

Confusion Prevails Over Extent Of Trump's TikTok 'Ban'

By **Alex Lawson**

Law360 (August 10, 2020, 8:33 PM EDT) -- President Donald Trump's efforts to "ban" TikTok using legal tools that aren't usually aimed at popular mobile apps have left attorneys confused about how exactly the social media platform will be targeted as U.S.-China relations continue to fray.

Under a pair of orders issued by Trump last week citing TikTok and the messaging app WeChat as threats to national security, U.S. companies will be prohibited from conducting "transactions" with the platforms' Chinese parent companies. It will fall to the U.S. Department of Commerce to draw the lines around which transactions will be banned over the next several weeks.

A number of options are on the table, including pulling TikTok and WeChat from app stores run by U.S. companies, or barring banks from supporting any transactions conducted on the apps or with their parent companies. But it's all guesswork at this point, and Akin Gump Strauss Hauer & Feld LLP partner Christian Davis said attorneys are scrambling to ascertain the scope of the White House's plans.

"We're trying to understand more clearly what would actually be included as a 'transaction' that would be identified," Davis told Law360. "There is the potential that this could be as broad as a sanctions designation, or it could be much more narrow and apply to very specific types of transactions. I am trying to understand what the aims of the government are."

The TikTok and WeChat orders are just the latest escalation in the broader U.S.-China conflict that began with tit-for-tat tariffs on each side and has ballooned into an all-out economic brawl with considerable national security, foreign policy and geopolitical implications.

In the case of TikTok, several experts viewed the order as placing more pressure on the app's parent company, ByteDance Ltd., to divest its interests in the app to a U.S. company, like Microsoft. If such a sale goes through in time, the TikTok order would be functionally null.

Formally, Trump has deemed that TikTok and WeChat pose significant security risks to the U.S., citing a national emergency order he issued last year regarding foreign intrusions into U.S. telecommunications networks. ByteDance and WeChat owner Tencent Holdings Ltd. are now squarely in the government's crosshairs.

To take action, Trump is using his authority under the International Emergency Economic Powers Act. IEEPA has formed the basis of modern U.S. sanctions law, but attorneys struggled to find examples of it

being used to target such a popular consumer product.

"Targeting mobile applications seems to be yet another extension of IEEPA's broad reach," Crowell & Moring LLP partner Caroline Brown said.

The extent to which Trump can use IEEPA to suppress TikTok or WeChat is murky, but the law could be used to effectively starve the apps' owners of U.S.-based revenue streams and eventually kill the platforms through attrition in the U.S. market.

Several attorneys said one move the White House is likely eyeing is banning companies like Google and Apple from offering TikTok and WeChat in their app stores. That would prevent any new downloads of the apps and, ostensibly, any future updates for apps already downloaded on U.S. users' phones.

IEEPA was drafted to regulate international commerce, so any financial transaction involving the apps or their parent companies could potentially be on the chopping block in the coming weeks. This could involve bans on purchasing advertisements on these platforms and bans on banks supporting any transactions conducted via the apps.

Any restrictions on banking could potentially hit WeChat harder than TikTok. While the messaging service has a relatively small U.S. footprint, it also provides mobile payment services that could be effectively wiped out.

"I suspect that in the drafting process, they thought, 'How can we really hurt these companies? We can hurt them by prohibiting transactions via the banks,'" Vanderbilt Law School professor Timothy Meyer told Law360.

There is also confusion about whether the orders could extend beyond the two apps at issue. After WeChat owner Tencent was named in Trump's executive order, observers wondered whether the company's ownership in numerous online gaming companies, including a 40% stake in Fortnite developer Epic Games, could soon come under hefty U.S. sanctions.

Soon after the order was issued, the Los Angeles Times quoted an anonymous White House official as saying that the action only applies to WeChat and not to any of Tencent's other business interests.

But White House spokesperson Judd Deere would not confirm this limitation on the order, explaining that it is still up to Commerce to decide what transactions are fair game in the next six weeks.

"They will sanction transactions only as defined by the secretary of commerce," Deere told Law360. "[That] could include all transactions over which the U.S. can exercise jurisdiction."

If the administration opts to restrict new downloads and financial dealings with TikTok, there is still an open question on how the order will affect people who already have the app and use it without any financial exchange, provided it is still able to function on those people's devices.

While IEEPA is a broad statute that gives the president tremendous authority to restrict trade, it does have specific exemptions that could prove significant in the context of targeting mobile apps.

Specifically, IEEPA forbids the president from restricting "postal, telegraphic, telephonic, or other

personal communication, which does not involve a transfer of anything of value." While the law was written well before the smartphone boom, Meyer said this language would seem to limit the White House's ability to police individual app users.

"This is a classic problem of trying to apply old laws to the internet age. But if I represented plaintiffs challenging the executive orders, I would certainly make these arguments to challenge any restriction on personal use or downloading of the app," he said. "The overall intent of the restrictions on presidential power ... was clearly to limit the president's power to interfere in personal activities of the kind implicated by use of these apps."

Another looming question is how much time U.S. banks or companies will be given to comply with new rules covering ByteDance and Tencent. The orders set a 45-day deadline for Commerce to detail which transactions with the companies will be banned, and that same deadline also applies to companies that will have to abide by the new rules.

"It remains unclear whether Commerce would provide a notice and wind-down period with respect to any restrictions or whether any licensing authority will be available," Brown said. "Whether or not Commerce does so might be relevant to any due process challenges to the orders."

While Trump has drawn TikTok and WeChat into his broader economic standoff with China, it's possible that the use of IEEPA to target popular apps in this way could be a one-off. But Brown said she is eager to see how the orders are implemented in order to decipher whether the administration could continue to use sanctions to target Chinese companies.

"A separate question left open is whether this administration will use these executive orders as templates for similar action against other Chinese-owned companies and applications in an effort to further protect the information communications technology services supply chain," she said. "Despite the ostensible inefficiencies from such a piecemeal approach, it could offer a more immediate means to effect similar prohibitions moving forward."

--Editing by Aaron Pelc and Alanna Weissman.