

Insights

HONG KONG AUTONOMY ACT UPDATE: SECTION 5(A) REPORT DELIVERED TO U.S. CONGRESS

Oct 23, 2020

Introduction

On 7 August 2020, eleven Hong Kong officials were added to the Specially Designated Nationals and Blocked Persons List (“**SDN List**”) of the Treasury Department’s Office of Foreign Assets Control (“**OFAC**”) pursuant to the President’s Executive Order on Hong Kong Normalization (“**EO 13936**”), for “*undermining Hong Kong’s autonomy and restricting the freedom of expression or assembly of the citizens of Hong Kong*”. The property and the interests in property of SDNs in the U.S. or in the possession or control of U.S. persons are blocked as of 7 August 2020. The named individuals, or the SDNs, include Hong Kong’s Chief Executive Carrie Lam, Hong Kong’s Secretary for Justice Teresa Cheng, and Director of the Hong Kong and Macao Affairs Office of the State Council Xia Baolong.

In addition, on 14 October 2020, the U.S. Department of State issued a [press release](#) stating that the U.S. Secretary of State submitted to the U.S. Congress the [report](#) required under Section 5(a) of the Hong Kong Autonomy Act (“**HKAA**”) to identify foreign persons who are “*materially contributing to, have materially contributed to, or attempt to materially contribute to the failure of the People’s Republic of China to meet its obligations under the Sino-British Joint Declaration or Hong Kong’s Basic Law*” (“**Section 5(a) Report**”). Section 6 of the HKAA authorizes blocking sanctions to be imposed on the individuals identified in the Section 5(a) Report. Ten Hong Kong officials were identified in the Section 5(a) Report, all of whom were previously added to the SDN List of OFAC on 7 August 2020 pursuant to EO 13936. Stephen Lo, the former Commissioner of the Hong Kong Police Force, was included in the SDN List but not included in the Section 5(a) Report. He remains a named individual under the SDN List but is not subject to secondary sanctions under the HKAA.

Section 5(a) Report under the HKAA

The HKAA requires that the U.S. Secretary of the Treasury consult with the U.S. Secretary of State within 30 to 60 days after the Section 5(a) Report is submitted (i.e. from 13 November 2020 to 13 December 2020). Upon consultation, the U.S. Secretary of Treasury is required to issue another report under Section 5(b) of the HKAA (“**Section 5(b) Report**”) identifying foreign financial institutions (“**FFIs**”) that knowingly conduct a significant transaction with an individual identified in

the Section 5(a) Report. Not later than one year after inclusion on the Section 5(b) Report, FFIs will be subject to at least five (5) secondary sanctions set forth in the HKAA. All sanctions set forth in Section 6(b) of the HKAA must be imposed against any FFI included in the Section 5(b) Report for two years or more. Among the sanctions available to be imposed is a prohibition against the FFI from engaging in any transactions involving property or interests in property within the jurisdiction of the United States.

In order to warn all FFIs about the risks of engaging in significant transactions with parties named in the Section 5(a) Report, OFAC has updated the [SDN list](#) in respect of the individuals named in the Section 5(a) Report by including language about potential secondary sanctions risks pursuant to the Hong Kong Autonomy Act of 2020.

OFAC guidance - Key takeaways

Along with the release of the Section 5(a) Report, the OFAC issued guidance in the form of FAQs. In respect of FFIs that may be named in the Section 5(b) Report, the key takeaways are set out below:

- The U.S. Treasury Department will only identify FFIs that knowingly conduct a significant transaction with a foreign person following the individual's listing in the Section 5(a) Report, i.e. after 14 October 2020 ([FAQ #848](#)).
- Transactions with individuals identified in the Section 5(a) Report will not be considered "significant" if the transaction constitutes a good-faith wind down within 30 days of an individual's identification in the Section 5(a) Report ([FAQ #848](#)).
- The U.S. Treasury Department will reach out to an FFI to inquire about its conduct before identifying it in a Section 5(b) Report ([FAQ #848](#)).
- An FFI can be excluded or removed from the Section 5(b) Report after being identified if the significant transaction: (a) does not have a significant and lasting negative effect that contravenes obligations of China in relation to the Joint Declaration and the Basic Law; (b) is not likely to be repeated again; and (c) has been reversed or mitigated through positive countermeasures taken by the FFI ([FAQ #849](#)).
- In determining whether a transaction is "significant", the U.S. Secretary of the Treasury may consider the totality of the facts and circumstances, including the size, number, and frequency of the transaction and the nature of the transaction(s). A transaction will not be considered significant if a U.S. person would not require a specific license to engage in the transaction ([FAQ #850](#)).
- For a FFI to "knowingly" conduct a significant transaction with an individual, the FFI would have actual knowledge of the conduct, the circumstance, or the result ([FAQ #851](#)).

Next steps

Any FFI that knowingly conducts a significant transaction with an individual named in the Section 5(a) Report (including any updates to the report) may be subject to mandatory secondary sanctions under the HKAA. FFIs should note the recently published guidance from OFAC and take necessary internal steps before 13 November 2020 in anticipation of the U.S. Secretary of State releasing the Section 5(b) Report.

This article was co-written with Trainee Solicitor Stephanie Cheung.

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