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President Issues Executive Orders Prohibiting Transactions With the Makers of TikTok and WeChat

Two executive orders (the EOs) were signed on August 6, 2020, an Executive Order on Addressing the Threat Posed by TikTok (TikTok EO) and an Executive Order on Addressing the Threat Posed by WeChat (WeChat EO). The two orders, which are similar but differ in certain respects, generally announce that U.S. persons will be prohibited from engaging in transactions with the companies producing the TikTok and WeChat apps—ByteDance Ltd. (ByteDance) and Tencent Holdings Ltd. (Tencent), respectively—and their subsidiaries, effective 45 days after the issuance of the EOs. That date falls on Sunday, September 20, 2020.

The EOs are vaguely worded and appear to vest significant discretion in the U.S. secretary of commerce to determine the scope of the prohibitions that will be imposed on that date. It is not possible to predict the effect of these prohibitions with any confidence. However, because of the possible impact that these new prohibitions will have on U.S. business, we are providing this guidance based on the broad language of the new EOs and experience with prior U.S. economic sanctions and trade controls.

Purported National Security Rationale

The EOs state that they were promulgated to address "the spread in the United States of mobile applications developed and owned by companies in the People's Republic of China," which purportedly "capture vast swaths of information from its users, including Internet and other network activity information such as location data and browsing and search histories" and could share such information with the Chinese government. The EOs also mention the possibility of Chinese censorship on the TikTok and WeChat platforms and the possibility of disinformation campaigns. Additionally, the WeChat EO also alleges that WeChat allows the Chinese government to "keep tabs" on Chinese nationals visiting the United States.

Authority Vested in the Secretary of Commerce

On balance, the EOs read very much like previous U.S. executive orders imposing economic sanctions on foreign entities, insofar as the EOs potentially prohibit all "transactions" by U.S. persons. Normally, U.S. economic sanctions are administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and therefore delegate interpretive power to the secretary of treasury.

An unusual aspect of the EOs is that they instead delegate that authority to the secretary of commerce. Specifically, under the EOs, the secretary of commerce must identify the "transactions" prohibited under the EOs and the subsidiaries of ByteDance and Tencent that will be affected. This delegation is surprising because the Department of Commerce generally has jurisdiction only over trade in goods and technology (exports and imports), and not over financial transactions such as commercial agreements, investments, lending, and banking services.

It is unclear whether the fact that authority is delegated to the secretary of commerce is an indication of the intended scope of the prohibitions (i.e., narrower than traditional economic sanctions), or whether the designation reflects the possibility that the EOs are intended to serve as a bargaining chip in United States-China trade negotiations, in which the Commerce Department has taken a more central role than Treasury.

Comparison of the TikTok and WeChat EOs

While the EOs have largely identical provisions, there are two notable differences.

First, while the TikTok EO simply prohibits "any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States with ByteDance," the WeChat EO 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" (emphasis added). Assuming this is not a drafting error, the different wording suggests that prohibitions with respect to Tencent could be limited to WeChat, while prohibitions with respect to ByteDance would not be limited to TikTok. This would be a critical distinction, as Tencent has significant investments in the U.S. gaming and broader technology sectors. Some public reports have already suggested the administration's order is aimed solely at WeChat and not Tencent's extensive other operations, including mobile and videogames.

Second, the WeChat EO includes a provision absent from the TikTok EO, which specifies that no prior notice is required regarding any prohibitions imposed under the WeChat EO. This type of provision is usually included in blocking sanctions that freeze the U.S. assets of foreign persons. The purpose of this provision in the WeChat EO is unclear, given that by the terms of the EOs, they will not become effective until September 20. It is true, however, that the precise scope of the new prohibitions may not be known until September 20. It should also not be taken as a given that the inclusion of the "prior notice" provision indicates that Tencent will be subject to blocking sanctions. It is far from clear whether the inclusion of the "prior notice" provision in the WeChat EO or its exclusion from the TikTok EO was intentional. Both Tencent and ByteDance have a U.S. presence and U.S. assets, so there does not appear to be a basis for treating them differently.

Scope of the Prohibitions

Because the precise scope of the prohibitions has yet to be determined, definitive analysis is not yet possible. Instead, we attempt to make some inferences based on the potential breadth of the EOs as well as past U.S. experience with sanctions and trade controls.

Covered U.S. Persons

The EOs prohibit transactions by "any person ... subject to the jurisdiction of the United States," with ByteDance and Tencent, as well as any transaction by a "United States person" intended to evade the prior prohibition.

The latter term, "U.S. person," is commonly used in U.S. sanctions regulations and is defined within the EOs themselves. It includes individuals who are U.S. citizens and lawful permanent residents, as well as those physically present in the U.S., and entities organized under U.S. law, including their foreign branches. Importantly, however, it does not include foreign subsidiaries of such entities.

