

# U.S. Escalates Measures against China with New Sanctions against TikTok, WeChat and Senior Hong Kong Officials

**August 11, 2020**

On August 6, 2020, President Trump issued two Executive Orders authorizing restrictions on certain transactions still to be specified with ByteDance Ltd. and Tencent Holdings Ltd., the developers of the popular mobile phone applications TikTok and WeChat. Both companies are based in the People's Republic of China. These restrictions will become effective 45 days after the date of the orders.<sup>1</sup>

Subsequently, on August 7, 2020, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") imposed sanctions on 11 senior officials of the Hong Kong Special Administrative Region of China under the recently issued Executive Order 13936 of July 14, 2020.<sup>2</sup> In response, on August 10, 2020, China announced it would sanction 11 U.S. individuals, including U.S. Senators Ted Cruz and Marco Rubio.

Both of these actions represent a marked escalation of U.S. measures targeting Chinese persons or entities and follow, in recent months, the issuance of new U.S. sanctions authorities in response to China's recent actions toward Hong Kong, the imposition of U.S. sanctions on Chinese government officials and entities under the U.S. "Global Magnitsky" human rights sanctions program with respect to China's recent actions in Xinjiang Province, and the heightening of U.S. export controls restricting exports to the Chinese technology company, Huawei. With respect to the TikTok and WeChat Executive Orders, however, many details remain to be settled, particularly in relation to the precise scope of restrictions applicable to the identified Chinese companies.

Companies should begin reviewing their customers and counterparties to determine the extent of any touchpoints or dealings with companies that may be subject to the TikTok or WeChat Executive Orders and with any of the individuals recently designated under Executive Order 13936.

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<sup>1</sup> The "Executive Order on Addressing the Threat Posed by TikTok" is available [here](#); the "Executive Order on Addressing the Threat Posed by WeChat" is available [here](#).

<sup>2</sup> Please see our earlier [client update](#) for further discussion of Hong Kong-related U.S. sanctions authorities.

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## TikTok and WeChat Executive Orders

### Why did President Trump issue the Executive Orders?

The TikTok and WeChat Executive Orders come on the heels of threats by President Trump to ban TikTok from operating in the United States unless sold to a U.S. company, following a review by the Committee on Foreign Investment in the United States of national security concerns raised by the potential for Chinese influence in the United States through TikTok.

The orders reflect a growing unease by U.S. authorities with the access to information available to Chinese-controlled apps on phones or other devices in the United States. For example, both Executive Orders specifically cite U.S. concerns with the collection of personal and proprietary information by TikTok and WeChat of U.S. persons (particularly, federal employees and contractors) or Chinese nationals visiting the United States, along with other concerns related to Chinese government censorship and what the U.S. government refers to as “disinformation campaigns” mediated through the applications.

Indeed, alongside the issuance of the two Executive Orders, the U.S. Senate also unanimously passed the No TikTok on Government Devices Act, a bill that would generally impose a ban on TikTok on government-issued devices.<sup>3</sup> Several U.S. federal agencies, including the U.S. Departments of Defense and Homeland Security and the Transportation Security Administration, have already imposed a similar ban.

These actions are in line with the Trump administration’s “Clean Network” program, which aims to protect the information of U.S. persons and companies in part by removing PRC phone applications from mobile applications stores under the “Clean Store” effort.<sup>4</sup> It is possible, therefore, that one of the primary goals behind the Executive Orders may simply be the elimination of TikTok and WeChat from mobile application stores.

Concern for jurisdictional control and protection of persons’ personal data is, of course, not unique to the U.S.-China relationship. In fact, the European Union’s highest court recently determined that the extent of U.S. intelligence and law enforcement authorities’ ability to access personal data in the United States invalidates the EU-U.S. Privacy Shield as a mechanism for the cross-border transfer of personal data between the EU and

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<sup>3</sup> See No TikTok on Government Devices Act, S. 3455, 116<sup>th</sup> Cong. (2020).

<sup>4</sup> See Press Statement, Michael R. Pompeo, U.S. Secretary of State, Announcing the Expansion of the Clean Network to Safeguard America’s Assets (Aug. 5, 2020), <https://www.state.gov/announcing-the-expansion-of-the-clean-network-to-safeguard-americas-assets/>.

