

September 21, 2020

# Implementation of Department of Commerce Prohibitions on Transactions Related to TikTok and WeChat Delayed

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## **Prohibitions on Transactions Related to TikTok Delayed Until September 27 Following President's Approval of Transaction with Oracle and Walmart; Prohibitions on Transactions Related to WeChat Delayed Temporarily Following United States District Court's Preliminary Injunction**

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### **SUMMARY**

On September 18, 2020, the Department of Commerce identified prohibited transactions relating to mobile applications ("Apps") TikTok and WeChat, as required by Executive Orders 13942 and 13943, respectively. The prohibitions, which were originally to take effect on September 20, include prohibitions on the provision of services related to the distribution and functioning of the TikTok and WeChat Apps, including for the purpose of transferring funds or processing payments to or from parties within the United States through the WeChat App, but only apply to "business-to-business transactions" and include several carve-outs.

The effective dates for most of the prohibited transactions have now been delayed. Certain prohibitions with respect to TikTok related to the distribution or maintenance of the App were supposed to become effective September 20, but the Department of Commerce postponed the effective date to September 27 after President Trump approved the deal in concept between Oracle Corp., Walmart Inc., and ByteDance Ltd., the owner of Tiktok, which would allow TikTok to divest itself of its U.S. assets and U.S. user data in line with a separate executive order. Most of the other prohibitions for TikTok will become effective beginning on November 12, 2020, which allows certain functionality while CFIUS' work related to the Oracle, Walmart, and ByteDance deal remains ongoing. The prohibitions with respect to WeChat were supposed to become effective as of September 20, 2020, but a Magistrate Judge for the U.S. District Court

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for the Northern District of California granted a preliminary injunction on September 19, ruling that the plaintiffs in *U.S. WeChat Users Alliance v. Donald J. Trump* had shown serious questions going to the merits of their First Amendment claim.<sup>1</sup>

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### BACKGROUND AND KEY PROVISIONS

On August 6, 2020, President Trump issued Executive Orders 13942 and 13943 to address national security threats posed by Apps developed and owned by ByteDance Ltd. (“ByteDance”) and Tencent Holdings Ltd. (“Tencent”).<sup>2</sup> The executive orders noted that ByteDance’s TikTok App and Tencent’s WeChat App automatically capture wide swaths of Americans’ personal and proprietary information, and that the collected data could be accessed by the Chinese government. The executive orders further provided that certain transactions with ByteDance and Tencent would be prohibited by September 20, 2020 (45 days after the issuance of the orders) and required the Secretary of Commerce to identify the transactions subject to these prohibitions by that date.

Through two notices from the Office of the Secretary published on September 18, 2020, the Department of Commerce identified the following transactions relating to TikTok and WeChat as being within the scope of prohibited transactions:<sup>3</sup>

- ***Distribution or Maintenance of Application.*** Any provision of services to distribute or maintain the TikTok or WeChat Apps, constituent code, or App updates through an online mobile App store, or any online marketplace where mobile users within the land or maritime borders of the United States and its territories may download or update Apps for use on their mobile devices;
- ***Internet Hosting Services.*** Any provision of internet hosting services enabling the functioning or optimization of the TikTok or WeChat Apps, within the land and maritime borders of the United States and its territories;
- ***Content Delivery Services.*** Any provision of content delivery services enabling the functioning or optimization of the WeChat or TikTok App, within the land and maritime borders of the United States and its territories;
- ***Internet Transit or Peering Services.*** Any provision of directly contracted or arranged internet transit or peering services enabling the functioning or optimization of the TikTok or WeChat App, within the land and maritime borders of the United States and its territories;
- ***Utilization of Code.*** Any utilization of the TikTok or WeChat App’s constituent code, functions, or services in the functioning of software or services developed and/or accessible within the land and maritime borders of the United States and its territories; or
- ***Future Determinations.*** Any other transaction with ByteDance or with Tencent that is related to WeChat or their subsidiaries by any person, or with respect to any property, subject to the jurisdiction of the United States, as may be identified at a future date under the authority delegated under Executive Orders 13942 and 13943.

