

CLIENT ALERT

U.S. State Department Fails to Certify Hong Kong's Autonomy: Signals Potential Change in Trade and Economic Treatment

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On May 27, 2020, the U.S. Secretary of State Michael Pompeo issued a [statement](#) that 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.” U.S. relations with Hong Kong are governed by the [United States-Hong Kong Policy Act of 1992](#), which authorizes the U.S. to provide “different” treatment for Hong Kong than it accords the People’s Republic of China in a variety of political, economic, trade, and other areas so long as Hong Kong remains “sufficiently autonomous.”

In November 2019, President Trump signed into law the [Hong Kong Human Rights and Democracy Act of 2019](#). Among other measures, this law requires the Secretary of State to make an annual certification about whether Hong Kong continues to merit its special treatment under U.S. law. The recent action by Secretary of State Michael Pompeo was the first time such a certification was required. The annual report to Congress on Hong Kong was due by the end of March, but Secretary Pompeo remarked that the report’s submission to Congress had been delayed “to account for any additional actions that Beijing may be contemplating in the run-up” to China’s May 22 National People’s Congress “that would further undermine the people of Hong Kong’s autonomy.” His statement anticipated action China’s National People’s Congress took on May 28 which empowered its standing committee to draft national security legislation for Hong Kong. The passage of such a national security law would have an impact on the fifteen enumerated factors in the statute to be considered in the annual certification.

What the Statement Does and Does Not Do

The May 27 statement by the Secretary of State does not alone change trade or other preferential treatment afforded by the U.S. to Hong Kong. It does, however, position the President to issue an Executive Order that could remove some or all of the special status currently provided to Hong Kong. The new certification required by Congress was intended to increase transparency, place pressure on the Executive Branch, and assert Congressional influence over Hong Kong matters.

Under U.S. law, the President is authorized to make the determination of the status of Hong Kong’s autonomy and “may” suspend the application of current laws or provisions of laws that treat Hong Kong distinctly from China through Executive Order. This leaves open the possibility that U.S. action could be limited in scope and phased in, rather than a full revision of the current U.S. special and differential treatment for Hong Kong in areas such as customs and tariffs. Any Executive Order issued by the President would be published in the Federal Register and specify the law or provision of law affected by the order. This may provide an opportunity for companies, industry sectors, and other organizations to offer comments and recommendations.

What is at Stake in U.S.-Hong Kong Trade

Hong Kong has served as a major entrepôt to Asia and for commercial relations with China. Hong Kong’s longstanding open trade policy and Common Law legal system has historically made it attractive to business. U.S.-Hong Kong bilateral trade totals

over \$45 billion, and the United States has its largest trade surplus with Hong Kong compared to any other market. More than 1,200 U.S. companies do business in Hong Kong, and over 800 of these companies have either regional headquarters or regional offices there.

A discontinuation of special trading status by the United States could have the effect of raising tariffs on products imported from Hong Kong into the United States to levels similar or identical to those currently imposed on China. Hong Kong's special status has allowed it to avoid U.S.-imposed section 301, section 232, and other countervailing and anti-dumping duties imposed on China. The United States has extradition and tax treaties in place with Hong Kong, but not with China. Hong Kong is also treated as a separate destination under U.S. law for export control purposes, and is therefore not bound by the dual-use export control rules that are specific to China.

What to Watch

- A U.S. **interagency** process may be initiated to decide on what actions to take in the U.S.-Hong Kong relationship given the Secretary of State's determination.
- An **Executive Order** by the President could provide an opportunity for company and industry comments on any proposed reductions or modifications in the current trade, economic, or other treatment afforded by the U.S. to Hong Kong.
- **Additional tariffs** imposed by the United States against China as a result of its 2017 Section 301 investigation against China could be extended to imports from Hong Kong. In practice, this may be a less likely course of action by the Administration given that the trade barriers identified in that investigation were based on a fact-finding review by the U.S. that did not include Hong Kong and the stated U.S. concerns were not attributable to Hong Kong policies or practices.
- **Sanctions** may be imposed by the U.S. on persons identified by the U.S. as responsible for undermining Hong Kong's fundamental freedoms and autonomy. Under the 2019 Hong Kong Human Rights and Democracy Act, this could include asset blocking and a visa ban on such individuals.
- Current separate **customs treatment** for Hong Kong by the U.S. could be merged into those in place for China.
- **Export controls** currently in place for China could be extended in whole or in part to U.S. exports to Hong Kong. This could have a particular impact on U.S. high tech products destined for final use in Hong Kong.
- **Congressional action** is likely, including potentially committee hearings and legislation that seeks to demonstrate Congressional engagement and to reinforce Executive Branch action on the economic and trade relationship with Hong Kong and China.
- **Potential actions by other nations** could impact Hong Kong trade and economic matters.

How to Prepare

Hong Kong's position as a major hub for international trade and finance could be impacted by a change in U.S. treatment of Hong Kong and the imposition of sanctions, export controls, or tariffs. The potential for significant impacts to the trade relationship exists even if the implementation is phased or calibrated so as to not undermine U.S. investment in Hong Kong or Hong Kong's unique attributes such as its common law system and independent judiciary, along with other laws and policies.

Companies and organizations that rely upon Hong Kong for their operations, customers, or as a point of entry into China or the Indo-Pacific region need to assess their exposure to a potential change in U.S. policies towards Hong Kong. This means understanding current markets and supply chains and scenario-planning for what changes may or may not mean. The United States may not be alone in considering action, so factoring in broader international trade and economic relations with Hong Kong and China may be valuable. Although the U.S. Secretary of State's statement of May 27 does not result in any immediate change in U.S.-Hong Kong economic and trade relations, it signals an appropriate moment for stocktaking to prepare for potential future change.

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