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Nine Things You Need to Know About the Trump Administration Sanctions Against TikTok and WeChat

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On Thursday, August 6, 2020, the Trump Administration took long-rumored action against the popular social media apps, TikTok and WeChat, in the forms of two executive orders. The orders largely prohibit persons or property subject to U.S. jurisdiction from transactions with the China-based owners of the apps, escalating tensions between U.S. and China and causing wide speculation on their scope and impacts.

Because these two executive orders have many provisions requiring interpretation and guidance, we seek to answer here nine frequently asked questions about this latest executive action by the Trump Administration.

I. What Do the Executive Orders Prohibit?

To start, there are two separate Executive Orders: one pertaining to TikTok and its parent company ByteDance, Ltd. ("ByteDance") or Zǐjié Tiàodòng, and ByteDance's subsidiaries (the "TikTok Order"); and the other pertaining to WeChat and its parent company Tencent Holdings, Ltd., and its subsidiaries ("Tencent") (the "WeChat Order") (together, the "Executive Orders").

With respect to TikTok, subsection 1(a) of the order prohibits, as of September 20, 2020, any transactions identified by the Secretary of Commerce by any persons, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance and its subsidiaries. The Secretary of Commerce is required to identify the transactions subject to the ban by September 20, 2020.

With respect to WeChat, subsection 1(a) of the WeChat Executive Order prohibits, as of September 20, 2020, any transaction identified by the Secretary of Commerce "that is related to WeChat" by any person, or with respect to any property, subject to the jurisdiction of the United States with, Tencent Holdings, Ltd. and any of Tencent's subsidiaries. There are legal ambiguities regarding what is within the scope of "any transaction that is related to WeChat" with Tencent given the broad touchpoints between Tencent and WeChat. As with the TikTok Order, the Secretary of Commerce must identify the transactions subject to this prohibition by September 20, 2020.

II. What Types of Transactions Can Be Banned?

The short answer is: no one knows just yet, since the scope of the bans has not yet been publicly announced. Secretary of Commerce Wilbur Ross must define what constitutes a “transaction”—and is therefore prohibited—beginning in 45 days.

Neither the TikTok Order nor the WeChat Order defines the term “transaction.” However, both Executive Orders reference Executive Order 13873, which defines “transactions” broadly to include:

“any **acquisition, importation, transfer, installation, dealing in, or use** of any information and communications technology or service (transaction) by any person, **or with respect to any property**, subject to the jurisdiction of the United States, where the transaction involves any property in which any foreign country or a national thereof has any interest (**including through an interest in a contract for the provision of the technology or service**), where the transaction was initiated, is pending, or will be completed after the date of this order,” and “where the Secretary of Commerce [in consultation with other Cabinet officials] has determined that... (ii) the transaction: (A) poses an undue risk...” (Emphases added.)

That definition is consistent with U.S. practice in sanctions regulation generally, and we think it likely a similarly broad definition would apply here.

That said, both Executive Orders contemplate that the Secretary of Commerce will “identify” those transactions that are prohibited, leaving room for substantial discretion in defining the contours of the ban.

Moreover, the scope of what can be prohibited under each Executive Order differs. Section 1(a) of the WeChat Order prohibits: “...**any transaction that is related to WeChat by any person** ...” while the TikTok order prohibits “...**any transaction by any person** ...” Thus, the WeChat Order applies to transactions undertaken with Tencent with respect to WeChat specifically, and presumably not other Tencent ventures or operations, while the TikTok Order applies to transactions with its parent company, ByteDance, in its entirety.

III. What Do the Executive Orders NOT Do?

The Executive Orders do not ban “all U.S. business” with TikTok/ByteDance or WeChat/Tencent. They will prohibit certain, enumerated transactions, **as determined by the Secretary of Commerce**. Further, the Executive Orders do not ban such transactions **immediately**. The prohibitions take effect 45 days following the issuance of the Executive Orders—on September 20 of this year.

The Executive Orders do not directly address the reported pending Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) review of ByteDance’s prior acquisition of TikTok, as the process and procedure for the CFIUS review is set forth under a separate legal authority under Section 721 of the Defense Production Act. (Under that law, CFIUS has the authority to force a foreign acquirer to divest its investment in a U.S. business if it determines at the conclusion of its review that the Committee’s national security concerns cannot be resolved or mitigated through other measures.) Nonetheless, the Secretary of Commerce plays a critical role in both actions as Commerce is one of the member agencies of the Committee and has been delegated the authority to determine the types of transactions to be banned pursuant to the TikTok Order, as described above.

IV. Are the Prohibitions Retroactive, and Will they Apply to Transactions Closed or Completed Prior to the Date of the Executive Orders?

