

Executive Order Eliminates Differential Treatment for Hong Kong

July 21, 2020

On July 14, 2020, President Trump issued Executive Order 13936 (the “Executive Order” or “E.O. 13936”)¹ implementing a range of changes to United States policy toward Hong Kong in response to China’s new national security law with respect to Hong Kong adopted by the National People’s Congress. The Executive Order follows the Secretary of State’s May 27, 2020, certification to Congress under the Hong Kong Policy Act that Hong Kong no longer maintains a high degree of autonomy from China. This action comes in parallel with the adoption of the Hong Kong Autonomy Act (“HKAA”), the latest in a series of human rights-focused sanctions measures aimed at China (though to date, only at individual Chinese officials and agencies). A fuller description of the sanctions actions can be found in our recent blog posts.²

I. Overview

- The 1992 Hong Kong Policy Act, as amended (“HKPA”), Pub. L. 102-383, 22 U.S.C. §§ 5701 *et seq.*, established U.S. policy to maintain relations with Hong Kong separately from mainland China to the extent consistent with the 1984 Sino-British Joint Declaration. The HKPA was amended last November by the Hong Kong Human Rights and Democracy Act of 2019, Pub. L. 116-76.
- Under the HKPA, existing U.S. laws and international agreements continue to apply to Hong Kong, notwithstanding the transfer of sovereignty to China.³
- The HKPA, however, allows the President to declare, by Executive Order, that “Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded to the People’s Republic of China” and thereby suspend application of the law.⁴ In E.O. 13936, the President declares that it is the policy of the United States “to suspend or

¹ E.O. 13936, The President’s Executive Order on Hong Kong Normalization (July 14, 2020), <https://www.whitehouse.gov/presidential-actions/presidents-executive-order-hong-kong-normalization/>.

² See United States Enacts Additional Hong-Kong Related Sanctions; Impact Remains Unclear (July 14, 2020), <https://www.clearytradewatch.com/2020/07/united-states-enacts-additional-hong-kong-related-sanctions-impact-remains-unclear/>; BIS Expands Export Restrictions on Huawei, Extends Temporary General License (May 22, 2020), <https://www.clearytradewatch.com/2020/05/bis-expands-export-restrictions-on-huawei-extends-temporary-general-license/>; BIS Tightens National Security Export Controls (April 29, 2020), <https://www.clearytradewatch.com/2020/04/bis-tightens-national-security-export-controls/>.

³ 22 U.S.C. § 5721.

⁴ 22 U.S.C. § 5722.



eliminate different and preferential treatment for Hong Kong to the extent permitted by law and in the national security, foreign policy, and economic interest of the United States.”

- The Executive Order invokes the President’s authority under the HKPA with respect to a number of statutes, regulations, and treaties relating to export controls, travel and immigration, law enforcement, and scientific and educational cooperation.⁵ A number of the actions listed in E.O. 13936 will need to be implemented by agency regulation, and a number of treaties require notice for withdrawal; agency heads are also directed to propose further actions that are “necessary and prudent” to end preferential treatment for Hong Kong.
- Additional modifications or terminations with respect to the differential treatment of Hong Kong under other statutory or regulatory provisions may still be forthcoming.

II. Export Controls

A. Export Administration Regulations

The U.S. export control regime has historically distinguished between Hong Kong and China under the Export Administration Regulations (“EAR”), administered by the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”), and included Hong Kong within various lists of countries or governments eligible for specific EAR license exceptions.

The Executive Order suspends differential treatment of Hong Kong under the Export Control Reform Act of 2018 (the statutory authority for the EAR), and directs the Secretary of Commerce to revoke all license exceptions under the EAR not available for China.⁶ Previous action by BIS suspended all license exceptions for exports, reexports, and transfers (in-country) to Hong Kong of items that are subject to the Export Administration Regulations (“EAR”) unless the relevant license exception is also available for China.⁷ This does not affect goods not subject to heightened export controls (so-called “EAR99” items), but a significant number of controlled goods could be affected. Deemed export/reexport transactions (e.g., releases of technical information to foreign citizens in the United States) involving Hong Kong persons authorized under a license exception prior to June 30, 2020 were permitted to continue to be authorized until August 28, 2020.⁸

