

ALERTS

Commerce Department's Ban on WeChat and TikTok Mobile Applications Delayed on Eve of Implementation

September 22, 2020

On Sept. 18, 2020, the U.S. Department of Commerce (“Commerce Department”) issued its eagerly anticipated regulations under President Trump’s Aug. 6, 2020 Executive Orders (“E.O.s”) relating to the mobile applications (“apps”), WeChat and TikTok. As explained below, the regulations sharply restrict transactions involving either app within the United States, beginning on Sept. 20, 2020.[1] At the same time, the Commerce Department refrained from imposing sanctions on use of the apps outside the United States or on trading in the securities of WeChat’s and TikTok’s parent companies.

Both sets of regulations were scheduled to begin to take effect on Sept. 20, but due to subsequent developments in the courtroom and the boardroom, neither will. On Sept. 19, 2020, a federal judge in California granted a motion for a preliminary injunction which will — at least temporarily — curtail the government’s ability to implement the WeChat ban. And on the same day, following the announcement of a bid by Oracle Corp. (“Oracle”) for the U.S. operations of TikTok, the Commerce Department temporarily delayed implementation of the TikTok ban for one week.

Background

The Aug. 6, 2020 E.O.s vest broad authority in the Commerce Department to prohibit persons subject to U.S. jurisdiction from engaging

in transactions with the Chinese companies that own TikTok and WeChat.[2] E.O. 13942 targets ByteDance Ltd. (“ByteDance”), the owner of TikTok Inc. (“TikTok”); E.O. 13943 targets Tencent Holdings Ltd. (“Tencent”), the owner of WeChat.[3] According to the E.O.s, the apps pose a national security threat to the United States by virtue of the risk that personal and proprietary information captured from U.S. persons may be shared with the Chinese government. A later E.O., issued on Aug. 14, 2020, provides ByteDance 90 days to divest its interest in the U.S. operations of TikTok and thereby avoid certain sanctions.[4] This E.O. provided some hope that U.S. users of TikTok may continue to use the app if ByteDance successfully sells its U.S. TikTok operations by Nov. 12, 2020.

Both apps are widely used throughout the world, including in the United States. WeChat has become a vitally important tool in conducting business in China in particular, including among investment professionals. WeChat’s owner, Tencent, is a public company whose shares are widely traded. Under the E.O.s, the Commerce Department has the power to outlaw, to the fullest extent permitted by law, all transactions with ByteDance and all transactions with Tencent related to WeChat.[5] The E.O.s gave the Commerce Department 45 days — or until Sept. 20, 2020 — to decide what transactions would be prohibited, leaving many wondering exactly how far the Commerce Department would go.[6]

What the Commerce Department’s Regulations Do

The Sept. 18, 2020 regulations represent the Commerce Department’s first — but not necessarily last — word on what types of transactions will be prohibited under the E.O.s.

The regulations targeting WeChat and TikTok are largely the same. They prohibit, “within the land and maritime borders of the United States and its territories,” the following transactions:

1. Any provision of service to distribute or maintain WeChat or TikTok apps, constituent code, or application updates through an online mobile app store or online marketplace where mobile users may download or update apps for use on their mobile devices;
2. Any provision of internet hosting services enabling the functioning or optimization of either app;

3. Any provision of content delivery network services enabling the functioning or optimization of either app;
4. Any provision of directly contracted or arranged internet transit or peering services enabling the function or optimization of either app; and
5. Any utilization of either app's constituent code, functions or services in the functioning of software or services developed and/or accessible within the United States.[7]

In addition, the regulations take aim at WeChat's payment function by prohibiting any provision of services through the WeChat app for the purpose of transferring funds or processing payments within the United States.[8]

Although the substance of the prohibitions are essentially the same for both WeChat and TikTok, the implementation dates for each app vary. With respect to WeChat, all of the prohibitions were to take effect on Sept. 20, 2020. With respect to TikTok, only the first prohibition — on the provision of services to enable users in the United States to download or update the app — was to take effect on Sept. 20, 2020. The other prohibitions do not take effect until Nov. 12, 2020.[9]

Both sets of regulations expressly leave open the possibility that further transactions identified at a future time may also be prohibited.[10]

What the Regulations Do Not Do

Equally notable are the transactions relating to WeChat and TikTok that are *not* prohibited under the Commerce Department's regulations.

