

Legal Update 法律动态

Updated - The Hong Kong Autonomy Act

(更新版) 《香港自治法》

Background 背景

On July 14, 2020, President Trump signed into law the Hong Kong Autonomy Act (HKAA). The HKAA provides for mandatory sanctions against individuals, entities and financial institutions in response to China's National Security Law for Hong Kong. Together with the "[President's Executive Order on Hong Kong Normalization](#)" it is the latest in a series of US measures in response to the ongoing disagreement with China regarding China's obligation to maintain Hong Kong's autonomous status under the Joint Declaration and the Basic Law. As further detailed in our recent Alerts¹, it follows:-

2020年7月14日，特朗普总统签署《香港自治法》(HKAA)，令其成为法律。《香港自治法》规定对某些个人、实体和金融机构实施强制性制裁，作为对中国颁布的《中华人民共和国香港特别行政区维护国家安全法》(以下简称《香港国家安全法》)的回应。关于中国在《中英联合声明》和《香港基本法》下维持香港高度自治地位的义务，美国与中国之间正产生一连串分歧，《香港自治法》连同《[关于香港正常化的总统行政命令](#)》(President's Executive Order on Hong Kong Normalization)就是美方因此采取的一系列举措的最新步骤。如同我们在近期发表的文章¹中提到：

- The May 27, 2020 certification by the Secretary of State under the Hong Kong Human Rights and Democracy Act that Hong Kong no longer enjoys sufficient autonomy in order to justify special treatment by the US,
- The May 28, 2020 announcement by President Trump that the United States would initiate the process of revoking Hong Kong's favorable treatment under US law and
- The decision by the Chinese Government to introduce a National Security Law for Hong Kong, which took effect on June 30, 2020.
- Announcements this week by the State Department of visa restrictions on Chinese government officials, and by the Commerce Department of the elimination of exceptions treating Hong Kong more favourably than China for exports of goods and technology to Hong Kong, and China's threat of visa restrictions against US officials.
- 2020年5月27日，美国国务卿根据《香港人权与民主法案》，宣称香港不再享有充分自治权，因此不再有理由获得美国的特殊待遇。

- 2020 年 5 月 28 日，特朗普总统宣布美国将撤销香港所享受的美国法律下的优惠待遇。
- 中国颁布《香港国家安全法》，该法律已于 2020 年 6 月 30 日生效。
- 本周，美国国务院宣布对某些中国政府官员实施签证限制；美国商务部则宣布在向香港出口商品和技术方面不再对香港区别对待，从而不再赋予其比中国大陆更优惠的待遇；同时，中国警告将对美国官员实施签证限制。

The Major Provisions of the HKAA 《香港自治法》的主要规定

Section 3 - This section lists a number of "findings" by Congress which conclude:-

第 3 章 - "(16) The ways in which the Government of China, at times with the support of a subservient Government of Hong Kong, has acted in contravention of its obligations under the Joint Declaration and the Basic Law, as set forth in this section, are deeply concerning to the people of Hong Kong, the United States, and members of the international community who support the autonomy of Hong Kong."

本章列出了美国国会的几条“结论”，其中包括：

"(16) 如本章所述，中国政府——有时在一个恭顺的香港政府的支持下——的行动违反了其在《中英联合声明》和《香港基本法》下的义务，令香港民众、美国和支持香港自治的国际社会成员十分担忧。"

Section 5(a) – No later than 90 days after the legislation is passed the Secretary of State must submit a report identifying any "foreign person" that is "materially contributing to, has materially contributed to, or attempts to materially contribute to the failure of the Government of China to meet its obligations under the Joint Declaration or the Basic Law" (an Identified Foreign Person)

第 5(a)章 -

Notes:

- The term "foreign person" includes any individual or entity that is not a US person.
- References to the *Joint Declaration* means the Joint Declaration signed between China and the United Kingdom in 1984, which referred to Hong Kong continuing to have a "high degree of autonomy" after the handover of sovereignty in 1997.
- References to the *Basic Law* mean Hong Kong's mini-constitution.

立法通过后 90 天内，美国国务卿应提交一份报告，列明“正在实质上导致、曾经实质上导致或试图实质上导致中国政府未能履行其在《中英联合声明》或《香港基本法》下义务”的任何“外国人”（“被列明外国人”）。

注：

- “外国人”包括任何不是美国人的个人或实体。
- 《中英联合声明》是指中英两国于 1984 年签署的联合声明，其中指出香港在 1997 年主权移交后继续享有“高度的自治权”。
- 《香港基本法》指香港的“小宪法”。

Section 5(b) – 第 5(b)章 - Between 30 and 60 days after the submission of the Secretary of State's report under section 5(a), the Secretary of the Treasury must submit "a report that identifies any foreign financial institution that knowingly conducts a significant transaction with a foreign person identified in [the Secretary of State's report]" (an Identified FFI).

