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Hong Kong Business Advisory

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Introduction

The U.S. Department of State, the U.S. Department of the Treasury, the U.S. Department of Commerce, and the U.S. Department of Homeland Security are issuing this advisory to highlight growing risks associated with actions undertaken by the Government of the People’s Republic of China (PRC) and the Government of the Hong Kong Special Administrative Region (SAR) that could adversely impact U.S. companies that operate in the Hong Kong SAR of the People’s Republic of China (“Hong Kong”).

Businesses, individuals, and other persons, including academic institutions, research service providers, and investors (hereafter “businesses and individuals”) that operate in Hong Kong, or have exposure to sanctioned individuals or entities, should be aware of changes to Hong Kong’s laws and regulations. This new legal landscape, including the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law, or NSL,) could adversely affect businesses and individuals operating in Hong Kong. As a result of these changes, they should be aware of potential reputational, regulatory, financial, and, in certain instances, legal risks associated with their Hong Kong operations.

These risks fall into four categories: risks for businesses following the imposition of the NSL; data privacy risks; risks regarding transparency and access to critical

business information; and risks for businesses with exposure to sanctioned Hong Kong or PRC entities or individuals.

Background on Hong Kong's Economic Status

Hong Kong retains many economic distinctions from mainland China, such as free and open trade, negligible tariff or non-tariff barriers, and well-protected property ownership and intellectual property rights. Hong Kong continues to exercise independent authority in the implementation of commercial agreements, sets a monetary policy autonomously from the PRC, and participates separately from mainland China in many international organizations and multilateral entities, including the Asia-Pacific Economic Cooperation, the Financial Action Task Force, and the World Trade Organization. Hong Kong, in many respects, is a separate legal jurisdiction from the PRC, maintaining a separate currency, as well as separate regulatory structures to supervise companies operating in the territory. However, as noted in the Department of State's 2021 Hong Kong Policy Act Report, the PRC's imposition of the NSL on Hong Kong in June 2020 led to major structural changes that significantly reduced Hong Kong's autonomy. As a result, business and rule of law risks that were formerly limited to mainland China are now increasingly a concern in Hong Kong.

Heightened Risks for Businesses and Individuals Operating in Hong Kong under the NSL

- *Businesses operating in Hong Kong, as well as individuals and businesses conducting business on their behalf, are subject to the laws of Hong Kong, including the National Security Law. Foreign nationals, including one U.S. citizen, have been arrested under the NSL.*

In June 2020, the PRC National People's Congress Standing Committee unilaterally imposed the NSL on Hong Kong, significantly reducing Hong Kong's autonomy and undermining protected rights and freedoms. Offenses established by the NSL include secession, subversion, terrorist activities, and collusion with a foreign country or external elements to endanger national security. Individuals in Hong Kong have been arrested under the NSL for publishing newspaper articles, participating in routine democratic processes, expressing an opinion regarding the government or the Chinese Communist Party, and attending public gatherings. Penalties for offenses under the NSL can include criminal fines and imprisonment, including life imprisonment in certain circumstances. In addition, the NSL states, inter alia, that "an incorporated or unincorporated body, such as a company or

organization which commits an offense” under the NSL, may be subject to a criminal fine and to having its operations suspended or its license or business application revoked “if the body has been punished for committing an offense” under the NSL. Certain provisions may also apply to offenses “committed from outside the Region by a person who is not a permanent resident of the Region,” and the NSL states that it also applies to “an incorporated or unincorporated body such as a company or an organization which is set up in the Region if the person or the body commits an offence under this Law outside the Region.”

Hong Kong authorities have arrested foreign nationals under the NSL, including one U.S. citizen. Those arrested may have travel documents confiscated and may be prevented from departing Hong Kong. Additionally, the Legislative Council passed an amendment to immigration law on April 28, effective August 1, which could potentially allow Hong Kong authorities to place exit bans on individuals seeking to depart the country, including non-residents.