A wide range of license exceptions (some of which are subject only to limited changes) are affected, including Additional Permissive Reexports (APR), Computers (APP), Aircraft, Vessels, and Spacecraft (AVS), Encryption (ENC), Shipments to Country Group B Countries (GBS), Governments and International Organizations (GOV),

⁵ While the President’s authority to unilaterally abrogate treaty obligations is subject to some debate, generally courts have declined to interfere in cases where the President has asserted or exercised the authority to terminate treaties. *See, e.g., Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated*, 444 U.S. 996 (1979). Where, as here, there is explicit statutory authority, any challenge is very unlikely to be successful. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (“Because the President’s action...was taken pursuant to specific congressional authorization, it is ‘supported by the strongest of presumptions and the widest latitude of judicial interpretation....’” (quoting *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952))).

⁶ E.O. 13936, Sec. 3(c). In addition, imported goods and containers of such goods produced in Hong Kong must now list China instead of “Hong Kong” as the “country of origin” under U.S. Customs labeling requirements. E.O. 13936, Sec. 2(f); *see also* 19 U.S.C. § 1304; Customs Bulletin and Decisions, Vol. 31, No. 24/25, 17 (June 18, 1997).

⁷ BIS, Suspension of License Exceptions for Hong Kong (June 29, 2020), <https://www.bis.doc.gov/index.php/documents/pdfs/2568-suspension-of-license-exceptions-for-exports-and-reexports-to-hong-kong/file>.

⁸ *Id.*

Limited Value Shipments (LVS), Servicing and Replacement of Parts and Equipment (RPL), Replacement Strategic Trade Authorization (STA), Technology and Software under Restriction (TSR), and Technology and Software Unrestricted (TSU). Hong Kong will also presumably be treated consistently with China under the EAR's chemical and biological warfare controls, where it is currently in a less restrictive category.

B. Arms Export Control Act

On June 29, 2020, the U.S. Department of State announced that the United States was ending exports of “U.S.-origin defense equipment” to Hong Kong and would “take steps toward imposing the same restrictions on U.S. defense and dual-use technologies to Hong Kong as it does for China.”⁹ The Executive Order formalizes this policy by ending differential treatment under the HKPA with respect to the Arms Export Control Act (“AECA”).¹⁰ Accordingly, sales and exports of defense articles to Hong Kong previously authorized under the AECA and the International Traffic in Arms Regulations are henceforth subject to a presumption of denial where a Hong Kong person is named as an end-user, licensee, or sublicensee, or where Hong Kong is listed as a marketing, transfer, re-transfer, reexport, sales, or distribution territory.¹¹

Accompanying guidance issued by the U.S. Department of State's Directorate of Defense Trade Controls (“DDTC”) provides that existing authorizations under specific licenses continue to be valid and that the Department “is not taking steps to revoke or rescind previously approved authorizations . . . to Hong Kong.”¹² Hong Kong persons residing overseas who were previously authorized access to defense articles subject to the ITAR are also exempted.¹³ The DDTC will review, on a case-by-case basis, license applications for exports of defense services to Hong Kong persons physically located outside of Hong Kong or mainland China and authorized to receive defense articles prior to July 14, 2020.¹⁴

III. Sanctions

The Executive Order implements, and largely overlaps with, the human rights and autonomy-related sanctions provisions contained in the Hong Kong Human Rights and Democracy Act of 2019 and the HKAA.¹⁵ In particular, section 4 of the Executive Order authorizes the Secretary of State or the Secretary of Treasury, in consultation with the other, to impose blocking sanctions on persons (individuals or entities) engaged in a number of activities:

- **National Security Law.** Persons (1) directly or indirectly involved in coercing, arresting, detaining, or imprisoning individuals under the Law of the People's Republic of China on Safeguarding National

⁹ U.S. Department of State, Press Statement: U.S. Government Ending Controlled Defense Exports to Hong Kong (June 29, 2020), <https://www.state.gov/u-s-government-ending-controlled-defense-exports-to-hong-kong/>.

