



Sunday, September 20, 2020, was intended to be the day on which prohibitions would go into effect on ByteDance Ltd. (ByteDance) and Tencent Holdings Ltd. (Tencent) and their subsidiaries—makers of the TikTok and WeChat apps, respectively. Those prohibitions, first announced in President Donald Trump's August 6, 2020, executive orders, and later clarified in U.S. Department of Commerce rules on September 18, 2020, are not currently in effect due to a pending transaction involving TikTok and a judicial injunction involving WeChat.

In our [prior update](#), we analyzed the August 6 executive orders themselves. In this update, we discuss the September 18 Department of Commerce rules, and the events that have delayed, and may ultimately prevent, those rules from taking effect.

New Commerce Rules

On September 18, 2020, the Department of Commerce released two new rules for public inspection, addressing prohibitions regarding TikTok and WeChat, and implementing the prohibitions established in the August 6 executive orders.

The rules include two types of prohibitions: (1) those directly involving use of the TikTok and WeChat apps in the United States, and (2) those involving support services that "enable the functioning or optimization" of the apps in the United States. The following is a summary of each prohibition type:

Type 1: As of September 20, 2020, the following transactions are prohibited:

- Any provision of service to distribute or maintain the WeChat or TikTok mobile applications, constituent code, or application updates through an online mobile application store in the United States
- Any provision of services through the WeChat mobile application for the purpose of transferring funds or processing payments within the United States

Type 2: As of September 20, 2020, for transactions involving WeChat, and as of November 12, 2020, for transactions involving TikTok, the following transactions are prohibited:

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

While the new Department of Commerce rules would have had a significant, immediate impact on U.S. technology companies and users of the TikTok and WeChat apps, they were relatively narrowly tailored given the expansive scope of the August 6 executive orders. The new rules focused exclusively on activities supporting the use of TikTok and WeChat in the United States, while the executive orders contained no such limitations. However, the Department of Commerce rules do explicitly allow the possibility of additional prohibitions consistent with the executive orders in the future.

The Department of Commerce rules are slated for publication in the Federal Register on Tuesday, September 22, though it remains to be seen whether the pending TikTok transaction or court injunction affect the publication dates.

Pending Tiktok Transaction

Since the August 6 executive orders were issued, there has been speculation that TikTok might be spared by being acquired by a U.S. owner. An [August 14, 2020, executive order](#) actually required that ByteDance divest

TikTok's U.S. operations within 90 days—which produced the November 12, 2020, deadline applicable to the Type 2 prohibitions discussed above.

On Saturday, September 19, President Trump announced that he had approved a proposed transaction whereby ByteDance would spin off its U.S. TikTok presence into a new company. U.S. companies Oracle and Walmart would collectively acquire up to a 20% stake in the new company, with ByteDance retaining majority ownership. Under the deal, TikTok's cloud operations would be managed by Oracle, which, according to a TikTok statement would make that U.S. company "responsible for hosting all U.S. user data and securing associated computer systems to ensure U.S. national security requirements are fully satisfied."

Although the proposed transaction does not appear to satisfy the terms of the August 14 executive order, the announcement that it had President Trump's approval suggests that the transaction, if consummated, will prevent further action under either the August 6 or August 14 executive orders. It also will allow U.S. companies to engage in transactions with both ByteDance and the new entity.

WeChat Court Case and Injunction

Unlike TikTok, there has been no discussion of any possible U.S. acquisition regarding WeChat, which has a much larger user base inside China than outside China and depends on a unitary platform connecting users across jurisdictions.

However, a lawsuit filed in the U.S. District Court for the Northern District of California, *U.S. WeChat Users Alliance v. Trump*, resulted in a preliminary injunction issued on Saturday, September 19, that prevents implementation of all of the WeChat prohibitions listed in the new Department of Commerce rule. In her order granting the plaintiffs' motion for preliminary injunction, Magistrate Judge Laurel Beeler explained that plaintiffs had demonstrated a substantial likelihood of success on the merits of their First Amendment claim, though not on their remaining legal challenges.

It is too soon to predict whether the *WeChat Users Alliance* case will be successful, and it is unclear how long the preliminary injunction will remain in place. The U.S. government may seek an immediate appeal of the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit.

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Authors



Andrew Caridas

Counsel

ACaridas@perkinscoie.com [202.654.1736](tel:202.654.1736)



Ann M. Nagele

Partner

ANagele@perkinscoie.com [206.359.6121](tel:206.359.6121)

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