United States.<sup>5</sup> Thus, the two Executive Orders implicate broader issues over jurisdictional control of personal data.

That said, President Trump's statements leading up to the issuance of the two Executive Orders have also caused many to view these actions as an effort by the Trump administration to ratchet up pressure for the sale of TikTok to a U.S. company.

### **Who and what are targeted by the Executive Orders?**

The TikTok and WeChat Executive Orders are broadly worded and authorize restrictions on the following activities:

- “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zijié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest”; and
- “any transaction that is related to WeChat by any person, or with respect to any property, subject to the jurisdiction of the United States, with Tencent Holdings Ltd. (a.k.a. Téngxùn Kònggǔ Yǒuxiàn Gōngsī), Shenzhen, China, or any subsidiary of that entity.”

Based on this language, the Executive Orders appear to authorize prohibitions that could be extremely expansive (e.g., generally limiting U.S. persons' transactions with WeChat worldwide). However, this authorization may be more far-reaching than necessary, depending on U.S. objectives. As discussed below, the Executive Orders call on the U.S. Secretary of Commerce to identify what transactions will be subject to these restrictions. This suggests that the sanctions actually imposed may be narrower than what the sweeping words of the Executive Orders appear to indicate, although it is far from certain at this time what transactions will be identified.

Transactions with either TikTok's developer, ByteDance, or ByteDance's subsidiaries, appear to be within the scope of the TikTok Executive Order. It is unclear, however, whether other companies or property related to ByteDance may be encompassed by the phrase in the TikTok Executive Order “in which any such company has any interest.”

In the case of restrictions on transactions with Tencent, the WeChat Executive Order has an additional proviso describing the targeted transactions as those “related to WeChat,” which language appears intended to narrow the scope of prohibitions on Tencent, given the breadth of other services provided by Tencent besides WeChat (e.g.,

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<sup>5</sup> Please see our [client update](#) of July 17, 2020, for further discussion of the invalidation of the EU-U.S. Privacy Shield.

music, video games, e-commerce, etc.). It is also uncertain at this time, however, to what extent any prohibitions could impact Tencent's other businesses.

Both the TikTok and WeChat Executive Orders apply to any person or property that is "subject to the jurisdiction of the United States." This language reflects the text of the International Emergency Economic Powers Act ("IEEPA"), the underlying statutory authority for the Executive Orders, and it parallels language used by OFAC in its Cuban Assets Control Regulations, where the language has been used to encompass foreign subsidiaries of U.S. persons.<sup>6</sup> It is unclear that the inclusion of this phrase in the Executive Orders signals a potential application of restrictions to foreign subsidiaries of U.S. persons, or if the language is simply meant to indicate that the U.S. Secretary of Commerce's authority to impose sanctions reaches to the full extent of the President's authority under IEEPA.

### **What prohibitions may be imposed under the Executive Orders?**

The precise set of transactions that would be prohibited under the TikTok and WeChat Executive Orders still remains to be specified by the U.S. Commerce Department during the 45-day period after the dates of the orders.

Notably, the provision in the Executive Orders calling for implementing regulations to be issued by the U.S. Commerce Department, rather than the U.S. Treasury Department, suggests that any sanctions are likely to be focused on export controls restricting the exportation of merchandise, software and technology to those entities. Had the Trump administration intended to impose blocking sanctions on assets of ByteDance or Tencent or other prohibitions on financial transactions with those entities, the sanctions would typically be imposed by the U.S. Treasury Department through its Office of Foreign Assets Control. The use of export restrictions rather than financial sanctions also would be consistent with the Trump administration's approach to some other Chinese technology companies, including Huawei. The fact that the authority cited in the Executive Orders includes IEEPA but not the 2018 Export Control Reform Act could perhaps suggest a different focus, but it may be simply an oversight, given that IEEPA provided the legal authority for U.S. export controls until 2018. Thus, we believe that the eventual prohibitions may be generally similar to the export controls currently administered by the U.S. Commerce Department, given the agency's subject matter expertise on technology issues and exports.

Nonetheless, pending the issuance of any guidance by the U.S. Commerce Department or other developments, the exact restrictions will remain uncertain.