¹⁰ See E.O. 13936, Sec. 2(c); see also AECA, Pub. L. 94-329, codified at 22 U.S.C. § 2751 *et seq.*

¹¹ Directorate of Defense Trade Controls, Hong Kong Executive Order: Licensing Policy Change for Hong Kong (July 15, 2020) (“DDTC Guidance”), https://www.pmdtc.state.gov/ddtc_public?id=ddtc_public_portal_news_and_events&timeframe=12month&_ncforminfo=e9Iu2zCJ7b01ea0xA8S_X14TJjhIfHA6oaa3od45jemaG0TAwDmSTiE10wKDtlbDmVOnCARlwR72MK2GPq_bA%3D%3D.

¹² *Id.*

¹³ *Id.*; see also E.O. 13936, Sec. 3(d).

¹⁴ See DDTC Guidance.

¹⁵ For information on the HKAA sanctions, see our prior blog post at: <https://www.clearytradewatch.com/2020/07/united-states-enacts-additional-hong-kong-related-sanctions-impact-remains-unclear/>.

Security in the Hong Kong Administrative Region (the “National Security Law”), or (2) responsible for or involved in developing, adopting, or implementing the National Security Law.

- ***Human Rights Abuses.*** Persons responsible for, complicit in, or engaged in, directly or indirectly, actions relating to:
 - Democracy: The undermining of democratic processes or institutions in Hong Kong;
 - Hong Kong Autonomy: Threatening the peace, security, stability, or autonomy of Hong Kong;
 - Censorship: Censorship or limitations with respect to Hong Kong, relating to the freedom of expression or assembly, or access to free and independent media; or
 - Serious Human Rights Abuses: Extrajudicial rendition, arbitrary detention, torture, or other gross violations of “internationally recognized human rights” or “serious human rights abuse” in Hong Kong
- ***Leaders or Officials.*** Current or past leaders or officials of a government or private entity that has engaged in (or whose members have engaged in) any of the above activities relating to the National Security Law, or to democracy, Hong Kong autonomy, or censorship.
- ***Directors or Officers.*** Directors or senior executive officers of any entity sanctioned for the above activities.¹⁶

Individuals sanctioned under the Executive Order, and their immediate family members, are also subject to visa bans.¹⁷ As is typical with sanctions Executive Orders, E.O. 13936 also authorizes the imposition of sanctions against persons who have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, persons engaged in the targeted activity, as well as persons owned, controlled by, or acting on behalf of such persons.¹⁸ U.S. persons are prohibited from dealing with, or evading sanctions relating to, persons blocked under the Executive Order.¹⁹

IV. Law Enforcement

The Executive Order directs executive agencies to take steps to terminate law enforcement cooperation with the Government of Hong Kong and its security services, relating to extradition, transfer of sentenced persons, and certain law enforcement training:

- ***U.S.-Hong Kong Extradition.*** The United States entered into an extradition treaty with Hong Kong in 1996,²⁰ which contains a termination clause permitting either party to withdraw on six months’ notice. Notably, the Executive Order directs the administration to give notice of intent to suspend – but not

¹⁶ E.O. 13936, Sec. 4.

¹⁷ *Id.*, Sec. 7.

¹⁸ *Id.*, Sec. 4(a)(iv)-(v).

¹⁹ *Id.*, Secs. 6, 8.

²⁰ Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders (TIAS 98-121), <https://www.govinfo.gov/content/pkg/CRPT-105erpt2/html/CRPT-105erpt2.htm>.

withdraw from – the treaty, and follows recent suspensions of Hong Kong extradition treaties by Australia and Canada.²¹ Like most extradition treaties, the agreement between the United States and Hong Kong requires “dual criminality,” meaning that the U.S. is not obligated to extradite persons for offenses under Hong Kong law that would not be offenses under U.S. law. The U.S. does not currently have an extradition treaty in place with mainland China.

- ***Transfer of Sentenced Persons.*** The United States and Hong Kong have also shared an agreement for the transfer of sentenced persons in either territory to serve prison sentences in the jurisdiction of which they are citizens or nationals (in the case of the United States), or permanent residents (in the case of Hong Kong).²² The Executive Order directs the administration to give notice of intent to terminate the agreement, which will cease to have effect three months after the date of receipt of the notice.²³ Although the United States remains a party to the multilateral Council of Europe Convention on the Transfer of Sentenced Persons, China has not signed the Convention, nor do the two countries share a transfer treaty.²⁴
- ***Law Enforcement Training.*** The Executive Order directs the administration to “take steps to end the provision of training to members of the Hong Kong Police Force or other Hong Kong security services at the Department of State’s International Law Enforcement Academies.”²⁵ Since 1995, the U.S. Department of State’s Bureau of International Narcotics and Law Enforcement Affairs has offered various specialized courses to foreign law enforcement entities.²⁶