The term "person subject to the jurisdiction of the U.S." is arguably broader and could be interpreted to include foreign subsidiaries of U.S. entities. It remains to be seen if the secretary of commerce will clarify whether foreign subsidiaries of U.S. entities are subject to the prohibitions.

Prohibited Transactions

The EOs are broadly drafted to prohibit "any transaction" with ByteDance and Tencent—subject to the important possibility, discussed above, that the Tencent prohibition is limited to transactions "related to" WeChat. This language is reminiscent of comprehensive U.S. economic sanctions and could be interpreted to prohibit all transactions, including both trade transactions such as the import or export of goods and technology, and financial transactions such as investment, lending, and banking services.

The EOs also include prohibitions on "any transactions" with respect to any of ByteDance or Tencent's property that is subject to the jurisdiction of the United States. These prohibitions could be broadly interpreted to block the U.S. property of ByteDance and Tencent. However, previous executive orders blocking U.S. property have stated so explicitly. It would also be unusual to impose blocking sanctions with a 45-day delay, since the delay would allow the sanctioned person to repatriate any U.S. assets.

Despite the broad reference to "any transactions," however, the EOs empower the secretary of commerce to "identify the transactions" subject to these prohibitions. Thus, the secretary of commerce arguably has unfettered discretion to impose less than the comprehensive sanctions implied by the broad wording of the EOs.

In the past, the United States has at times imposed only limited sanctions or trade controls on particular persons. For example, the United States maintains sanctions lists with respect to Russian entities that impose various tiers of sanctions on different entities, including prohibitions on particular investments or lending transactions. Alternatively, the United States has imposed export prohibitions with respect to certain Chinese entities, most famously Huawei, so there would certainly be precedent for a more measured approach.

Notably, the EOs mention President Trump's [Executive Order 13873](#) of May 15, 2019, (Securing the Information and Communications Technology and Services Supply Chain). Executive Order 13873, which was generally interpreted as primarily directed at Huawei, prohibited only specific types of transactions: "any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service" which the secretary of commerce determined to pose an unacceptable risk to U.S. national security and communications integrity.

These transactions prohibited by Executive Order 13873—which are the kind of trade transactions that would normally fall under the purview of the secretary of commerce—are the types of transactions that would be most likely to implicate President Trump's purported motivation for the EOs, i.e., concern regarding the penetration of TikTok and WeChat in the U.S. market.

Accordingly, the secretary of commerce could reasonably limit the EOs to prohibiting the types of transactions enumerated in Executive Order 13873. However, the EOs are worded much more broadly and certainly do not compel such a narrow reading.

Given President Trump's stated concern regarding the security risks that may arise from use of TikTok and WeChat within the United States, it seems likely that the initial prohibitions would include at least the following:

- TikTok and WeChat may no longer be available for download from U.S. app stores, meaning that users of iOS and Android phones may not be able to install the apps onto new phones or obtain updates for existing installs.
- U.S. advertisers may no longer be able to purchase ads on TikTok and WeChat, presumably making the apps commercially nonviable in the United States.

Prohibited Entities

The EOs prohibit transactions with ByteDance, Tencent, and "any subsidiary" of those entities, "as identified by the Secretary of Commerce." As written, the EOs are unclear whether the secretary of commerce's authority extends to determining whether particular subsidiaries are included in the prohibitions. In the absence of contrary guidance from the secretary of commerce, the prohibitions appear to extend to all subsidiaries of ByteDance and Tencent. Consistent with past U.S. sanctions practice, that would include any entity in which ByteDance or Tencent hold a 50% or greater interest.

Licensing Policy

Because the precise scope of the prohibitions is uncertain, it is not possible to predict what the policy of the U.S. government will be toward granting licenses to engage in prohibited transactions.

If the prohibitions imposed on September 20 resemble comprehensive economic sanctions, that may also suggest that the U.S. government is taking a harder stance on issuing licenses. Alternately, if the prohibitions are more akin to import and export controls, the government may also be more willing to entertain license applications. Past experience with export licenses for sales to Huawei may be instructive. At times, the Department of Commerce issued Huawei export licenses relatively freely, with as many as half of the applications being approved. At other times—usually coinciding with soured trade negotiations between the United States and China—the licensing process has ground to a halt.

Possible Next Steps

As with all aspects of the United States-China trade relationship, the future of the EOs is highly uncertain. Changes in the overall relationship between now and September 20 will likely affect the breadth of prohibitions imposed under the EOs. Changes in the relationship thereafter will likely affect the U.S. government's willingness to entertain license applications.

With respect to TikTok and ByteDance, there appear to be productive ongoing discussions with U.S. technology companies that are interested in acquiring TikTok's business in the United States and certain other markets. Such a deal would likely result in termination of the TikTok EO. Similarly, the secretary of commerce could delay imposition of prohibitions on ByteDance if negotiations on such a deal are making satisfactory progress, but

have not concluded, by September 20.

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