Only judges specially appointed by the chief executive may oversee NSL cases. The NSL established an Office for Safeguarding National Security (OSNS) in Hong Kong, staffed by PRC security services and not subject to the jurisdiction of the Hong Kong government, including its judiciary. The OSNS, rather than Hong Kong courts, is empowered to exercise jurisdiction over certain cases brought under the NSL. The NSL also established a new Committee for Safeguarding National Security, led by the chief executive and accountable to the PRC.

Heightened Risks Regarding Data Privacy

- *Businesses face risks associated with electronic surveillance without warrants and the surrender of data to authorities.*

The NSL introduced a heightened risk of PRC and Hong Kong authorities using expanded legal authorities to collect data from businesses and individuals in Hong Kong for actions that may violate “national security.” Hong Kong authorities have, to date, interpreted “national security” to include participating in primary elections, calling for political steps specifically protected by the Basic Law, posting opinions on social media, and meeting with members of the diplomatic community. Prosecutions to date may not fully reflect the extent to which “national security” 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. While Hong Kong maintains a separate regulatory framework from the PRC for how businesses, individuals, and government authorities collect, handle,

and use data in Hong Kong, and while Hong Kong authorities have traditionally respected data privacy, the rule of law, and limits on government authority, the NSL grants Hong Kong law enforcement broad authorities to conduct wiretaps or electronic surveillance on approval of the chief executive, rather than the courts, in national security-related cases.

The NSL empowers Hong Kong law enforcement to conduct searches, including of electronic devices, for evidence in national security cases, and the NSL permits Hong Kong law enforcement to require Internet service providers to provide or delete data and other information relevant to national security cases, both without judicial oversight. Furthermore, businesses and individuals should be aware that the NSL authorizes the Office for Safeguarding National Security, which is staffed by PRC security services, to collect data in Hong Kong.

Beijing is developing a broad data policy regime through its Cybersecurity Law, draft Data Security Law, and draft Personal Information Protection Law and related regulations. These bills, as drafted, do not extend the PRC's regulatory jurisdiction to Hong Kong, but U.S. companies should be aware that legislation supported by Beijing could be quickly imposed on or passed in Hong Kong. Businesses and individuals operating in Hong Kong should be aware that Hong Kong's own data privacy laws can require businesses and individuals to localize data in the territory; however, that aspect of the law has not been implemented since the Personal Data (Privacy) Ordinance was legislated in 1995.

Heightened Risk Regarding Transparency and Access to Information

- *Businesses that rely on free and open press may face restricted access to information.*

Since the imposition of the NSL, Hong Kong authorities have increased pressure on freedom of expression, notably freedom of the press. In March, Hong Kong and Macau Affairs Office Director Xia Baolong stated that the principle of “patriots governing Hong Kong” also extends to the media. Hong Kong Chief Executive Carrie Lam has vowed to stamp out “fake news.” Describing “fake news” as a matter of national security, Hong Kong Police Commissioner Chris Tang affirmed in April that the police would enforce the law and prosecute journalists should evidence of violations be found. On June 11, the Hong Kong government, under the NSL, announced changes to the Film Censorship Ordinance

to enable the Film Censorship Authority to ban any movies “deemed to be supporting or glorifying acts that could endanger national security.”

In February, a Hong Kong government report criticized Radio Television Hong Kong (RTHK), the territory’s only public broadcaster, for “deficiencies” in its editorial practices. RTHK began deleting its online content after its director of broadcasting abruptly resigned six months before his term ended. Hong Kong authorities have arrested and prosecuted a journalist for allegedly making false statements in accessing publicly available information for investigative reporting.

On June 17, the National Security Department of the Hong Kong Police searched pro-democracy newspaper *Apple Daily* offices to gather evidence for a case of suspected contravention of the NSL, after the police arrested five senior executives, including the editor-in-chief and the CEO of *Apple Daily*’s parent company Next Media on suspicion of “colluding with a foreign country or with external elements to endanger national security.”