First, as noted above, all the prohibitions apply only "within the land and maritime borders of the United States and its territories." They do not apply outside the United States, even to U.S. persons acting outside the United States. In other words, the Commerce Department chose not to exercise its authority under the E.O.s to extend the prohibitions to all "persons subject to U.S. jurisdiction," wherever located.[11] This is unlike the economic sanctions administered by the Department of Treasury's Office of Foreign Assets Control, which broadly apply to U.S. persons, wherever located, and in some instances, to activities abroad conducted by foreign companies owned or controlled by U.S. persons.

The Commerce Department regulations make this limitation explicit, stating that the prohibitions do not apply to “[a]ctivities related to mobile applications intended for distribution, installation or use outside of the United States, including but not limited to any person subject to U.S. jurisdiction, and all ancillary activities, including activities performed by any U.S. person, which are ordinarily incident to, and necessary for, the distribution, installation and use of mobile applications outside of the United States.”[12]

Second, the prohibitions apply only “to the parties to business-to-business transactions.”[13] They do not apply to “[t]he exchange between or among” users “of personal or business information using the [WeChat and TikTok] mobile application.”[14]

Third, the prohibitions are limited to the enumerated activities involving the WeChat and TikTok apps themselves. They do not prohibit other business dealings with Tencent or ByteDance or limit transactions or trading in their stock or other securities.

Finally, the regulations by their terms do not apply to: (1) the payment of wages, salaries and benefit packages to employees or contractors; or (2) the storing of TikTok or WeChat app user data in the United States.[15]

The regulation targeting TikTok also clarifies that nothing in it should be read to prohibit any transaction necessary to effectuate Tencent’s divestment of its interest in the U.S. operations of TikTok, set forth in the Aug. 14, 2020 E.O.[16]

WeChat and TikTok Litigation

Since the E.O.s were published in early August, several litigations have resulted, brought by, among others, an alliance of WeChat users. Following the announcement of regulations by the Commerce Department on Sept. 18, 2020, a federal judge in the U.S. District Court for the Northern District of California has granted a motion for a preliminary injunction which, at least for the time being, puts a nationwide freeze on the implementation of E.O. 13943 and halts the ban on the use of WeChat in the United States.[17] The court’s order details that the Plaintiffs have shown serious questions going to the merits of their First Amendment claim, which curtails the government’s ability to limit free speech.[18] It is likely that the government will appeal this order.

A similar action was filed by TikTok and Tencent on Sept. 18, 2020, but no decisions have yet been issued in that case.[19]

TikTok Ban Delayed

In addition, on Sept. 19, 2020, the Commerce Department delayed implementation of the TikTok regulations from Sept. 20 to Sept. 27, 2020, giving time for a deal to occur whereby Oracle would acquire TikTok's U.S. operations.[20] This delay occurred immediately following President Trump's tentative approval of the anticipated deal, which involves Oracle and Walmart joining together to form a new entity to purchase TikTok's U.S. operations.[21] Under this contemplated deal, "Oracle will be responsible for key technology and security responsibilities to protect all U.S. user data." [22] While it remains to be seen whether this deal will come to fruition, TikTok has bought itself some time to consummate a deal or, as noted above, curtail this ban in the courts.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] See Commerce Department, "Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States" (Sept. 18, 2020), available here.

[2] E.O. 13942, "Addressing the Threat Posed by TikTok, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain" (Aug. 6, 2020), available here; E.O. 13943, "Addressing the Threat Posed by WeChat, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain" (Aug. 6, 2020), available here.

[3] *Id.*

[4] Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51,297 (Aug. 14, 2020), available here.

[5] See E.O. 13942 and E.O. 13943, *supra* note 2.

[6] *Id.*

[7] Commerce Department, “Identification of Prohibited Transactions to Implement Executive Order 13942 and Address the Threat Posed by TikTok and the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain” (Sept. 18, 2020), available here; Commerce Department, “Identification of Prohibited Transactions to Implement Executive Order 13943 and Address the Threat Posed by WeChat and the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain” (Sept. 18, 2020), available here.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See generally id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Identification of Prohibited Transactions to Address the Threat Posed by TikTok, *supra* note 7.

[17] *U.S. WeChat Users Alliance v. Donald J. Trump*, No. 20-cv-05910-LB (N.D. Cal Sept. 19, 2020) (Order Granting Motion for Preliminary Injunction).

[18] *See id.* at 16-18.

[19] *TikTok Inc. v. Donald J. Trump*, No. 20-cv-2658 (D.D.C. filed Sept. 18, 2020).

[20] Commerce Department, “Statement on Delayed Prohibitions Related to TikTok” (Sept. 19, 2020), available here.

[21] *See* U.S. Dep’t of Treasury, “Statement on TikTok from Treasury Spokesperson Monica Crowley” (Sept. 19, 2020), available here.

[22] *Id.*

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