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CLIENT ALERT

New Executive Orders Start Clock Ticking for TikTok and WeChat

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On August 6, 2020, the President issued two Executive Orders (the EOs) pursuant to the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act (NEA) prohibiting U.S. persons from engaging in transactions with the Chinese-owned parent companies of the mobile applications (apps) TikTok and WeChat. The prohibitions begin 45 days after the orders (September 20, 2020) and the EOs direct the Secretary of Commerce to identify the transactions subject to the EOs within that time. The EOs do not confer any authority on the Secretary to take immediate or earlier action.

The EOs, which mirror one another in several instances, do not declare a new national emergency but rather base the prohibitions on the same national emergency declared with respect to the information and communications technology and services supply chain as pronounced in Executive Order 13873 (Securing the Information and Communications Technology and Services Supply Chain). The EOs note "the spread in the United States of mobile applications developed and owned by companies in the People's Republic of China (China) continues to threaten the national security, foreign policy, and economy of the United States" and single out TikTok and WeChat as being of particular concern.

Specifically, the EO addressing the mobile video app TikTok states that it "automatically captures vast swaths of information from its users, including Internet and other network activity information such as location data and browsing and search histories." Such collection, according to the EO, could contribute to China's ability to access Americans' personal and proprietary information, potentially track locations of Federal employees and contractors, build dossiers for blackmail and enable corporate espionage on U.S. companies. Another concern cited by the EO is reported censorship by TikTok of "content that the Chinese Communist Party deems politically sensitive, such as content concerning protests in Hong Kong and China's treatment of Uyghurs and other Muslim minorities" and its potential use in disinformation campaigns.

The EO targeting the messaging, social media and electronic payment app WeChat includes in the description of risks its ability, like that of TikTok, to capture information from its users that "threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information", to censor content deemed politically sensitive, and its potential use for disinformation campaigns. The EO adds that WeChat captures information on Chinese nationals visiting the United States. It does not identify potential risks to Federal employees and contractors, presumably because WeChat has less current adoption in the United States than TikTok.

Most notably, the TikTok EO prohibits transactions by any U.S. person with TikTok's parent company, ByteDance Ltd. (ByteDance) or its subsidiaries, and not TikTok itself. By contrast, the WeChat EO specifically prohibits transactions "related to WeChat" with Tencent Holdings, Ltd. (Tencent), the parent company. That the TikTok EO does not use the same language in the prohibition to bar transactions "related to TikTok" seems to suggest a path forward for TikTok if it's no longer affiliated with ByteDance. The scope of the WeChat order leaves some ambiguity, so its remains for the Commerce Secretary to define whether the EO extends to other transactions with Tencent or its subsidiaries. Tencent has ownership stakes in several U.S. companies other than WeChat, especially in the video gaming industry. Accordingly, using the WeChat EO as grounds for prohibiting transactions with other companies or apps backed by Tencent could have far-reaching effects. While there has been a suggestion made by White House officials that the EO is only targeted at transactions specifically involving WeChat and the language may be interpreted as such, the order itself doesn't explicitly limit its coverage to that.

Neither EO defines the "transactions" subject to the EOs nor do they immediately prohibit any transactions with ByteDance or Tencent. Instead, the EOs direct the Secretary of Commerce to "identify the transactions" subject to the prohibition by September 20, 2020. This should include a delineation of the scope of the WeChat order. A provision in the EOs explicitly provides that any transaction designed to evade or avoid the prohibition is also prohibited.

Commentary

For months, the fate of TikTok has hinged on review of ByteDance's acquisition of Musical.ly by the Committee on Foreign Investment in the United States (CFIUS). Although ByteDance acquired Musical.ly in 2017, and rebranded it to TikTok, it failed to file a notice with CFIUS. Following Congressional pressure, CFIUS began review of the "non-notified" transaction in November 2019. Although Musical.ly, like its parent ByteDance, was a Chinese company, CFIUS is authorized to review those transactions where foreign acquisition of "U.S. entities" – interpreted to include those with a substantial U.S. presence – may pose a threat to U.S. national security. Recent public reporting suggests that TikTok is in discussions with a potential U.S. acquirer following CFIUS review. If ByteDance divests its ownership interests in TikTok before September 20 – the date that the EOs go into effect – the EO will not affect TikTok's operations. While the EO is plainly targeted at TikTok, it prohibits transactions only with ByteDance and not TikTok itself, so ByteDance's divestiture of TikTok would position TikTok beyond the scope of the order. The EO would still apply to other transactions with ByteDance or its subsidiaries.