Unlikely. Both Executive Orders state that the prohibition “applies except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, **and notwithstanding any contract entered into or any license or permit granted before the date of this order.**” (Emphasis added.) Executive Order 13873 limits the scope to transactions “initiated or pending” after the identification by the Secretary of Commerce, thus grandfathers in previously executed contracts. While the Secretary’s authority in the TikTok and WeChat orders is not limited by that definition, it would seem inconsistent, on the one hand, to say that the prohibition will take effect in 45 days and, on the other hand, at the end of that period apply the prohibition to already completed transactions.

However, we think it is certainly plausible that the prohibitions might apply to still-in-progress activities, or transactions that are the subject of executed contracts but whose performance has not been completed. The U.S. Government certainly has taken that approach in the past, sometimes with and sometimes without grace periods to allow for wind-downs of pending activity.

V. Can a U.S. Person Continue to Use WeChat or TikTok on Their Phones?

The Secretary of Commerce still needs to make a determination as to which transactions the Trump Administration wishes to ban, but prohibiting the installation or “use” of the WeChat or TikTok app on mobile phones for U.S. citizens would appear to be within the scope of the term “transaction” used by Executive Order 13873. Whether the Secretary of Commerce will go so far as to outright prohibit “use” of WeChat or TikTok—as opposed to other, more limited restrictions such as the prohibition on contractual or supplier relationships—is still a *big* question mark.

If the Administration does take this step, it might apply even to U.S. citizens or permanent residents who are located abroad. The prohibitions contained in the Executive Orders extend to persons subject to U.S. jurisdiction, which applies to U.S. citizens or permanent residents wherever located.

VI. Will Popular Gaming Apps Owned By Tencent Be Banned?

On the basis of the text of the WeChat Order, the answer would seem to be no, at least with respect to any gaming app that is not “related to WeChat.” Section 1(a) prohibits: “**...any transaction that is related to WeChat** by any person, or with respect to any property, subject to the jurisdiction of the United States, **with Tencent Holdings Ltd.** (a.k.a. Téngxùn Kònggǔ Yǒuxiàn Gōngsī), Shenzhen, China, or any subsidiary of that entity, as identified by the Secretary of Commerce (“Secretary”) under section 1(c) of this order.” (Emphases added.)

Nonetheless, the term “related to WeChat” may be construed quite broadly, and other Tencent apps that interface with or rely upon WeChat in some way could be affected. We will need to await the Secretary’s decision before understanding its full scope.

VII. What Authority Does the President Possess to Issue the Executive Orders?

The Executive Orders specifically cite the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*) (“IEEPA”), the National Emergencies Act (50 U.S.C. § 1601 *et seq.*) (“NEA”) and section 301 of title 3 of the United States Code. IEEPA, in particular, has long been used to support presidential exercise of authority on the basis of national security in the sanctions arena and has been construed quite broadly by the courts.

VIII. What is the Meaning of the Reference to Executive Order 13873 in the Executive Orders, and How Will That Impact Implementation of these Executive Orders?

On May 15, 2019, the Trump Administration issued an executive order—Executive Order (“E.O.”) 13873—declaring a national emergency based on a finding that “foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services.” E.O. 13873 laid the groundwork for the United States to broadly prohibit transactions involving the procurement or use of telecommunications technology from any foreign company the United States designates to be a national security risk, a move largely seen as aimed at China. This executive order was designed to be promulgated through rules and regulations issued by the Department of Commerce. On Tuesday, November 26, 2019, Commerce issued its proposed regulations and opened the required notice-and-comment period.

Despite the interim regulations having been issued over eight months ago, the regulations have yet to be finalized. We anticipate that Commerce will finalize its interim final rule containing the regulations as another mechanism by which the U.S. Government can effectively prohibit the use of certain Chinese technology. The rule as drafted sets forth a process and procedure to identify technology that causes undue risk to national security and allows the Secretary to prohibit any “use” of any “information and communications technology” that poses an unacceptable risk to U.S. national security or U.S. persons.

IX. What is the Next Step?

Procedurally, we still will have to wait to see what the Secretary of Commerce identifies the scope of prohibited transactions, and whether there will be any exceptions or licenses (authorizations) granted pursuant to subsection 1(b) of both Executive Orders.

The Secretary possesses a range of options in determining which types of transactions to ban. These might include (as examples only):

- Prohibiting app stores from making the apps available;
- Prohibiting the companies from engaging in ad buys promoting the subject apps;
- Prohibiting the processing of payments involving user transactions on TikTok and WeChat;
- Prohibiting the financing of certain transactions involving TikTok and WeChat; or
- Prohibiting use of the apps by U.S. persons (consumers).

It is possible that the Trump Administration may pull back and take a less restrictive approach, particularly if it decides that national security interests may be addressed through other regulatory means (including at least with respect to TikTok, through the pending review by CFIUS, and any remedies the government or the President may pursue through that process).

We regularly advise clients engaging in cross border transactions both involving China and navigating U.S. sanctions and we would be happy to assist with any questions on these topics as the situation develops.

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