS

The Advisory identifies four broad categories of risks: (i) risks for businesses following the imposition of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the “National Security Law”); (ii) data privacy risks; (iii) risks regarding transparency and access to critical business information; and (iv) risks for businesses that engage with, or may engage with, sanctioned Hong Kong or PRC entities or individuals.

A. RISKS UNDER THE NATIONAL SECURITY LAW

The PRC National People’s Congress Standing Committee passed the National Security Law in June 2020, which established punishable offenses including secession, subversion, terrorist activities, and collusion with a foreign country or external elements to endanger national security. According to the Departments, Hong Kong authorities have arrested individuals under the National Security Law for “publishing newspaper

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articles, participating in routine democratic processes, expressing an opinion regarding the government or the Chinese Communist Party, and attending public gatherings.”

The Advisory highlights the fact that certain provisions of the National Security Law may apply to activities undertaken outside of Hong Kong by persons that are not permanent residents of Hong Kong, and notes that one U.S. citizen has been arrested under the National Security Law. The Advisory also reports that, pursuant to an amendment to Hong Kong immigration law that will take effect on August 1, authorities will potentially be allowed to place exit bans on individuals, including non-residents, that are attempting to leave Hong Kong.

Finally, the Advisory notes that the Office for Safeguarding National Security, established by the National Security Law and staffed by PRC security services, has exclusive jurisdiction over certain cases brought under the National Security Law.

B. DATA PRIVACY RISKS

The Advisory notes that the National Security Law provides Hong Kong authorities with an expanded ability to collect data from businesses and individuals in cases involving actions that may endanger national security. In such cases, wiretaps or electronic surveillance may be approved by the chief executive, rather than the courts, and authorities may require internet service providers to provide or delete relevant information. The Departments express concern that the term “national security” as used in the National Security Law “may be used by local authorities in the future as a legal pretext to penalize any behavior or speech deemed to oppose Hong Kong or PRC authority.”

C. TRANSPARENCY AND ACCESS TO INFORMATION

The Advisory specifically discusses what the Departments view as heightened risks for news media businesses under the National Security Law’s provisions that allow for the prosecution of activities deemed to endanger national security. The Advisory cites statements from Hong Kong officials regarding their intent to enforce the National Security Law against the news media, as well as examples of actions taken by Hong Kong authorities against both news media businesses and individual employees, including the police search of the offices of the *Apple Daily* newspaper and arrest of senior executives, the accusations against whom are described by the Departments to be “conspiring with foreign institutions to seek sanctions against China and Hong Kong by publishing dozens of articles in the newspaper.”²

D. SANCTIONS AND COUNTERSANCTIONS

Finally, the Advisory highlights the risks U.S. persons, as well as foreign persons subject to U.S. jurisdiction, face in conducting activities that may involve individuals or entities subject to Hong Kong-related sanctions under U.S. law. The Advisory addresses risks that arise under both U.S. law and Chinese law, emphasizing the incompatibility of the two legal regimes.

1. Risks Under U.S. Law

The Advisory discusses a number of U.S. authorities under which sanctions have been, or may in the future be, imposed against individuals or entities to target “conduct related to the situation with respect to Hong Kong.”

- **OFAC Sanctions.** The Advisory notes that U.S. individuals and entities are prohibited from engaging in certain transactions with persons on the Office of Foreign Assets Control’s (“OFAC”) Specially Designated Nationals and Blocked Persons List, and that failure to comply can result in civil and criminal penalties under U.S. law. To date, OFAC has designated 42 individuals under its Hong Kong-related authorities.³
- **Export Controls.** On December 23, 2020, the Department of Commerce’s Bureau of Industry and Security (“BIS”) removed Hong Kong as a separate destination under the Export Administration Regulations (“EAR”) and placed certain Hong Kong government entities on the BIS military end-user restricted list. The Advisory cautions that the restrictions that apply for military end-use or military end-users, including military intelligence, now apply to Hong Kong since it is treated as part of the PRC for purposes of the EAR.
- **Federal Legislation.** The Advisory highlights two key pieces of legislation – the Hong Kong Autonomy Act (“HKAA”) and the Hong Kong Human Rights and Democracy Act (“HKHRDA”) – that provide for the imposition of Hong Kong-related sanctions. The HKAA provides for the imposition of asset-blocking sanctions and visa restrictions on foreign persons that materially contribute (or attempt to materially contribute) “to the failure of the PRC to meet its obligations under the Joint Declaration⁴ or the Basic Law⁵,” and requires the imposition of sanctions on foreign financial institutions that knowingly conduct a significant transaction with such a person.⁶ The HKHRDA mandates the imposition of asset-blocking sanctions and visa restrictions on foreign persons determined by the President to be “responsible for (1) the extrajudicial rendition, arbitrary detention, or torture of any person in Hong Kong, or (2) other gross violations of internationally recognized human rights in Hong Kong.”
- **Executive Order 13936.** Executive Order 13936 implements provisions of the HKAA and the HKHRDA and imposes sanctions on foreign persons who, among other things, develop, adopt or implement the National Security Law; commit serious human rights abuses in Hong Kong; or are responsible for, or engage in, actions or policies that undermine democratic processes or institutions in Hong Kong or threaten the peace, security, stability or autonomy of Hong Kong.

