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AUGUST 7, 2020



Administration's Attempt to Delete TikTok and WeChat: Latest Trade Tiff or New Battle

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On Thursday evening, August 6, President Trump issued a pair of unprecedented Executive Orders that took aim at two large Chinese affiliated technology companies. The orders are designed to limit transactions with social media platform TikTok and the WeChat communications network. The bans are set to take place in 45 days. Given that this type of executive action in this arena is novel, is not clear how the prohibitions will impact business partners and customers. However, in the context of similar national security actions we have a roadmap to follow as to how the bans may be rolled out.

Since at least the fall of 2019, U.S. government regulators have been investigating TikTok, which has seen explosive growth in America (175 million downloads in the U.S. alone according to the Executive Order) and around the world in just the past two years. TikTok has been accused of collecting data on users and sharing that information with the Chinese government. TikTok has denied these accusations and acknowledged in October that it was in discussions with the U.S. government. "While we cannot comment on ongoing regulatory processes, TikTok has made clear that we have no higher priority than earning the trust of users and regulators in the U.S."

Last week, President Trump in media interviews hinted that a ban was imminent, just as details emerged of talks around a possible sale of the company between TikTok's owner and technology behemoth Microsoft. There have been a series of sometimes conflicting statements by Trump and others in his Administration regarding how a sale to Microsoft or in Trump's words another "very American" company would work and if that could make the Executive Order moot. Trump himself indicated that any deal would require, "a very substantial portion of that price is going to have to come into the Treasury of the United States, because we're making it possible for this deal to happen." It is unclear what legal route the Administration would take to try to enforce this condition.

WeChat has been around for much longer than TikTok and has not seen as much public scrutiny as the social medial upstart. However, the messaging, social media, and payments service has been tagged with similar criticism by the Administration. The Executive Order addressing WeChat described the rationale for acting as, "Like TikTok, WeChat automatically captures vast swaths of information from its users. This data collection threatens to allow the Chinese Communist Party

access to Americans' personal and proprietary information. In addition, the application captures the personal and proprietary information of Chinese nationals visiting the United States, thereby allowing the Chinese Communist Party a mechanism for keeping tabs on Chinese citizens who may be enjoying the benefits of a free society for the first time in their lives.”

The orders are similar in how they outline the bans, which appear rather broad.

- “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zìjié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest, as identified by the Secretary of Commerce”
- “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 Holdings Ltd. (a.k.a. Téngxùn Kònggǔ Yǒuxiàn Gōngsī), Shenzhen, China, or any subsidiary of that entity, as identified by the Secretary of Commerce”

However, both orders provide discretion by tasking the Secretary of Commerce with the identification of the specific transactions that will be prohibited – so there is a high degree of uncertainty around what actually will be banned. Already the Administration has indicated through the media that it is NOT targeting Tencent's extensive video game portfolio, including Riot Games and Epic Games. In addition, both companies have indicated that there could be litigation to block the Executive Order's implementation.

While it is unclear what transactions will be included by the Secretary of Commerce, whether a sale may occur, or litigation may blunt its effects – **businesses and users should recognize that the national security regulations cited in the orders can have a powerful negative impact on these two large technology companies.** Both applications could be pulled out of the app stores and off of American phones. Advertisers could be prohibited from purchasing advertisements on TikTok. Companies could be banned from interacting with the extensive interactive payment network used by WeChat. Plus, these orders could impact a wide range of transactions, including products, real estate, finance, services, that have nothing to do with the consumer side of the applications. Finally, it may be possible that additional executive actions will be taken against these companies, including their potential inclusion on the Department of Commerce's “entity list” which would further restrict the business activities of these companies.

It is widely anticipated that the Chinese government will respond in some fashion – perhaps hitting back at a large or several U.S.-based technology companies. A proportional response could signal a major escalation on the long-running trade dispute between the world's two largest economies and as the bilateral relationship takes center stage in the 2020 U.S. presidential election.

Nixon Peabody's Asia-Pacific, Cross Border Risks, and Export Controls practices are closely monitoring the implementation of the Executive Orders, the Chinese government's response, and the U.S./China trade and investment climate generally and will provide additional updates. Additionally, we can assist clients evaluate their circumstances as they navigate through this turbulent environment.

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