

# POTUS Bans WeChat

## [U.S. TECH LAW UPDATE](#)<sup>1</sup>

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### **I. Introduction**

On August 6, 2020, the President of the United States (“POTUS”), Donald J. Trump, issued an Executive Order on Addressing the Threat Posed by WeChat (the “WeChat Order”), a widely used mobile application owned and operated by Tencent Holdings Ltd. (“Tencent”), based in Shenzhen, China.<sup>2</sup> In the Order, the President stated that WeChat poses a threat to “the national security, foreign policy, and economy of the United States” due to how the mobile application stores the data of U.S. citizens and businesses.<sup>3</sup> Additionally, the WeChat Order asserted that WeChat censors the transmission of information unfavorable to the Communist Party of China. While the WeChat Order does not target traditional national security issues, data security and privacy are increasingly at the forefront of U.S. national security concerns.

Beginning September 20, 2020, the WeChat Order prohibits any transaction related to WeChat by any person, or with respect to any property, subject to the jurisdiction of the United States, with Tencent or any of its subsidiaries.<sup>4</sup> The WeChat Order further prohibits attempts and conspiracies to evade such prohibitions. Moreover, the WeChat Order authorizes the Secretary of Commerce, Wilbur Ross, to identify the types of transactions subject to the WeChat Order by September 20, 2020. Until then, the actual scope of the WeChat Order, and the implications for individual and business users of the mobile application, will remain unclear.

First released in 2011, WeChat is the world’s largest standalone mobile application, boasting over 1 billion monthly active users. The mobile application encompasses a variety of features, including video, audio and text messaging, payment functions that allow users to order food, travel, and pay utility bills, public service functions such as booking doctor appointments, applying for visas, and hosting government issued identification cards, and more. According to its privacy policies, Tencent currently stores the data of international users on servers located in Ontario, Canada, and Hong Kong.<sup>5</sup> Tencent asserts that it does not share with third parties the data of its users without the consent of the user. However, Tencent states that it will share data with government, public, regulatory, judicial and law enforcement bodies in cases where Tencent is legally required to disclose such information. Tencent also shares user information within its

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<sup>2</sup> [Executive Order on Addressing the Threat Posed by WeChat](#) (August 6, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See [WeChat Privacy Policy](#).



“group of companies,” which includes Tencent International Service Europe BV in the Netherlands, Tencent International Service Pte Ltd. in Singapore, WeChat International Pte Ltd. in Singapore, Oriental Power Holdings Limited in Hong Kong, and WeChat International Limited in Canada (which runs the Hong Kong and Canadian servers). Tencent’s privacy policies do not address whether or not Tencent shares user information with any of its affiliated companies in mainland China.

The WeChat Order accompanied the widely expected Executive Order on Addressing the Threat Posed by TikTok (the “TikTok Order”), which the President publicly referred to in the days preceding its issuance.<sup>6</sup> Similar to the WeChat Order, the TikTok Order cited national security concerns as the administration’s impetus for taking action against TikTok, a video-sharing mobile application owned by the China-based company ByteDance Ltd. (“ByteDance”). The TikTok Order asserts that TikTok’s data capture policies threaten to “allow the Chinese Communist Party access to Americans’ personal and proprietary information – potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct espionage.”<sup>7</sup>

Both orders were preceded by the Secretary of State’s announcement of the expansion of the Clean Network program, described as “the Trump Administration’s comprehensive approach to safeguarding the nation’s assets including citizens’ privacy and companies’ most sensitive information from aggressive intrusions by malign actors, such as the Chinese Communist Party.”<sup>8</sup> Under the program, the Administration seeks to “remove untrusted applications from U.S. mobile app stores” due to the belief that mobile applications created by China-based companies, “threaten our privacy, proliferate viruses, censor content, and spread propaganda and disinformation.”<sup>9</sup> Although the extent of the WeChat Order’s impact remains uncertain, the Clean Network program does suggest that the White House might attempt to remove more China mobile applications from U.S. mobile application stores going forward.

