

ALERT

Biden Administration Revokes Trump EOs Targeting TikTok, WeChat, and Other Chinese Software Apps; Initiates Broader Investigations into Software Apps by Foreign Adversaries

June 11, 2021

On June 9, 2021, the Biden Administration issued an executive order (EO) entitled “Executive Order on Protecting Americans’ Sensitive Data from Foreign Adversaries.” This EO revoked three prior Trump Administration EOs aimed at addressing risks to U.S. national security stemming from Americans’ use of TikTok, WeChat, and other mobile applications (apps) and software developed or controlled by the following Chinese entities: Alipay, CamScanner, QQ Wallet, SHAREit, Tencent QQ, VMate, and WPS Office and their subsidiaries. Because President Trump’s prohibitions on the use of these apps and software were already entangled in litigation, this move by President Biden was not entirely unexpected. President Biden’s new EO renders much of the pending litigation moot and paves the way for new national security investigations. More specifically, the new EO states that President Biden is examining a broader range of threats to U.S. national security posed by software app developers from all “foreign adversary” nations and will consider regulating and possibly prohibiting transactions with foreign adversaries deemed to pose serious risks to the national security, economic security, and foreign policy interests of the United States, including entities involved in “serious human rights abuses.”

As background, on May 15, 2019, former President Trump issued Executive Order 13873 (EO 13873) (“Securing the Information and Communications Technology and Services Supply Chain”), which

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directed the U.S. Department of Commerce to develop and implement processes to counter risks to U.S. national security arising from transactions with “foreign adversaries” in the information and communications technology and services (ICTS) supply chain. Subsequently, President Trump issued three EOs prohibiting transactions with TikTok, WeChat, and the other Chinese software apps listed above (EOs 13942, 13943, and 13971) and their affiliates. Following the issuance of EO 13942, the Trump Administration issued another EO requiring TikTok’s parent company, ByteDance, to divest its ownership of TikTok based on an investigation by the Committee on Foreign Investment in the United States (CFIUS).

The Biden Administration’s new EO instructs the Office of Management and Budget and other relevant departments and agencies to “promptly take steps to rescind any orders, rules, and regulations, guidelines, or policies” used to implement or enforce penalties under these three EOs. The new EO also directs agencies and departments to dissolve any personnel positions, committees, task forces, or other entities established to enforce the Trump Administration’s three EOs. Because two of former President Trump’s EOs were enjoined through litigation, this step will effectively render those proceedings moot.

As noted, President Biden will nevertheless continue with the U.S. Government’s assessment of national security risks arising from the ability of “foreign adversaries” to collect personal data and sensitive business data from the United States through software apps. This assessment is being conducted in accordance with the procedures and processes established under the Interim Final Rule implementing EO 13873. The Commerce Department has, to date, issued several subpoenas to Chinese companies pursuant to the Interim Final Rule in order to determine whether their activities pose risks to the national security of the United States and its persons. The Department has not publicly named the Chinese companies receiving the subpoenas.

As those investigations continue, this new EO directs the Department of Commerce to work in coordination with the U.S. Department of Homeland Security and the Director of National Intelligence to identify existing and emerging threats and to produce a report for the White House with recommendations to address those threats. The full timetable for the completion of this assessment and recommendation process is 180 days.

- Within 60 days of the EO (August 8, 2021), the Director of National Intelligence and Secretary of Homeland Security will provide threat and vulnerability assessments, respectively, to the Secretary of Commerce in support of the Commerce report.
- Within 120 days (October 7, 2021), Commerce, in consultation with secretaries of various departments and heads of agencies, is required to submit a report (incorporating the national security threat and vulnerability assessments) to the National Security Advisor (NSA) “with recommendations to protect against harm from the unrestricted sale of, transfer of, or access to United States persons’ sensitive data, including personally identifiable information, personal health information, and genetic information, and harm from access to large data repositories by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary.”
- Within 180 days (December 6, 2021), Commerce will recommend to the NSA executive and legislative fixes to address “the risk associated with connected software applications that are designed, developed, manufactured, or supplied” by persons owned or controlled by, or subject to the jurisdiction

of, a foreign adversary.

Thereafter, President Biden will determine the extent to which transactions with foreign adversaries should be addressed and the scope of any potential regulations or prohibitions in order to protect U.S. interests. Pursuant to the EO, the Commerce Department will continue to monitor transactions involving software apps for national security risks and recommend actions to the President as appropriate.

While the Trump-issued EO ordering ByteDance to divest its ownership of TikTok remains in effect, that EO is subject to litigation, and the sale process has not yet been completed. This week's EO suggests that the Biden Administration may be reconsidering divestment of TikTok through CFIUS and may instead use Commerce's new authority under EO 13873 to address national security concerns regarding use of the TikTok app within the United States.

Wiley is monitoring the U.S. government's evolving "whole-of-government" approach to counteract China's political, economic, military, and espionage competition with the United States and the potential impacts on U.S. and non-U.S. companies. Wiley's team of attorneys and professionals have produced legal analyses concerning the evolution of these measures, and relevant alerts may be accessed [here](#), [here](#), [here](#), and [here](#).

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