Conversely, WeChat does not seem to have a similar exit to avoid becoming subject to the EO. While a smaller number of U.S. persons use WeChat, the app services a large swath of payments and e-commerce for U.S. businesses in China and could substantially affect their operations there should they be cut off from the app. Similarly, many U.S. businesses operating within the United States and other U.S. persons rely on the messaging app to communicate with counterparts in China. Depending on how the EO is implemented, that line of communication could no longer be an open pathway after September 20, 2020.

Protecting the Information and Communications Technology and Services Supply Chain

These EOs are the latest in a series of actions designed to protect the information and communications technology and services supply chain, including the expanded use of export controls to limit Huawei Technologies Co., Ltd.'s ability to produce or develop products using certain U.S. software and technology, and Section 889 of the 2019 National Defense Authorization Act, which prohibits the federal government from entering into a contract with any entity that uses "covered telecommunications equipment or services."

Both EOs are predicated on Executive Order 13873 issued last May, "Securing the Information and Communications Technology and Services (ICTS) Supply Chain." That order directed the Secretary of Commerce to promulgate regulations to prohibit transactions involving components produced by "foreign adversaries" that pose risks to U.S. national security. Pursuant to the ICTS Executive Order, the Commerce Department proposed regulations on November 27, 2019, that adopt a case-by-case framework through which Commerce can review information and communications technology and services that have connections to a “foreign adversary” and determine whether certain transactions are prohibited or must be mitigated due to national security concerns.

Separately, CFIUS has long since been focused on the extent that information can be collected in vast quantities and the corresponding ability for foreign intelligence to manipulate that information. Recent legislation modernizing CFIUS, the Foreign Investment Risk Review Modernization Act (FIRRMA), explicitly extends to foreign investors’ access to personally identifying information (PII) of U.S. citizens, making it clear that CFIUS will continue to scrutinize foreign acquisition of U.S. businesses that collect or maintain sensitive PII of U.S. citizens. Indeed, CFIUS has forced divestiture of U.S. businesses where the collection of sensitive information was at issue, as was the case with Grindr.

Similar in some ways to CFIUS, Team Telecom, the interagency national security review body that reviews certain licensing applications referred to it by the Federal Communications Commission (FCC) for national security and law enforcement concerns, recently recommended in June that the FCC deny an application by Pacific Light Cable Network (PLCN) and backed by Facebook and Google for a submarine cable system that would have directly connected mainland U.S. and Hong Kong. Team Telecom raised concerns about PLCN’s Chinese owners and their relationship with China’s intelligence and security services. Team Telecom has previously recommended that the FCC take action with respect to other Chinese-owned telecoms.

The Executive Orders also come on the heels of two other developments last week: the U.S. Senate’s unanimous vote to approve a bill prohibiting Federal workers from using TikTok on government-issued devices and the Secretary of State’s announcement to expand the Clean Network Program in an effort to protect the nation’s critical telecommunications and technology infrastructure. Taken together, these developments signal an all tools approach to curb the perceived threat to national security presented by vulnerabilities in ICTS infrastructure and supply chain.

Conclusion

Should ByteDance divest its ownership interest of TikTok, the effect of the Executive Order on TikTok’s operations is ultimately nullified. It should be noted, however, that CFIUS retains its authority to review any acquisition of TikTok, and any such acquisition would necessarily need to ameliorate any national security concerns of the committee. This argues in favor of acquisition of TikTok’s U.S. assets by a U.S. entity.

The date by which a deal is rumored to be struck, September 15, should be on the radar for those with interests in TikTok. Should any acquisition fall through, TikTok would be subject to the EO when it goes into effect five days later on September 20, 2020. Because the TikTok EO targets transactions with ByteDance, other transactions involving ByteDance could remain subject to the order notwithstanding whether TikTok is still owned by the company.

The EO regarding WeChat is potentially further reaching as the scope of the order could extend to investment relationships and business dealings with companies in China. At stake could also be the payments and e-commerce platform that many U.S. companies use to access the Chinese market. Depending on how it’s implemented, many could find their communication connections severed and ability to do business hindered. Finally, a separate question left open is whether the Administration will use these EOs as templates for similar action against other Chinese-owned companies and apps in an effort to further protect the ICTS supply chain.

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