The TikTok Order and the WeChat Order are remarkably similar but contain one important difference—whereas the TikTok Order prohibits any transaction with ByteDance and its subsidiaries, the WeChat Order prohibits any transaction “that is related to WeChat” with Tencent and its subsidiaries.<sup>10</sup> Initially many readers were concerned that the prohibition encompassed all transactions with the Tencent family of companies, which includes a number of companies in the U.S. and elsewhere that publish popular video game franchises, such as Riot Games (League of Legends), Supercell (Clash of Clans) and Epic Games (Fortnite).<sup>11</sup> Shortly after the Administration announced the WeChat Order, White House officials clarified that the WeChat Order is meant to focus only on transactions specifically related to WeChat.<sup>12</sup>

## II. Authority

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<sup>6</sup> [Executive Order on Addressing the Threat Posed by TikTok](#) (August 6, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> [Clean Network](#), U.S. Department of State (August 5, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> Executive Order on Addressing the Threat Posed by WeChat (August 5, 2020).

<sup>11</sup> Pei Li, [Factbox: WeChat owner Tencent investments in the United States and beyond](#), Reuters (August 6, 2020).

<sup>12</sup> Sam Dean, [Trump Banned TikTok and WeChat. Are Video Games Next?](#), The Los Angeles Times (August 7, 2020).



In issuing the WeChat Order, the White House relied upon three authorities and one precedent. First, the National Emergencies Act, 50 U.S.C. §1621, allows the President to declare a national emergency pursuant to certain procedural formalities. Second, Section 301 of the Title 3 of the United States code authorizes the President to designate and empower the head of any department or agency in the executive branch to carry out the President’s orders, such as in the event of a national emergency.

The range of power vested in the President in the event of national emergency is addressed by the third authority relied upon by the White House, the International Emergency Economic Powers Act, 50 U.S.C. § 1701 (the “IEEPA”). Enacted by Congress in 1977, IEEPA authorizes the President to address extraordinary threats to the United States that arise in substantial part with respect to a foreign adversary during a national emergency.<sup>13</sup> IEEPA, as currently amended, empowers the president to:

- (A) Investigate, regulate, or prohibit:
  - (i) Any transactions in foreign exchange,
  - (ii) Transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or national thereof,
  - (iii) The importing or exporting of currencies or securities; and
- (B) Investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.<sup>14</sup>

Penalties for violations of IEEPA are severe. The statute allows for the imposition of a civil penalty of up to US\$250,000.<sup>15</sup> A person who willfully commits or attempts to commit an IEEPA violation may be fined up to US\$1,000,000 and face up to twenty years of imprisonment upon conviction.<sup>16</sup>

Although IEEPA grants the President significant authority to address national security concerns, the President may only utilize the authority following a declaration of a national emergency.<sup>17</sup> On May 15, 2019, the White House released Executive Order 13873 “Securing the Information and Communications Technology and Services Supply Chain.”<sup>18</sup> Executive Order 13837 acts as the underlying precedent to the WeChat Order. Under Executive Order 13873,

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<sup>13</sup> See [International Emergency Economic Powers Act](#) (“IEEPA”), 50 U.S.C. § 1701.

<sup>14</sup> IEEPA, 50 U.S.C. § 1702.

<sup>15</sup> IEEPA, 50 U.S.C. § 1705(b).

<sup>16</sup> IEEPA, 50 U.S.C. §1705(c).

<sup>17</sup> IEEPA, 50 U.S.C. §1701.

<sup>18</sup> [Executive Order 13873](#), 84 Federal Register 22,689 (May 17, 2019).



President Trump declared a national emergency with respect to information and communication technologies and the United States' foreign adversaries, such as China. The national emergency declaration stated that foreign adversary creators of certain information and communications technology and services intend to “commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people.”<sup>19</sup>

Under Executive Order 13873, President Trump ordered prohibitions on any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service (transaction) by any person . . . where the transaction involves any property in which any foreign country or a national thereof has any interest (including through an interest in contract for the provision of the technology or service)” and where the information and communications technology or services are “designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary.”<sup>20</sup> In order for the prohibition to apply, the Secretary of Commerce, in consultation with other United States executive officials, must also determine that such transaction:

- (A) Poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology or services in the United States;
- (B) Poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the digital economy of the United States; or
- (C) Otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.<sup>21</sup>

