

ALERT

Commerce Department Identifies Prohibited WeChat, TikTok Transactions

September 24, 2020

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UPDATE: On Saturday, September 19, 2020, the U.S. Commerce Department announced a one week delay of the prohibited transactions related to TikTok that were set to go into effect the following day, “[i]n light of recent positive developments” (*i.e.*, a proposed deal with Oracle and Walmart that may resolve U.S. national security concerns). Those transactions are now prohibited beginning September 27, 2020, although the company has filed a motion for a preliminary injunction to block the U.S. government from implementing the restrictions. Additionally, on September 19, a federal district court granted a preliminary injunction temporarily halting the prohibitions against WeChat after finding the plaintiffs, a group of U.S. WeChat users, had shown “serious questions going to the merits of the[ir] First Amendment claim.”

The U.S. Commerce Department (Commerce) today released its list of transactions involving WeChat and TikTok that will soon be prohibited under two Executive Orders that President Trump signed on August 6, 2020. The Executive Orders broadly prohibited U.S. persons from engaging in transactions with the parent companies of the two Chinese social media apps but left it to Commerce to identify within 45 days the specific types of transactions that would be subject to the new prohibitions.

In two *Federal Register* notices released today, Commerce clarified that the scope of prohibited transactions under the Executive Orders will be limited to business-to-business transactions related to

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information and communications technology (ICT) and services, which the notices define as any items or services that are “primarily intended to fulfill or enable the function of information or data processing, storage, retrieval, or communication by electronic means.” The list also includes several carve-outs for transactions by individual users and transactions occurring outside of the United States. Such carve-outs are responsive to concerns about the breadth of the Executive Orders and allegations raised in litigation brought to challenge them in federal court.

Beginning on **September 20, 2020**, the following transactions are prohibited:

- Any provision of services to distribute or maintain the **WeChat** or **TikTok** mobile applications, constituent code, or application updates through an online mobile application store or any online marketplace where mobile users in the United States can download or update applications for use on their mobile devices; and
- Any provision of services through the **WeChat** mobile application for the purpose of transferring funds or processing payments to or from parties in the United States.

For example, U.S. app stores likely will be unable to offer any new downloads of the WeChat or TikTok apps in the United States starting on September 20, and users in the United States likely will be unable to receive any related updates/upgrades, including security patches, to the apps.

Additionally, the following transactions are prohibited **as of September 20, 2020, for WeChat, and as of November 12, 2020, for TikTok**:

- Any provision of Internet hosting services (*e.g.*, file hosting, domain name server hosting, cloud hosting, virtual private server hosting) enabling the functioning or optimization of the WeChat or TikTok mobile application in the United States;
- Any provision of content delivery services enabling the functioning or optimization of these mobile applications in the United States;
- Any provision of directly contracted or arranged Internet transit or peering services enabling the functioning or optimization of the WeChat or TikTok mobile application within the United States; and
- Any utilization of either mobile application’s constituent code, functions, or services in the functioning of software or services developed and/or accessible within the United States (*e.g.*, use of the code underpinning the WeChat or TikTok application to release the same or a similar application under a different name).

Commerce also provided itself with some flexibility to identify other prohibited transactions related to WeChat or TikTok at a future date. As noted above, most of the restrictions on TikTok have been tolled until November 12, which is the deadline the President imposed for TikTok to divest itself of its U.S. assets and U.S. user data. If TikTok complies with the U.S. divestment order, the prohibitions highlighted above may be lifted.

Notably, the rules expressly limit the reach of the prohibitions above, as follows:

- The restrictions only apply to parties to business-to-business transactions.
- They do not apply to exchanges among users of personal or business information using the mobile applications, which, for WeChat, also includes transferring and receiving funds.
- The prohibitions also do not apply to the payment of wages, salaries, or benefit packages to employees or contractors.
- Consistent with the territorial limits noted above, the restrictions do not apply to activities related to mobile applications intended for distribution, installation, or use outside of the United States and any ancillary activities (including those performed by a U.S. person) that are ordinarily incident to and necessary for, the distribution, installation, or use of the applications outside of the United States.
- Finally, the prohibitions do not reach storing WeChat or TikTok mobile application user data in the United States.

Companies will have to evaluate whether their relationships with or use of the apps runs afoul of these prohibitions, as clarified by Commerce. Questions may include how the use of “constituent code” is integrated into apps or offerings.

Wiley is advising on these issues and continues to closely monitor the U.S. government’s efforts to address the growing political, economic, and military competition from China and the impact of such efforts on U.S. and non-U.S. companies. Should you have any questions on the Executive Orders and their implications, please do not hesitate to contact one of the attorneys listed on this alert.