

Insights

RESTRICTIONS AFFECTING WECHAT AND TIKTOK: NOW CLEARLY DEFINED, BUT FACING LEGAL CHALLENGES

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Just as quickly as the U.S. Department of Commerce announced the parameters of prohibitions on transactions involving TikTok and WeChat, pursuant to Executive Orders 13942 and 13943, respectively, actions were taken to delay implementation of those prohibitions.

The Executive Orders, issued simultaneously on August 6, 2020, broadly indicated that “transactions” involving TikTok (and its parent company ByteDance) or WeChat would be prohibited as of September 20, 2020. The Department of Commerce was required to identify the types of transactions covered by the prohibitions within that 45-day period. On Friday, September 18, the Department of Commerce identified the following types of transactions as falling within the ban, effective 11:59 pm September 20, 2020:

- Distribution or maintenance of either application, their updates, or constituent code in U.S. mobile app stores; and
- Support for use of WeChat within the United States for payment processing or funds transfer purposes.

Also identified on September 18 as prohibited transactions were the following additional activities related to the WeChat and TikTok mobile applications in the United States:

- Provision of internet hosting services;
- Provision of content delivery network services;
- Provision of internet transit or peering services; and
- Use of the application’s code, functions or services in the development or use of alternate or new applications.

These additional four prohibitions were slated to go into effect with respect to WeChat on September 20, 2020, and with respect to TikTok on November 12, 2020.

If these restrictions had proceeded as planned, by the end of the day on September 20, 2020, use of WeChat would have been severely hindered in the United States and access to WeChat and TikTok would not have been available through U.S. app stores. Use of the WeChat app to pay for transactions and for other funds transfer applications would have ceased in the United States.

However, events of the last couple weeks have overtaken implementation of these prohibitions. A lawsuit by users of WeChat challenged the imposition of the restrictions on First Amendment grounds. Explaining that the Trump Administration's outright ban of WeChat could run afoul of the First Amendment as overly broad, the U.S. District Court for the Northern District of California issued a preliminary injunction Saturday, September 19, barring the app store prohibitions related to WeChat from taking effect the next day. The Administration moved to stay the preliminary injunction on September 24, citing significant national security concerns and providing classified information in support of the motion. It remains unclear whether or when the WeChat-related prohibitions will be allowed to proceed.

Separately, the Department of Commerce postponed from September 20 to September 27, 2020, implementation of the prohibitions affecting the availability of TikTok and updates related thereto in U.S. app stores. The delay came amid a possible deal among Oracle, Walmart, and ByteDance to form a new entity, TikTok Global, for TikTok's US operations. Despite indications of President Trump's approval of the deal on September 20, recent conflicting reports from Administration officials and the companies involved regarding TikTok Global's ownership called into question whether and how the deal would move forward, prompting TikTok to seek an injunction preventing the imposition of the app store restrictions on September 27. If the proposed TikTok Global deal gains further traction with the Trump Administration by addressing the national security concerns noted in Executive Order 13942 and the August 14, 2020, Executive Order requiring ByteDance to divest from TikTok, then it is possible that the prohibitions concerning TikTok could ultimately be eliminated. In the meantime, on Sunday, September 27, the U.S. District Court for the District of Columbia granted TikTok a preliminary injunction halting the mobile app store ban. The injunction does not apply to the other prohibitions set to go into effect on November 12.

For now, this means we all wait and watch. It is prudent, though, to ensure you take this extra time to assess where and how your employees and business currently utilize WeChat or TikTok (including advertising on the platforms), so that you can promptly adjust your business activities as needed in the event either set of restrictions are reinstated.

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