

CLIENT ALERT

Commerce Announces Prohibitions on Transactions with WeChat and TikTok

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On September 18, 2020, the U.S. Department of Commerce (“Commerce”) [announced prohibitions on transactions related to WeChat and TikTok](#) pursuant to Executive Order (“EO”) 13943, signed by President Trump on August 6, 2020. The Federal Register Notices of two orders, which were meant to be published on September 22, 2020 and were withdrawn by Commerce on September 21, provided additional details on the prohibited transactions with [WeChat](#) and [TikTok](#), respectively. EO 13943 required Commerce to identify a set of transactions to be restricted by September 20, 2020, limiting U.S. persons in transactions with (1) ByteDance, or its subsidiaries, and (2) Tencent Holdings, or its subsidiaries, for transactions related to WeChat.

Commerce’s measures will effectively ban WeChat and TikTok from app stores in the United States, preventing new users from downloading or receiving updates for either app. Additionally, hosting and network services necessary to enable the use of WeChat were to have been prohibited on the same date. The President has provided until November 12, 2020 until such hosting services are prohibited for TikTok. The President has set the same date for ByteDance to resolve the national security concerns posed by TikTok lest it be forced to divest the U.S. operations of TikTok through the Committee on Foreign Investment in the United States (“CFIUS”) process. It appears, therefore, that the sanctions on TikTok could be reversed if a satisfactory solution is reached with CFIUS.

Following public reports that Oracle and Walmart would obtain equity shares in TikTok and host its U.S. data in the United States, [Commerce announced on September 19](#) that the initial ban on U.S. downloads of TikTok would be delayed until September 27. For WeChat, the restrictive measures were still supposed to go into effect on September 20, but on the

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same day, a federal judge in the Northern District of California, ordered a preliminary nationwide injunction on Commerce's measures as they relate to WeChat due to the merits of the First Amendment claim raised by the U.S. WeChat Users Alliance. The preliminary injunction has delayed the removal of WeChat from U.S. app stores and introduced uncertainty into both when Commerce's order will take effect as it relates to WeChat and whether Commerce will be forced to amend the order.

Notably, as currently written, the orders do not require non-U.S. app stores to remove WeChat and TikTok from their marketplaces. Additionally, in what may be an attempt to protect many U.S. employees of WeChat and TikTok from losing their jobs, the orders to be published by Commerce on September 22 explicitly carve out all activities related to mobile applications intended for distribution, installation or use outside of the United States by any person, including but not limited to any person subject to U.S. jurisdiction. The orders also state that ancillary activities, including those 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 are not prohibited. Furthermore, the orders do not prohibit the exchange of personal or business information among users of the apps, though as a practical matter users won't be able to utilize the apps when the orders prohibit providing hosting or content-delivery services for the apps in the United States; starting November 12 for TikTok and whenever the preliminary injunction is lifted on the measures for WeChat.

The announcement and orders released by Commerce state that the following will be prohibited:

As of September 27, 2020 for TikTok, and for WeChat as soon as the preliminary injunction is lifted:

1. Any provision of service to distribute or maintain the WeChat or TikTok mobile applications, constituent codes, or application updates through an online mobile application store in the United States, or any online marketplace where mobile users within the land or maritime borders of the United States and its territories may download or update applications for use on their mobile devices;

As of November 12, 2020 for TikTok, and for WeChat as soon as the preliminary injunction is lifted:

1. Any provision of internet hosting services enabling the functioning or optimization of the mobile application in the United States;
2. Any provision of content delivery network services enabling the functioning or optimization of the mobile application in the United States;
3. Any provision directly contracted or arranged internet transit or peering services enabling the function or optimization of the mobile application within the United States;

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4. Any utilization of the mobile application's constituent code, functions, or services in the functioning of software or services developed and/or accessible within the United States.

For WeChat as soon as the preliminary injunction is lifted:

1. Any provision of services through the WeChat mobile application for the purpose of transferring funds or processing payments within the United States.

Additional Sanctions Possible in the Future

The announcement does not deplete the much broader authority the President granted to Secretary Wilbur Ross in EO 13943, and suggests that Commerce may expand the restrictions at a later date. The Federal Register Notices specifically state that restrictions will also be applied to:

1. Any other 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., or any subsidiary of that entity, as may be identified at a future date under the authority delegated under Executive Order 13943; and
2. Any other transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd., or its subsidiaries, including TikTok Inc., in which any such company has any interest, as may be identified at a future date under the authority delegated under Executive Order 13943.

The announcement also expressly states that if the government determines that WeChat's or TikTok's illicit behavior is being replicated by another app, the President has the authority to mandate further prohibitions. It's possible, therefore, that Commerce could, in the future, prohibit U.S. persons from facilitating the use of TikTok or WeChat overseas.

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