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Navigating U.S. Sanctions Against China and Hong Kong

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The political tensions between the United States and the People's Republic of China (PRC) have increased over the past few months, and those tensions have brought an expansion of U.S. economic sanctions. Notably, the U.S. has established a new sanctions regime focused on Hong Kong and has sanctioned numerous PRC individuals, entities, and governmental agencies, including for activities related to alleged human rights abuses. The PRC has responded with counter-sanctions, including the new Unreliable Entity List (UEL) system, which could present novel challenges for U.S. companies doing business in China.

Hong Kong-Related Sanctions

On July 14, 2020, President Trump signed the Hong Kong Autonomy Act (HKAA) into law. That same day, the President also issued Executive Order (EO) 13936, which implemented the HKAA and recognized that Hong Kong was no longer sufficiently autonomous from the PRC, pursuant to the Hong Kong Policy Act of 1992. In determining that Hong Kong was no longer sufficiently autonomous from the PRC, the President primarily cited the PRC's imposition of national security legislation in Hong Kong.

The President's Executive Order on Hong Kong Normalization

<https://www.federalregister.gov/documents/2020/07/17/2020-15646/the-presidents-executive-order-on-hong-kong-normalization>

The HKAA was passed by Congress with broad bipartisan support and authorizes the President to implement sanctions against foreign persons who undermine Hong Kong's autonomy. So far, several PRC and Hong Kong officials have been sanctioned under EO 13936, including Carrie Lam, the Chief Executive of Hong Kong.

In addition, the HKAA authorizes the President to impose secondary sanctions against foreign financial institutions that engage in significant transactions with certain sanctioned foreign persons (e.g., officials that engage in activities undermining Hong Kong's autonomy). By implementing the HKAA, EO 13936 also provides for sanctions pursuant to the International Emergency Economic Powers Act (IEEPA), giving the President broad discretion under national security grounds to penalize individuals, entities, and governmental agencies.

China Sanctions

While there currently is no China-specific U.S. sanctions program, the U.S. has imposed sanctions with respect to the PRC under other statutory and regulatory authorities. For example, the U.S. has utilized the Global Magnitsky Human Rights Accountability Act and its implementing executive order, EO 13818, to sanction PRC officials and governmental entities. The U.S. has also utilized its Iran sanctions program to sanction companies and individuals within the PRC that have assisted Iran in its efforts to evade U.S. sanctions, including with respect to oil exports.

Recently, the President announced sanctions against TikTok, WeChat, and their parent companies and subsidiaries. These new sanctions were implemented via two EO's, both dated August 6, 2020. Unlike most U.S. sanctions regimes, which are administered and enforced by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the new TikTok and WeChat sanctions delegate authority for implementation to the U.S. Department of Commerce. The Commerce Department has historically retained authority to implement and enforce the U.S.'s export control laws (including the Export Administration Regulations), and not economic sanctions. This certainly represents a new potential regulatory regime and another consideration for those operating in the region.

On September 18, 2020, the Commerce Department announced regulations further identifying the scope of transactions that are prohibited pursuant to the WeChat and TikTok EO's. However, the implementation of those sanctions has been delayed due to several factors.

Firstly, the Commerce Department had extended the deadline for the implementation of the TikTok sanctions until September 27, 2020. And the implementation of certain TikTok sanctions was subsequently enjoined following an order in the U.S. District Court for the District of Columbia. Secondly, a federal judge in the U.S. District Court for the Northern District of California also issued a preliminary injunction (on First Amendment grounds) precluding implementation of the WeChat sanctions. Going forward, it will remain to be seen how the US's judicial system treats the First Amendment implications of these new sanctions, as courts in the past have traditionally afforded the Executive Branch broad discretion to implement sanctions pursuant to its national security and foreign policy powers.

In response to the U.S.'s flurry of sanctions activity this summer, the PRC has implemented its own counter-sanctions program. Specifically, the Ministry of Commerce of China (MOFCOM) has implemented an Unreliable Entity List (UEL) system, which will sanction non-PRC entities or individuals that endanger the PRC's national sovereignty, security or development interests, or otherwise apply discriminatory measures against PRC persons, among other provisions.

Implications for Companies

Navigating these new sanctions laws can be challenging for companies, particularly those that have business operations in both Hong Kong or the PRC and the U.S. For example, challenges can arise when multi-national companies are confronted with conflicting sanctions laws. This challenge could achieve greater significance with the evolution of the PRC's UEL system. Notably, U.S. companies with operations in the region could be forced to choose between complying with local law and U.S. sanctions.

OFAC and other U.S. regulators have been reluctant to ease U.S. sanctions compliance burdens when confronted with conflicting local law, which is evidenced by how the European Union's Blocking Regulation is viewed by U.S. regulators. For example, U.S. sanctions regulators expect companies subject to U.S. jurisdiction to comply with U.S. economic sanctions, and local "blocking" laws, such as the EU Blocking Regulation, often do not preempt applicable U.S. law.

Additionally, the HKAA's secondary sanctions against foreign financial institutions could prove to be a situation where conflicts of laws arise. For example, the

Hong Kong Monetary Authority (HKMA) published a circular on August 8, 2020, shortly after the WeChat and TikTok EO's were announced, stating that HKMA-regulated entities do not have obligations under Hong Kong law to comply with "unilateral sanctions imposed by foreign governments" that are not part of the "international targeted financial sanctions regime." In other words, Hong Kong regulatory authorities will not require local companies to comply with extraterritorial U.S. sanctions that have not been imposed by the United Nations Security Council.

As evidenced by the HKMA's public statements and the PRC's new UEL system, coupled with the U.S.'s expanded Hong Kong and PRC sanctions, navigating these complicated issues will certainly be a challenge going forward.

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For more information on U.S. Economic Sanctions, check out Bruce and Andrew's PLI program, International Economic Sanctions Law - Recent Developments from a U.S. and EU Perspective, available from PLI Programs On Demand:

<https://www.pli.edu/programs/international-economic-sanctions-law?t=ondemand&p=307744>

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