

## U.S. decertification under the Hong Kong Policy Act – what is changing now, and what happens next?

28 May 2020

On 27 May 2020 U.S. Secretary of State Pompeo certified to Congress that the State Department no longer considers Hong Kong to have significant autonomy from China and therefore "Hong Kong does not continue to warrant treatment under United States laws in the same manner as U.S. laws were applied to Hong Kong before July 1997." This pronouncement by the secretary of state was made in response to the imminent passage of China's national security law, which the secretary earlier in the week had referred to as a "death knell" to Hong Kong. The stated purpose of the national security law is to provide new enforcement tools for the Hong Kong government to prosecute crimes related to secession, inciting subversion of state power, organizing and participating in terrorism, and foreign interference with Hong Kong.

The State Department's decision to decertify Hong Kong's status does not by itself result in any immediate changes under U.S. law. Rather, it sets in motion a process whereby the President may issue an executive order and choose to suspend some or all of the favorable treatment Hong Kong currently receives under various U.S. laws, in which case it would receive treatment no more favorable than the People's Republic of China (PRC) with respect to any such laws the President chooses to suspend. The President has significant discretion with regard to issuing an executive order, and he is not required to make any specific changes as a result of the certification.

An executive order could direct or authorize executive branch agencies to make particular changes to the treatment of investment, goods, services, and persons to or from Hong Kong including, for example, with respect to customs (including tariffs), export controls, and visas. If the executive order makes changes with respect to Hong Kong's treatment for purposes of export controls, for example, that could include imposing additional reasons for control on Hong Kong and more restrictive licensing policy such that Hong Kong is treated similarly as the PRC. Likewise, such changes could also potentially include the application of the U.S. arms embargo against the PRC to Hong Kong, which would result in a broad prohibition on exports of military- and space/satellite-related items. An executive order could also direct the Treasury Department to sanction individuals or entities found to have engaged in certain human right violations in Hong Kong. The President also could curtail certain cultural and educational exchanges and transportation arrangements between the United States and Hong Kong.

If an executive order is issued, any changes to the treatment of goods or persons from Hong Kong will have to be implemented by the various executive branch agencies through amendments to their respective regulations, which we expect will take place over the coming days and weeks.

On Friday, 29 May 2020 President Trump announced during a press conference that he was directing his Administration to begin the process of eliminating policy exemptions that give Hong Kong different and special treatment. While no specific actions were announced, the President indicated that changes would be made with respect to U.S. treatment of Hong Kong in the following areas:

- Extradition treaty arrangements.
- Customs.
- Visas.
- Export controls.
- Sanctions on PRC and Hong Kong officials who are involved in eroding Hong Kong's autonomy and freedom.

These developments are likely to result in retaliation by China, which will further increase tensions between China and the United States.

Please see below a summary of the legal framework behind these changes.

### **Treatment of Hong Kong under U.S. law**

Hong Kong has been afforded special treatment under U.S. law as a result of the Hong Kong Policy Act of 1992 (the "1992 Act," Pub. L. 102-383, 22 U.S.C. § 5701 et seq.), which was modified by the Hong Kong Human Rights and Democracy Act of 2019 (the "2019 Act," Pub. L. 116-76).

Under the 1992 Act as modified, U.S. law continued to apply to Hong Kong in the same manner as before 1 July 1997, the date on which the PRC resumed the exercise of sovereignty over Hong Kong from the United Kingdom. (22 U.S.C. § 5721(a)) This included a variety of trade-related commitments, such as the treatment of Hong Kong as distinct from the PRC for purposes of U.S. customs and export controls. (22 U.S.C. § 5713)

### **Certification and reporting requirements**

The 2019 Act added a number of requirements, including a new certification requirement (22 U.S.C. § 5725), which requires the secretary of state to certify annually that Hong Kong continues to warrant treatment under U.S. law in the same manner as before 1 July 1997. On 27 May 2020 Secretary of State Pompeo issued a press release stating that in light of the PRC's proposed national security legislation with respect to Hong Kong, he certified that Hong Kong does not continue to warrant such treatment.

### **Next steps**

Following this determination that Hong Kong does not warrant continued special treatment under U.S. law, the President may issue an executive order suspending the continued application of U.S. law in the same manner as of 1 July 1997. (22 U.S.C. § 5722(a)) This suspension may apply with respect to any particular law or provision thereof, meaning the President has significant discretion as to which provisions of U.S. law will or will not be suspended with respect to Hong Kong's favorable treatment.

Therefore, any changes to Hong Kong's treatment under U.S. law will likely be spelled out in the forthcoming executive order or implementing regulations. While the President has broad discretion under Section 5722, the special treatment of Hong Kong for purposes of U.S. customs, export controls, or immigration, in particular, are areas where changes may be forthcoming.

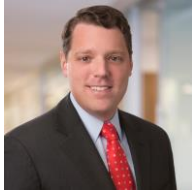
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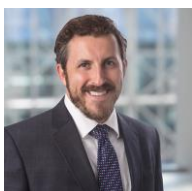
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