

Hong Kong Autonomy Act Report Delivered to the U.S. Congress and Guidance Issued to Foreign Financial Institutions

October 19, 2020

On October 14, 2020, the U.S. State Department announced that it had submitted to Congress the report (the “Section 5(a) Report”) required under Section 5(a) of the Hong Kong Autonomy Act of 2020 (the “HKAA”). The Section 5(a) Report was mandated to identify foreign individuals, entities or organizations that “materially contribute” to China’s failure to preserve Hong Kong’s autonomy.

The Section 5(a) Report names ten individuals, each of whom was already designated for U.S. sanctions, pursuant to Executive Order 13936, by the Office of Foreign Assets Control (“OFAC”) on August 7, 2020. One individual – Stephen Lo, the former commissioner of the Hong Kong police force – who was previously sanctioned under E.O. 13936 – is, without explanation, not named in the Section 5(a) Report.

As described in our prior [client update](#), the HKAA next requires the U.S. Treasury Department to submit a second report (the “Section 5(b) Report”) to Congress, between 30 and 60 days after the Section 5(a) Report. The Section 5(b) Report will identify foreign financial institutions (“FFIs”) that “knowingly conduct significant transactions” with those identified by the State Department in the Section 5(a) Report. Within one year of the inclusion of an FFI in the Section 5(b) Report, the U.S. President generally is required to impose menu-based sanctions on the named FFIs.

Accordingly, although no new sanctions immediately emanate from the issuance of the Section 5(a) Report, FFIs are now faced with a risk of secondary sanctions for dealing with the ten persons who have been identified in that report. Indeed, as a warning to FFIs, OFAC has amended the Specially Designated Nationals listing for each of the ten persons named in the Section 5(a) Report to include the notation: “Secondary sanctions risk: pursuant to the Hong Kong Autonomy Act of 2020.”

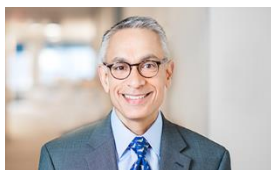
In addition, OFAC issued secondary sanctions guidance to FFIs in the form of four new “frequently asked questions” (“FAQs”). Importantly, the OFAC FAQs provide:

- The Treasury Department intends to reach out to an FFI regarding its conduct before naming the institution in the Section 5(b) Report. (FAQ #848)

- Transactions over the next 30 days to wind down relationships with the ten individuals named in the Section 5(a) Report generally will not be considered significant. (FAQ #848)
- An FFI can avoid imposition of sanctions if the significant transactions of the FFI that merited its inclusion in the Section 5(b) Report: (1) do not have a significant and lasting negative effect that contravenes the obligations of China to Hong Kong's sovereignty; (2) are not likely to be repeated in the future; and (3) have been reversed or mitigated through "positive countermeasures taken by the FFI." (FAQ #849)
- Consistent with other secondary sanctions regimes, the Treasury Department may consider "the totality of the facts and circumstances" when determining whether transactions are "significant" for purposes of section 5(b) of the HKAA. A transaction will not, however, be considered significant if a U.S. person would not require a specific license from OFAC to conduct or participate in the transaction. (FAQ #850)
- A definition for the term "FFI," by cross-reference to a definition in the U.S. Bank Secrecy Act (31 U.S.C. § 5312(a)(2)), which definition includes: banks; securities broker-dealers; insurance companies; loan and finance companies; casinos; and a broad range of other types of institutions. (FAQ# 851)
- A definition for the term "knowingly" to mean "that a person has *actual knowledge* of the conduct, the circumstance, or the result." (emphasis added) (FAQ #851)

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Please do not hesitate to contact us with any questions.



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