The Advisory emphasizes that failure by any U.S. person, or foreign person subject to U.S. jurisdiction, to comply with Hong Kong-related U.S. sanctions can result in civil and criminal penalties under U.S. law.

2. Risks Under Chinese Law

After highlighting the risks under U.S. law of engagement with entities or individuals that are subject to Hong Kong-related U.S. sanctions, the Advisory discusses the risks under Chinese law of complying with those sanctions.

- **Ministry of Commerce Rules.** The Advisory cites various provisions of the Rules on Blocking Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (the “Rules”) published by China’s Ministry of Commerce in January of this year. The Rules provide a framework whereby Chinese persons that are the subject of sanctions imposed by foreign parties (for example, the subjects of Hong Kong-related U.S. sanctions) may institute legal proceedings in a Chinese court against any person that complies with those foreign sanctions, “and thus infringes upon the legitimate rights and interests of [such Chinese person].”

- **Countering Foreign Sanctions Law.** The Law of the People’s Republic of China on Countering Foreign Sanctions, passed by the National People’s Conference on June 10, 2021, authorizes departments of the State Council to “impose countermeasures against individuals or organizations that directly or indirectly participate in the drafting, decision-making, or implementation of ‘discriminatory restrictive measures’ against PRC citizens or entities that interfere with PRC internal affairs.”⁷ The Advisory notes that such countermeasures may include, but are not limited to, denying and revoking visas or deportation, seizing and freezing assets within China, and prohibiting transactions and cooperation with Chinese individuals and entities. The Advisory also cautions that such countermeasures may be imposed against (1) spouses and relatives of individuals on the “countermeasures list,” (2) senior managers or controllers of entities included on the countermeasures list, and (3) organizations managed or controlled by individuals on the countermeasures list.
- **National Security Law Guidance.** The Advisory notes that the National Security Law makes it a criminal offense to conspire with, or to receive “instructions, control, funding or other kinds of support” from, a foreign country or person in order to “[impose] sanctions or blockade, or [engage] in other hostile activities against [Hong Kong] or the [PRC].” The Advisory cites August 2020 guidance from the Hong Kong Monetary Authority regarding this provision, which guidance instructs that “unilateral sanctions imposed by foreign governments are not part of the international targeted financial sanctions regime and have no legal status in Hong Kong.” The guidance does not prohibit regulated institutions from complying with U.S. sanctions, but advises such institutions that their policies should “be informed by a thorough assessment of any legal, business and commercial risks involved and based on a balanced approach,” and that, “[i]n assessing whether to continue to provide banking services to an individual or entity designated under a unilateral sanction which does not create an obligation under Hong Kong law ... [regulated institutions] should have particular regard to the treat customers fairly principles.”

In concluding its discussion of the seeming incompatibility between the U.S. and Chinese legal frameworks with respect to Hong Kong-related sanctions, the Advisory cautions that “businesses operating in Hong Kong may face heightened risk and uncertainty in connection with sanctions compliance efforts.”

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ENDNOTES

- ¹ U.S. Dep't of State, U.S. Dep't of the Treasury, U.S. Dep't of Commerce, and U.S. Dep't of Homeland Security, Hong Kong Business Advisory – Risks and Considerations for Businesses Operating in Hong Kong (July 16, 2021), <https://www.state.gov/risks-and-considerations-for-businesses-operating-in-hong-kong/>.
- ² Other examples cited in the Advisory include (1) the publication of a Hong Kong government report that criticized the public broadcaster Radio Television Hong Kong (“RTHK”) for “deficiencies” in its editorial practices, after which the director of broadcasting resigned and RTHK began deleting its online content, and (2) the arrest and prosecution of a journalist for allegedly making false statements in accessing publicly available information for investigative reporting.
- ³ Concurrently with the publication of the Advisory, OFAC added seven functionaries in Beijing’s liaison office in Hong Kong to the SDN List. See <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210716>.
- ⁴ The term “Joint Declaration” means the Joint Declaration of the Government of the United Kingdom and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, done at Beijing on December 19, 1984.
- ⁵ The term “Basic Law” means the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.
- ⁶ For further discussion of the HKAA, refer to our July 7, 2020 memorandum, [Hong Kong Autonomy Act: U.S. Congress Passes Sanctions Bill in Response to Chinese National Security Law](#).
- ⁷ The Advisory notes that “[t]he law makes reference to organizations, individuals, and measures within the territory of China. It does not explicitly distinguish between mainland China, Hong Kong, and Macau.”

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