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<sup>6</sup> See 31 CFR 515.329.

### What should companies do in the short term?

Whether the Trump administration has further plans for implementing the restrictions authorized under the TikTok and WeChat Executive Orders is unknown, including whether additional guidance may be forthcoming. If the potential divestment of TikTok to a U.S. company occurs in the next 45 days, which appears to be the administration's goal, the necessity of regulations implementing the TikTok Executive Order may be obviated. Of course, the WeChat Executive Order would still remain.

Accordingly, in advance of the effective date of any restrictions, companies would be well advised to begin assessing the extent of any touchpoints with ByteDance, Tencent and any subsidiaries or affiliates of these companies, including the nature of any transactions with these entities, so that they will be prepared to implement any sanctions that may eventually be announced.

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## U.S. Sanctions against Hong Kong Officials under Executive Order 13936

On August 7, 2020, the United States imposed the first sanctions under its recently adopted Hong Kong-related sanctions authorities. Eleven senior Hong Kong officials were added to the list of Specially Designated Nationals ("SDNs") under Executive Order 13936, which authorizes blocking sanctions on a wide range of conduct related to Hong Kong, including conduct connected to China's *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (the "National Security Law").

The bases for these individuals' designations are described below (one individual was designated on two bases):

- Five individuals were designated for developing, adopting or implementing the National Security Law;
- Two individuals were designated for coercing, arresting, detaining or imprisoning individuals under the authority of the National Security Law;
- One individual was designated as a leader or official of a government entity whose members have engaged in activities to prohibit, limit or penalize the exercise of freedom of expression or assembly in Hong Kong; and
- Four individuals were designated for being a leader or official of a government entity that has engaged in, or whose members have engaged in, actions or policies that threaten the peace, security, stability or autonomy of Hong Kong.

U.S. persons are no longer permitted to engage in transactions with these 11 persons, and any property of these persons that comes into the possession or control of a U.S. person must be blocked and reported to OFAC. The U.S. action does not impose immediate obligations on non-U.S. persons, but Executive Order 13936 provides that foreign persons that provide “material assistance” to any of these 11 individuals may also themselves become subject to blocking sanctions.

On August 8, 2020, the Hong Kong Monetary Authority issued circulars to “authorized institutions” and “stored value facilities” regarding “foreign government unilateral sanctions.”<sup>7</sup> The Authority advised that foreign unilateral sanctions create no obligations under Hong Kong law and indicated boards and senior management should have regard to the “treat customers fairly” principles under Hong Kong law in determining whether to continue providing services to individuals or entities designated under foreign sanctions.

On August 10, 2020, China responded to the United States’ sanctions under Executive Order 13936 by announcing that it would impose unspecified sanctions on 11 U.S. individuals, including six U.S. government officials (U.S. Senators Ted Cruz, Marco Rubio, Tom Cotton, Josh Hawley and Pat Toomey and U.S. Representative Chris Smith) and five leaders of various nongovernmental organizations.

We continue to expect additional developments from both the Chinese government and the Trump administration in this space. Companies may wish to review their customers and counterparties to determine the existence of any dealings not only with the 11 designated individuals but also with any other individuals that could become subject to U.S. sanctions under Hong Kong-related U.S. sanctions authorities.

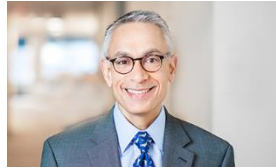
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<sup>7</sup> The Hong Kong Monetary Authority’s circulars may be found [here](#).

Please do not hesitate to contact us with any questions.

**Washington, D.C.**



Satish M. Kini  
smkini@debevoise.com



Robert T. Dura  
rdura@debevoise.com

**New York**



Carl Micarelli  
cmicarelli@debevoise.com



David G. Sewell  
dsewell@debevoise.com



Zila Reyes Acosta-Grimes  
zracosta@debevoise.com



Jonathan R. Wong  
jrwong@debevoise.com

**Hong Kong**



Gareth Hughes  
ghughes@debevoise.com



Mark Johnson  
mdjohnson@debevoise.com



Ralph Sellar  
rsellar@debevoise.com

**Shanghai**



Philip Rohlik  
prohlik@debevoise.com