V. Travel and Immigration

The U.S. and Hong Kong have maintained an immigration regime separate from mainland China. While Hong Kong SAR passport holders and British National (Overseas) passport holders did not enjoy visa-free travel to the United States even prior to the Executive Order, Hong Kong citizens generally enjoyed separate treatment from mainland China under U.S. immigration law.²⁷ The Administration has previously indicated that revisions would

²¹ As the treaty does not expressly provide for suspension, the administration appears to pursue this action on international law grounds. See Restatement (Third) of Foreign Relations Law of the United States §§ 333, 339.

²² Agreement Between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons (TIAS 99-418), Art. 4(1)(b)-(c), <https://www.justice.gov/criminal-oia/file/445121/download>.

²³ *Id.*, Art. 14(2).

²⁴ See U.S. Department of Justice, International Prisoner Transfer Program (updated April 19, 2019), <https://www.justice.gov/criminal-oia/list-participating-countriesgovernments>.

²⁵ E.O. 13936, Sec. 3(g).

²⁶ U.S. Department of State, International Law Enforcement Academies (ILEAs), <https://www.state.gov/international-law-enforcement-academy-ilea/>.

²⁷ On May 29, 2020, the President issued a Proclamation restricting immigration for students and researchers associated with “an entity in the PRC that implements or supports the PRC’s ‘military-civil fusion strategy.’” See <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-nonimmigrants-certain-students-researchers-peoples-republic-china/>. On July 15, 2020, U.S. Secretary of State Michael Pompeo announced the imposition of visa restrictions on certain employees of Chinese technology companies, including Huawei, that “provide material support to regimes engaging in human rights abuses globally.” U.S. Department of State, Press Statement: U.S. Imposes Visa Restrictions on Certain Employees of Chinese Technology Companies that Abuse Human Rights (July 15, 2020) (citing Section 212(a)(3)(C) of the Immigration and Nationality Act), <https://www.state.gov/u-s-imposes-visa-restrictions-on->

be made to immigration policy with respect to Hong Kong residents, which the New Executive Order now sets forth.

The Executive Order generally directs the administration, within 15 days of the order, to amend regulations “to eliminate the preference for Hong Kong passport holders as compared to PRC passport holders” relating to nonimmigrant visas.²⁸ The Executive Order further suspends the application of differential treatment under the HKPA to various provisions of the Immigration Act of 1990 and the Immigration and Nationality Act of 1952:

- ***Immigration Numerical Limits.*** The Executive Order suspends treatment of Hong Kong as a separate foreign state for purposes of per-country numerical limitations on immigration.²⁹
- ***Nonimmigrant Visa Duration.*** The Executive order suspends the treatment of Hong Kong under a separate reciprocity schedule from mainland China with respect to the duration of nonimmigrant visas.³⁰
- ***Visa Lottery.*** Under the Diversity Visa program, also known as the green card lottery, “foreign states” identified as having low numbers of immigrants in the previous five years are allotted a greater lottery distribution of immigrant visas.³¹ The Executive Order suspends the treatment of Hong Kong as a separate “foreign state” for purposes of the Diversity Visa program.³²
- ***Guam and Northern Mariana Islands Visa Waiver.*** The Executive Order suspends the eligibility of Hong Kong residents holding British National (Overseas) passports for visa-free travel to Guam and the Commonwealth of the Northern Mariana Islands.³³

The Executive Order also directs the administration to reallocate refugee admissions to residents of Hong Kong.³⁴ The practical import of the provision is likely limited, however, as such reallocation is limited “to the extent feasible and consistent with applicable law” and “within the refugee ceiling set by the annual Presidential Determination,” currently set at 18,000 for fiscal year 2020.³⁵

[certain-employees-of-chinese-technology-companies-that-abuse-human-rights/](#). How these proclamations will be implemented by the Department of Homeland Security remains unclear.

²⁸ See E.O. 13936, Sec. 3(b).