In a press conference, the police said that the five arrestees are accused of conspiring with foreign institutions to seek sanctions against China and Hong Kong by publishing dozens of articles in the newspaper, undermining previous assurances that the NSL would not be applied retroactively. Police also froze \$2.3 million in assets belonging to *Apple Daily* and two affiliated companies, leading the Hong Kong stock exchange to suspend trading of Next Media shares. With funds frozen without legal recourse and corporate leadership under arrest, *Apple Daily* issued its final edition on June 24.

Relevant U.S. Authorities for the Imposition of Sanctions

- *Individuals and entities should be aware of potential consequences of certain types of engagement with sanctioned individuals or entities.*

The United States has several sanctions authorities targeting certain conduct related to the situation with respect to Hong Kong. U.S. individuals and entities, including businesses, are prohibited from engaging in certain transactions with blocked persons absent a general or specific license from the Department of the Treasury’s Office of Foreign Assets Control (OFAC) or other exemption. A failure to comply with U.S. sanctions can result in civil and criminal penalties under U.S. law. OFAC strongly encourages organizations subject to U.S. jurisdiction, as well as foreign entities, including foreign financial institutions, that conduct business in or with the United States or U.S. persons, or deal in U.S.-

origin goods or services, to employ a risk-based approach to sanctions compliance by developing, implementing, and routinely updating a sanctions compliance program.

In addition to OFAC sanctions, on December 23, 2020, pursuant to the President's Executive Order 13936, the Department of Commerce's Bureau of Industry and Security (BIS), removed Hong Kong as a separate destination under the Export Administration Regulations (EAR). Subsequently, all items subject to the EAR that are destined for export, reexport or transfer (in-country) to or from Hong Kong will be treated as exports, reexports or transfers (in-country) to or from the PRC. Exporters should be aware that such restrictions that apply for military end-use or military end-users, including military intelligence, now apply to Hong Kong, since it is now treated as part of the PRC. In addition, Hong Kong government entities were placed on the BIS military end-user restricted list, further affirming that Hong Kong is treated in the same way as the PRC.

The Hong Kong Autonomy Act (HKAA) provides for the imposition of asset-blocking sanctions and visa restrictions on any foreign person that the Secretary of State, in consultation with the Secretary of the Treasury, determines is materially contributing to, has materially contributed to, or attempts to materially contribute to the failure of the PRC to meet its obligations under the Joint Declaration or the Basic Law, as defined in the HKAA (such sanctions being mandatory one year after such determination). Furthermore, the HKAA requires the imposition of certain sanctions on any foreign financial institution (FFI) that the Secretary of the Treasury, in consultation with the Secretary of State, determines to knowingly conduct a significant transaction with a foreign person determined to meet the criteria described above. (See Sections 6 and 7 of the HKAA for further details on sanctions with respect to identified foreign persons and FFIs, respectively.)

The Hong Kong Human Rights and Democracy Act (HKHRDA) requires the imposition of asset-blocking sanctions and visa restrictions on any foreign person that the President determines is 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. (See Section 7 of the HKHRDA for further details on sanctions with respect to foreign persons.)

Executive Order (E.O.) 13936, which implements certain provisions of the HKAA and the HKHRDA, among other legal authorities, imposes sanctions with respect to any foreign person determined by the Secretary of State in consultation with the Secretary of the Treasury to have met the criteria in E.O. 13936. For example,

E.O. 13936 provides for the imposition of such sanctions with respect to foreign persons in connection with certain conduct related to Hong Kong, including developing, adopting, or implementing the NSL; serious human rights abuses in Hong Kong; and actions or policies that undermine democratic processes or institutions in Hong Kong or threaten the peace, security, stability, or autonomy of Hong Kong.

E.O. 13936 also provides for the imposition of sanctions with respect to foreign persons determined to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, persons sanctioned pursuant to E.O. 13936 (See E.O. 13936 for all designation criteria).