Notes:

- The term "financial institution" is very broadly defined to include not only depository institutions but a range of other entities engaged in the business of accepting deposits, making, granting, transferring, holding or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers or sellers thereof. A foreign financial institution is therefore very broad also (and includes any financial institution organized under any non-US law).
- The term "significant transaction" is not defined in the law. However, we expect it will be interpreted broadly based on the same set of fact-specific and highly discretionary factors used by the Secretary of the Treasury in other sanctions contexts.
- Notably, the law defines the term "knowingly" based on an actual knowledge standard, rather than the broader "reason to know" standard used in other sanctions legislation.

在国务卿根据第 5(a)章提交报告后 30 天到 60 天内，美国财政部长应提交“一份报告，列明任何在明知的情况下与[国务卿报告中]被列明外国人进行重大交易的外国金融机构”（“被列明外国金融机构”）。

注：

- “金融机构”的定义非常广泛，不仅包括存款机构，还包括从事接受存款以及进行、授予、转让、持有或代理贷款或信贷、或者购买或出售外汇、证券、商品期货或期权、或者促使采购或出售这些产品的各类其他实体。因此，外国金融机构的定义也十分广泛（包括根据任何非美国法律成立的任何金融机构）。
- 该法律未定义“重大交易”。不过，我们预计，根据美国财政部长在其他制裁中使用的同样一套针对特定事实和高度自由裁量的因素，它将被广义解读。
- 值得注意的是，该法律对“在明知的情况下”的定义基于“实际知道”的标准，而非其他制裁立法中使用的更广义的“有理由知道”的标准。

Section 6 – 第 6 章 - The President can (and in certain circumstances shall, subject to possible waiver) impose sanctions (primarily the freezing of assets and associated prohibitions on dealings of any kind) on an Identified Foreign Person.

总统可以（在某些情况下应，但受限于可能授予的豁免）对被列明外国人实施制裁（主要是冻结资产以及和禁止相关的任何形式的交易）。

Section 7(a) – The President shall, subject to possible waiver, impose sanctions on an Identified FFI. There are 10 possible sanctions (see below) and, absent a waiver, the law would require the President to impose at least five of them within a year after an Identified FFI is named in the Secretary of the Treasury's report and then to impose all of these sanctions two years after the FFI is so named.

第 7(a)章 -

总统应（受限于可能授予的豁免）对被列明外国金融机构实施制裁。共有 10 项可能的制裁（见下）。同时，在没有豁免的情况下，该法律要求，在外国金融机构被财政部长报告列明后一年内，总统应实施其中至少五项制裁，然后在其被列明后两年内实施全部制裁。

Section 7(b) – The potential sanctions are:-

第 7(b)章 -

1. Refusal of credit from any US institution.
2. Prohibition from acting as a primary dealer in US debt.
3. Prohibition from acting as an agent of the US government for US public funds.
4. Prohibition from participating in foreign-exchange transactions that are subject to US jurisdiction.
5. Prohibition on the financial institution from entering into financial transactions with other financial institutions to the extent subject to US jurisdiction.
6. Prohibition on the financial institution from holding, using or dealing with any property which is subject to US jurisdiction.
7. Prohibition on the export of commodities or software to the financial institution where such export is subject to US jurisdiction.
8. Prohibition on any US person from investing in equity or debt of the financial institution.
9. Exclude officers or controlling shareholders from the US.
10. Imposition of any sanctions (1) to (8) above on the individual officers of the financial institution.

这些可能的制裁措施为：

1. 禁止任何美国机构向其提供信贷。
2. 禁止其担任美国债务的一级交易商。
3. 禁止其为美国政府担任美国公共资金的代理商。
4. 禁止其参与受美国管辖的外汇交易。
5. 禁止其与其他金融机构进行在美国管辖范围内的金融交易（例如 SWIFT）。
6. 禁止其持有、使用或交易受美国管辖的任何财产。
7. 禁止向其出口美国管辖的商品或软件。
8. 禁止任何美国人投资其股权或债务。
9. 将其管理人员或控股股东驱逐出美国。
10. 对其个别管理人员施加上述 1 至 8 下的任何制裁。

Section 8(a) – The President has the discretion to waive the imposition of sanctions with respect to any foreign person or foreign financial institution where such waiver is in the national security interest of the US. However, the law requires advance notice to Congress before any waiver may be exercised, and establishes a mechanism for Congress to disapprove of and to block the exercise of this waiver authority under the HKAA.