²⁹ See E.O. 13936, Sec. 2(a); Immigration Act of 1990 (“Immigration Act”), Sec. 103, codified at 8 U.S.C. § 1152 note; see also INA, Sec. 202(b), codified at 8 U.S.C. § 1152(b).

³⁰ See E.O. 13936, Sec. 2(b); Immigration and Nationality Act of 1952 (“INA”), Sec. 221(c), codified at 8 U.S.C. § 1201(c); see also U.S. Department of State, Hong Kong Reciprocity Schedule, <https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/HongKong.html>.

³¹ INA, Sec. 203(c), codified at 8 U.S.C. §§ 1101(a)(14), 1153(c).

³² See E.O. 13936, Sec. 2(b); 8 U.S.C. § 1153(c).

³³ See E.O. 13936, Sec. 2(b); INA, Sec. 212(l), codified at 8 U.S.C. § 1182(l). In 2011, U.S. Customs and Border Protection issued an interim final rule clarifying that individuals holding British National (Overseas) passports as a result of their connection to Hong Kong were eligible for participation in the visa-waiver program. See 76 F.R. 16231.

³⁴ See E.O. 13936, Sec. 3(k).

³⁵ *Id.*

VI. Other Provisions

A. CFIUS Reporting

The Executive Order suspends differential treatment to Hong Kong under Section 721(m) of the Defense Production Act of 1950, as amended (the “DPA”).³⁶ The DPA is the statutory authority for the Committee on Foreign Investment in the United States (“CFIUS”), and Section 721(m) requires CFIUS to provide an annual report to Congress covering all of the CFIUS reviews and investigations of transactions within its jurisdiction during the period covered by the report.³⁷ CFIUS currently distinguishes in its reporting of covered transactions by jurisdictions between Hong Kong and China.³⁸ There is no substantive change to the review process.

B. Income Tax Treatment

The Executive Order directs the administration to give notice of intent to terminate a 1989 agreement between Hong Kong and the United States granting reciprocal exemption of income tax on individuals and corporations for income derived from the international operation of ships.³⁹ Traditionally, the U.S. Internal Revenue Service (“IRS”) has treated Hong Kong as a separate jurisdiction from mainland China for taxation purposes. There is not currently a tax treaty in place between the United States and Hong Kong, while there is a bilateral income tax agreement between the United States and Mainland China.⁴⁰ Were the U.S. to begin treating Hong Kong as party of China for tax purposes, it is possible that Hong Kong residents could obtain favorable income tax treatment under the U.S.-China agreement.

C. Scientific and Educational Cooperation

The Executive Order directs the administration to take steps to terminate the Fulbright exchange program with respect to future exchanges with China and Hong Kong.⁴¹ The Executive Order also suspends continued cooperation under a recently expired protocol between the U.S. Geological Survey and the Chinese University of Hong Kong to pursue scientific and technical cooperation relating to Earth sciences.⁴²

³⁶ 50 U.S.C. 4565(m).

³⁷ *Id.*

³⁸ See e.g., Committee on Foreign Investment in the United States, *Annual Report to Congress FY 2018* (May 2020), available at: <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2018.pdf>.

³⁹ E.O. 13936, Sec. 3(j); Agreement for the reciprocal exemption with respect to taxes on income from the international operation of ships, TIAS 11892; 1549 UNTS 91 (1989), <https://treaties.un.org/doc/Publication/UNTS/Volume%201549/v1549.pdf>.

⁴⁰ United States-The People’s Republic of China Income Tax Convention, <https://www.irs.gov/pub/irs-trty/china.pdf>.

⁴¹ E.O. 13936, Sec. 3(h).

⁴² *Id.*, Sec. 3(h); Protocol Between the United States of America and Hong Kong, TIAS 11892 (Nov. 9, 2009), <https://2009-2017.state.gov/documents/organization/183998.pdf>.

VII. Conclusion

The Executive Order declares a national emergency relating to the situation in Hong Kong, sets forth a general policy of suspending or eliminating Hong Kong's differential treatment, and begins to authorize the executive agencies to implement such policy. At the same time, the Executive Order's express provisions relating to export controls and sanctions largely overlap with existing policies and authorities, and, in other areas, such as duties, tariffs, and regulatory cooperation, the Executive Order is silent. Much remains to be seen as to how the relevant executive agencies will implement the Executive Order as well as future areas of expansion.

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