The Department of Commerce also identified the following transactions related to WeChat as being within the scope of prohibited transactions:

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- **Transferring Funds or Processing Payments.** Any provision of services through the WeChat App for the purpose of transferring funds or processing payments to or from parties within the land or maritime borders of the United States and its territories.

The Department of Commerce notices also contained certain exceptions to these prohibitions, first noting that the identified prohibitions only apply to “business-to-business transactions,” and then providing carve-outs to the prohibitions for:

- Payment of wages, salaries, and benefit packages to employees or contractors;
- The exchange between or among TikTok or WeChat App users of personal or business information using the TikTok or WeChat App, to include the transferring and receiving of funds;
- Activities related to Apps 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, and all ancillary activities, including activities performed by any U.S. person, which are ordinarily incident to, and necessary for, the distribution, installation, and use of Apps outside of the United States; or
- The storing of TikTok or WeChat App user data in the United States.

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### DELAYS IN EFFECTIVE DATES

For TikTok, the prohibition on transactions related to the distribution and maintenance of the App were originally supposed to be effective as of September 20, 2020. However, on September 19, the Department of Commerce announced that it was delaying this prohibition until September 27 at the direction of the President because he had approved in concept the deal between ByteDance, Oracle, and Walmart, which would create a new company providing TikTok services to users in the United States in which the data privacy for American TikTok users would be secured by Oracle in line with the separate executive order requiring TikTok to divest itself of its U.S. assets and U.S. user data.<sup>4</sup> The other prohibited transactions on TikTok are supposed to begin in a second phase starting on November 12, 2020, providing CFIUS with the necessary time to approve the documentation and conditions for the transaction.<sup>5</sup>

All the prohibited transactions with respect to WeChat were supposed to become effective as of September 20, 2020. However, on September 19, a nationwide injunction preventing the implementation of these prohibitions was issued in *U.S. WeChat Users Alliance v. Donald J. Trump*, on the grounds that the “prohibited transactions burden substantially more speech than is necessary to serve the government’s significant interest in national security, especially given the lack of substitute channels for communication.”<sup>6</sup> The effective date of the prohibitions on transactions related to WeChat will be the subject of further appeals and litigation following this order for preliminary injunction since the government is expected to challenge.

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### IMPLICATIONS

With the possibility that the prohibitions on transactions may become effective in the near future, companies will need to determine whether any of their current business activities implicate these prohibitions. Based on the scope of the prohibitions published by Commerce, the compliance burden appears to fall largely on

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companies in the technology sector providing services within the United States. In light of the savings clauses in each Department of Commerce identification announcement warning that additional prohibitions could be added in the future, companies will need to continue to monitor the situation closely.

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ENDNOTES

- 1 Order Granting Motion for Preliminary Injunction, *U.S. WeChat Users Alliance v. Donald J. Trump*, Case No. 20-cv-05910-LB, ECF No. 17 and 18 (N.D. Cal. Sept. 19, 2020).
- 2 Exec. Order No. 13942, 85 Fed. Reg. 48637 (2020). See also Exec. Order No. 13943, Fed. Reg. 48641 (2020).
- 3 Department of Commerce, Identification of Prohibited Transactions to Implement Executive Order 13942 and Address the Threat Posed by TikTok and the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain (Sept. 18, 2020), available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-20920.pdf>. See also Department of Commerce, Identification of Prohibited Transactions to Implement Executive Order 13943 and Address the Threat Posed by WeChat and the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain (Sept. 18, 2020) available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-20921.pdf>.
- 4 Department of Commerce, Press Release, “Statement on Delayed Prohibitions Related to TikTok” (Sept. 19, 2020), available at <https://www.commerce.gov/news/press-releases/2020/09/statement-delayed-prohibitions-related-tiktok>. See also Order Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297 (2020).
- 5 Department of Treasury, Press Release, “Statement on TikTok from Treasury Spokesperson Monica Crowley” (Sept. 19, 2020), available at <https://home.treasury.gov/news/press-releases/sm1129>.
- 6 *U.S. WeChat Users Alliance v. Donald J. Trump*, Case No. 20-cv-05910-LB, ECF No. 17 and 18 at 18.

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