第 8(a)章 -

如果对任何外国人或外国金融机构给予制裁豁免符合美国国家安全利益，则总统可酌情决定授予该等豁免。不过该法律要求在行使任何豁免权之前应事先通知国会，并建立了相关机制使国会可以不同意并阻止行使该豁免权。

Section 8(b) – The President can remove any foreign person or foreign financial institution from the relevant report where the Secretary of State and the Secretary for the Treasury determine that the relevant person or entity has taken steps to remediate the wrongdoing or that the wrongdoing is unlikely to be repeated.

第 8(b)章 -

如果国务卿和财政部长认定，任何被列明外国人或外国金融机构已采取措施纠正其行为，或该行为不大可能重复，则总统可将该个人或实体从相关报告中移除。

Observations 一些观察

1. **Broad Implementing Discretion.** Notwithstanding the mandatory provisions in the legislation, the President retains important discretion in a number of respects regarding the imposition of sanctions against individuals, entities and financial institutions under the law. These discretionary factors will in practice have an important role to play in actual implementation of the law, and an understanding of these considerations could play an important part of a risk mitigation strategy for persons and entities whose activities could expose them to sanctions.
1. **广泛的自由裁量权。** 尽管该法规定有强制性条文，但总统根据该法针对个人、实体及金融机构施加制裁时，在若干方面还是保留着重要的酌情自由裁量权。在实操中，这些酌情因素将会在法律的实际执行中起重要作用，对于可能遭受制裁的个人或实体而言，了解这些因素对于其制定降低风险策略时或有重大意义。
 - a. **Timing.** The President does not need to impose any sanctions immediately. The Secretary of State's report on Identified Foreign Persons (Identified Foreign Persons Report) is due within 90 days of enactment, while the Secretary of the Treasury's report on Identified FFIs (Identified FFI Report) is due within 30 – 60 days of the Identified Foreign Persons Report. In each case, the President may wait for 12 months from the issuance of those reports to impose sanctions on a person or entity identified therein. The November Presidential elections are bound to play a role in the timing of any sanctions, and the balance of power between the White House and Congress may also have an impact on the political dynamic impacting the implementation of this law.
 - a. **时间。** 总统无须立即实施任何制裁。国务卿将于立法通过后 90 天内提交被列明外国人报告，财政部长将于被列明外国人报告提交后 30 至 60 天内提交被列明外国金融机构报告。总统可在该等报告发出 12 个月后才对报告中的被列明个人或实体实施制裁。11 月总统大选势必影响任何制裁的时间，而且白宫与国会之间的权力角力也将影响政治动态，从而进一步影响该法的实施。
 - b. **Determination that an Individual has "Materially Contributed" or that an FFI Has "Knowingly Conducted a Significant Transaction".** Moreover, both the Secretary of State and the Secretary of the Treasury have broad discretion in determining who satisfies

the criteria for inclusion in the Identified Foreign Persons Report and the Identified FFI Report, respectively. The “material contribution” standard (for Identified Foreign Persons), and the “knowledge” and “significant transaction” standards (for Identified Foreign Financial Institutions) are inherently discretionary and highly fact-specific. While this raises potential risk considerations for institutions and entities considering potential coverage, it also means the Administration will have substantial policy discretion as a practical matter in its determinations regarding whether or not to include entities and individuals who could arguably be covered by the law.

