CLIENT ALERT

Cold War in the App Store? White House Escalates Use of National Security Tools Against TikTok and WeChat

August 17, 2020

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On August 6, 2020, the White House issued two Executive Orders targeting the parent companies of two Chinese social media and communications apps, TikTok and WeChat. On August 14, 2020, the White House followed up, issuing yet another Order targeting TikTok's parent. These three Orders seem designed to force the Chinese companies ByteDance Ltd. (a.k.a. Zìjié Tiàodòng), the parent company of TikTok, and Tencent Holdings Ltd. (a.k.a. Téngxùn Kònggǔ Yǒuxiàn Gōngsī), the parent company of WeChat, to sell the apps' U.S. operations and data or to take some other action to placate the government's concerns over national security. Together, the Orders constitute an unprecedented use of sanctions authority, raising novel questions and risks.

The Orders

For now, the one clear message is that none of the Orders provide any current, direct restrictions on U.S. persons, except for TikTok Inc., a Delaware corporation. Instead, the August 6 Orders state that the Secretary of the U.S. Commerce Department "shall" identify a set of restricted transactions on **September 20, 2020**, limiting U.S. persons in transactions with (1) ByteDance, or its subsidiaries; and (2) Tencent Holdings, or its subsidiaries, if the transaction relates to WeChat. The August 14 Order then requires, among other things, ByteDance to (1) divest all ownership rights in assets, property, and data related to the use of TikTok within the United States by **November 12, 2020** (with a possibility of a 30 day extension), and (2) provide the U.S. Committee on Foreign Investment in the United States ("CFIUS") a ten-day notice period, during which CFIUS can review, and potentially object to, any proposed sale based on a list of factors related to national security.

This leaves a lot of unknowns for U.S. users of TikTok and WeChat, as well as business partners of ByteDance, Tencent Holdings, and their subsidiaries. Restrictions under the August 6 Orders are particularly noteworthy because of the built-in deadline, which distinguishes these Orders from similar ones issued last March. Back then, the White House authorized the Commerce Secretary to restrict the use of technologies from companies determined by the Secretary to be national security risks—widely interpreted as a threat targeting Huawei, the iconic Chinese technology company. That prior order, however, omitted any deadline trigger and ultimately the Commerce Secretary never implemented any sanctions. The latest Orders pose a more tangible, immediate specter.

The Past is Prologue

Notwithstanding the novelty of the current Orders, existing sanctions from other U.S. agencies, most notably the U.S. Treasury Department, provide guidance on the range of restrictions we might expect.[1] Drawing on existing precedent, new sanctions issued by Commerce could well include more targeted restrictions on specific types of transactions with specific companies, such as new debt restrictions limiting the companies' ability to secure financing using U.S. institutions; or even broad designations of the companies as Specially Designated Nationals, or "SDNs," blocking U.S. persons from almost all transactions and interactions with the companies and their property. Given the technology nexus here, it is also possible that the Secretary will impose unique restrictions, such as a prohibition on the use of servers in the United States to store or download the apps in question. We will note here, though, that the restrictions on Tencent Holdings are likely to be more limited than those on ByteDance, as the applicable order for Tencent Holdings limits the Secretary's authority to transactions *related to WeChat*, whereas that limitation is not present in the ByteDance order. Moreover, the August 14 Order evinces a more hardline approach to ByteDance than to Tencent Holdings.

[1] Although novel, these Orders come within an ongoing push by the Executive Branch to pressure China. As other recent examples, in July of this year, the State Department, along with the Treasury Department, the Commerce Department, and the Department of Homeland Security issued an advisory laying out the risks associated with doing business with certain entities in the Xinjiang Uyghur Autonomous Region and elsewhere in China. Moreover, the White House soon after issued another Executive Order establishing that U.S. policy moving forward will be to suspend or eliminate any preferential treatment for Hong Kong, and called on all heads of agencies to commence appropriate actions to bring that policy into fruition. That said, the latest Orders indicate a potential hardening of U.S. efforts.

Questions Raised

Reviewing the Orders with our clients and advising on risks, we are actively engaging on a number of the issues Commerce may be considering regarding both companies, including:

- Will U.S. persons still be able to access the apps for non-commercial purposes?
- Would a full-scale ban on the use of the apps exceed the authority provided under the International Emergency Economic Powers Act ("IEEPA"), or the other relevant statutes? Most notably, IEEPA excludes the authority to regulate the export or import, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials. 50 U.S.C. § 1702(b)(3).
- Will the new restrictions be effective immediately or will they provide a wind-down period for existing users?
- Will the restrictions grandfather in existing contracts and agreements?
- Will the restrictions only cover acts within the U.S. or will U.S. persons abroad also be restricted?
- Will the Commerce Department set up a general and specific licensing process to authorize certain users, transactions, or types of transactions, notwithstanding the published restrictions?

This is just the tip of the iceberg. Overall, the answers to these questions will have broad impacts across the United States and the world, given the widespread use of the apps. As one specific, but significant example, WeChat is also a mobile-payment platform—one of two major payment platforms in China. It is widely used across much of Asia, as cash is virtually non-existent in countries like China. If people cannot pay on the app, much of the consumer payments in Asia will be disrupted. And as a result, if the Order forces WeChat off U.S.-based app platforms, it may cause a significant drop in U.S. technology sales tied to those platforms, as those technologies will no longer meet key consumer demands. Relatedly, WeChat is one of the largest mobile gaming platforms in the world and in-app payments are large. Removal of the app, or prevention of payments for in-app purchases, will still further increase the likelihood of a move away from U.S. platforms.

This is all to say that even more-targeted restrictions can have enormous impacts, and could very well be some of the most significant steps to decouple the U.S. and Chinese economies that the U.S. has taken thus far.

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