Heightened Risks for Businesses with Exposure to Sanctioned Hong Kong or PRC Entities or Individuals, and for Businesses that Implement U.S. Sanctions

- *Businesses operating in Hong Kong may face heightened risks and uncertainty related to PRC retaliation against companies that comply with sanctions imposed by the United States and other countries, including through enforcement of the Countering Foreign Sanctions Law.*

Rules issued by the PRC's Ministry of Commerce (MOFCOM), the recently enacted Law of the People's Republic of China on Countering Foreign Sanctions, and the National Security Law indicate that PRC and Hong Kong authorities may seek to block sanctions imposed by the United States or other countries against PRC citizens or entities, and that individuals and companies may face legal repercussions for complying with such sanctions.

On January 9, MOFCOM published the "Rules on Blocking Unjustified Extraterritorial Application of Foreign Legislation and Other Measures" (the Rules), which came into force on the same date. Under the Rules, "where a citizen, legal person or other organization of China is prohibited or restricted by foreign legislation and other measures from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons, or other organizations, he/it shall truthfully report such matters to the competent department of commerce of the State Council within 30 days."

The Rules further provide that “where [State Council authorities], upon assessment, confirm that there exists unjustified extra-territorial application of foreign legislation and other measures, it may decide that the competent department of commerce of the State Council shall issue a prohibition order to the effect that, the relevant foreign legislation and other measures are not accepted, executed, or observed. Where a person complies with the foreign legislation and other measures within the scope of a prohibition order, and thus infringes upon the legitimate rights and interests of a citizen, legal person or other organization of China, the latter may, in accordance with law, institute legal proceedings in a people’s court, and claim for compensation by the person.”

On June 10, the National People’s Congress enacted the Law of the People’s Republic of China on Countering Foreign Sanctions, which authorizes the imposition of countermeasures in response to sanctions imposed on Chinese individuals or entities by foreign governments. The 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. The law states that the relevant departments of the State Council may 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. The law provides that the State Council departments may list such individuals or organizations in a countermeasures list and apply one or more of the following measures against them: (1) not issuing visas, denying entry, canceling visas, or deportation; (2) sealing, seizing, or freezing movable property, real estate, and all other types of property within the territory of “our country”; (3) prohibiting or restricting relevant transactions, cooperation, and other activities with organizations and individuals within the territory of “our country”; and (4) other necessary measures.

Furthermore, the law states that, in addition to individuals and organizations listed on the countermeasures list, the State Council may also employ countermeasures against: (1) spouses and immediate relatives of individuals listed on the countermeasures list; (2) senior managers or actual controllers of organizations included in the countermeasures list; (3) organizations in which individuals included in the countermeasures list serve as senior management; and (4) organizations in which persons included in the countermeasures list are the actual controllers or participate in establishment and operations. The law also states that decisions made by the relevant departments of the State Council in accordance with the provisions of relevant articles of the law are final decisions.

Article 29(4) of the NSL provides that it is a criminal offense for any person to, *inter alia*, “conspire with a foreign country or an institution, organisation or individual outside the mainland, Hong Kong and Macao of the People’s Republic of China, or directly or indirectly receive instructions, control, funding or other kinds of support from a foreign country or an institution, organisation or individual outside the mainland, Hong Kong and Macao of the People’s Republic of China, to...[impose] sanctions or blockade, or [engage] in other hostile activities against the Hong Kong Special Administrative Region or the People’s Republic of China.”

On August 8, 2020, the HKMA issued guidance instructing regulated institutions 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 expressly prohibit companies from complying with U.S. sanctions, however, and advises that companies’ policies should be “informed by a thorough assessment of any legal, business and commercial risks involved and based on a balanced approach. In 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, boards and senior management of [regulated institutions] should have particular regard to the treat customers fairly principles.”

Accordingly, businesses operating in Hong Kong may face heightened risk and uncertainty in connection with sanctions compliance efforts. Failure to comply with U.S. sanctions can result in civil and criminal penalties under U.S. law. Companies with questions about their sanctions compliance obligations may contact OFAC at ofac_feedback@treasury.gov or (800) 540-6322.