- b. **关于个人“实质上导致”或外国金融机构“知情地进行重大交易”的确定。** 国务卿和财政部长有广泛的自由裁量权，确定被列明外国人和被列明外国金融机构。适用于被列明外国人的“实质上导致”标准以及适用于被列明外国金融机构的“知情”和“重大交易”标准，在本质上都具有自由裁量的特点并高度依赖具体事实。这固然引起相关机构和实体潜在的风险考量，也意味着实操中美国行政当局在决定是否将可能被该法覆盖的实体或个人纳入名单时，有较大的政策性自由裁量权。
 - c. **Exclusion and Removal Criteria.** Even where the facts otherwise support a determination under the criteria above, the HKAA would leave the President discretion to either “exclude” or remove persons and entities from the various reports subject to certain specified criteria. In particular, these criteria require a determination that the relevant activity: (i) is not likely to be repeated in the future, (ii) has been reversed or otherwise mitigated by “positive countermeasures” taken by the foreign person or FFI in question, and (iii) “does not have a significant and lasting negative effect” on China’s obligations with respect to Hong Kong under the Joint Declaration and Basic Law. As this suggests, even where a potentially covered FFI or individual has engaged in activity that could expose it to potential sanctions, it is possible in certain circumstances to take steps to manage and minimize the associated risk, including through engagement and other mitigation measures. Any determination to exclude (or remove) requires notification to Congress.
 - c. **排除和移除标准。** 即使有事实支持按照上述标准确定相关个人或实体，在《香港自治法》下，总统可行使自由裁量权，在满足某些标准的前提下，将相关个人及实体从各项报告中“排除”或移除。这些标准要求确定有关活动：(i) 将来不大可能重复，(ii) 已由相关外国人或外国金融机构予以逆转或采取“积极的应对措施”以其他方式缓解，和 (iii) 对中国在《中英联合声明》和《香港基本法》下的义务“没有重大及持久的负面影响”。如此一来，即使曾经从事可能遭受制裁的活动而可被该法覆盖的外国金融机构或个人，仍有可能在若干情况下采取步骤管控及尽量减低相关风险，包括对话合作及其他缓解措施。任何排除（或移除）的决定均须知会国会。
 - d. **Waiver and Termination.** As noted above, the HKAA includes national security waiver authority (subject to Congressional advance notification and blocking mechanisms). The President may also terminate sanctions with respect to any Identified FFI or Identified Foreign Person with respect to which sanctions have been imposed. Notably, the criteria for termination are the same as those for exclusion from the reports as described above.
 - d. **豁免和终止。** 如上所述，《香港自治法》包括国家安全豁免权（但行使前须通知国会，并受制于国会的阻止机制）。总统亦可终止任何被列明外国金融机构或被列明外国人已遭受的制裁。终止适用的标准与上述除名适用的标准相同。
2. **Evaluating Potential Risks for Business.** The HKAA has the potential to significantly impact the interests of any FFI entity, and potentially for other businesses, with ties to individuals in China and Hong Kong who could be viewed as making a ‘material contribution’ to actions by the Chinese government that undermine Hong Kong’s autonomy. The designation of such individuals would have direct implications for FFIs to the extent they could be identified as engaging in “significant transactions” with such persons. Moreover, other businesses with

investments or other assets in which an Identified Foreign Person has interests could also be impacted by that individual's designation as a US sanctions target. This is because the imposition of an asset-blocking order would expose all assets in which such a person has interests to an immediate asset freeze, and could severely constrain options for divestment or exit from existing financial relationships. Accordingly, any FFI doing business in Hong Kong or China, as well as investors and other businesses with potential exposure, would be advised to review existing account and asset portfolios to identify any business they are currently undertaking with any politically exposed persons in either jurisdiction who could be targeted under the HKAA in respect of, at least, the promulgation of the Hong Kong National Security Law introduced with effect from June 30, 2020 and related government actions relevant to Hong Kong autonomy.

2. **评估企业的潜在风险。**任何外国金融机构和其他公司，如被认为与中国大陆及香港的“实质上参与”中国政府削弱香港自治行动的个人有联系，其权益均可能受到《香港自治法》的重大影响。指定该等人士将会对外国金融机构有直接影响，因为它们可能被认为与该等人士进行“重大交易”。此外，如被列明外国人在其他公司的投资或其他资产当中持有权益，该等公司也可能因该人被指定为美国制裁目标而受影响。这是因为施行资产冻结令会使该人享有权益的所有资产立即遭到冻结，可能严重妨碍从现有财务关系中剥离或退出。因此，建议所有在香港或中国大陆经营业务的外国金融机构，以及承受潜在风险的投资者及其他公司，对现有客户及资产组合进行审查，以识别出目前与两地中任何有政治风险的个人或实体的任何业务，这些个人或实体可能会至少因 2020 年 6 月 30 日生效的《香港国家安全法》和涉及香港自治的政府行动而成为《香港自治法》的目标。

¹ For further details, please refer to:

[Trump Announces Revocation of Hong Kong's Special Trade Status](#) (May 29, 2020)

[Potential Implications If Hong Kong's Special Status Is Revoked](#) (June 29, 2020)

[HKSAR National Security Law Explained](#) (July 2, 2020)

[The State of US-China Relations: Practical Implications for Hong Kong and Global Businesses](#) (June 14, 2020)

¹ 请参阅以下文章了解进一步详情：

[Trump Announces Revocation of Hong Kong's Special Trade Status](#) (2020 年 5 月 29 日)

[Potential Implications If Hong Kong's Special Status Is Revoked](#) (2020 年 6 月 29 日)

[HKSAR National Security Law Explained](#) (2020 年 7 月 2 日)

[中美关系状况对香港和全球商务的影响](#) (2020 年 6 月 14 日)

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

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