On November 27, 2019, the Department of Commerce issued proposed regulations to implement Executive Order 13873.<sup>22</sup> In particular, the Department of Commerce stated that in determining whether an information and communication technology and/or service is controlled by or subject to the direction of a foreign adversary, it will look to the laws and practices of the foreign adversary and the specific facts about the company's internal finances and procedures, including equity interest, access rights, seats on a board of directors or other governing body, contractual arrangements, voting rights, and control over design plans, operations, hiring decisions, or business plan development.<sup>23</sup>

The Department of Commerce's proposed regulations to implement Executive Order 13873 suggest that the Secretary of Commerce will make case-by-case factual determinations for transactions involving communication and information technology and/or services. The Department of Commerce furthermore stated that it may initiate a review of a transaction in three ways: (1) at the discretion of the Secretary of Commerce, (2) upon the written request of another

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See [Securing the Information and Communications Technology and Services Supply Chain](#), 84 Federal Register 65,316 (November 27, 2019); see also [U.S. Department of Commerce Proposes Rule for Securing the Nation's Information and Communications Technology and Services Supply Chain](#), U.S. Department of Commerce (November 26, 2019).

<sup>23</sup> *Id.*



government body or agency, or (3) based on information submitted to the Department of Commerce by credible private parties.<sup>24</sup>

While the relied upon authorities and precedent by the President help clarify how the WeChat ban will ultimately be effectuated, many questions remain unanswered. In particular, it is unclear whether or not the President can comprehensively ban the use of WeChat in the United States. Additionally, the implications of the WeChat ban for U.S. companies operating in China are still unknown—and many fear that the ban may affect their business operations overseas.

### III. Can POTUS Comprehensively Ban WeChat?

The WeChat Order bans transactions with Tencent and its subsidiaries that are related to WeChat. Section 1(c) of the WeChat Order states that the Secretary of Commerce shall identify the transactions subject to the prohibition on September 20, 2020.<sup>25</sup> As a result, we do not yet know what types of transactions will ultimately be prohibited by the WeChat Order.

Despite the uncertainty, Executive Order 13873 offers clues as to what the Administration might want the WeChat ban to look like in practice. Executive Order 13873 suggests that the term “transaction” encompasses the “acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service.”<sup>26</sup> This broad definition of “transaction” would include the installation and use of WeChat, but the President may not have the power to prohibit these actions under IEEPA, the authority relied upon for all of these Executive Orders.

As discussed above, parts of IEEPA use the term transaction in connection with foreign exchange, meaning a monetary transaction in the more ordinary sense of the term. Other parts of IEEPA allow the President to prohibit transactions involving any property in which a foreign national has an interest, which might extend to a much broader set of exchanges. In the past, IEEPA has primarily been used to prohibit transactions that are economic in nature, as opposed to non-monetary personal actions of U.S. citizens and businesses.<sup>27</sup> IEEPA also explicitly forbids the President from regulating or prohibiting personal communication which does not involve a transfer of anything of value and from regulating or prohibiting the importation of information.<sup>28</sup> However, IEEPA was enacted in 1977—long before a mobile phone application with the cultural relevance and scope of WeChat was conceivable. Almost forty years later, usage of most mobile applications involves the transfer of personal data in exchange for access to many of the mobile application’s features. Thus, it is possible that connecting with friends and family over WeChat (“personal communication” under IEEPA) now inherently involves the transfer of something of value to many companies—personal data.

Ultimately, it is still unclear what types of transactions will be prohibited under the WeChat Order. It is possible that U.S. mobile application stores will be restricted from offering

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<sup>24</sup> *Id.*

<sup>25</sup> Executive Order on Addressing the Threat Posed by Wechat (August 5, 2020).

<sup>26</sup> Executive Order 13873, 84 Federal Register 22,689 (May 17, 2019).

<sup>27</sup> See generally [The International Emergency Economic Powers Act: Origins, Evolution, and Use](#), Congressional Research Service (July 14, 2020).

<sup>28</sup> IEEPA, 50 U.S.C. §1702(b).



WeChat or any further updates to the application. Such an outcome would dovetail the WeChat Order and the policy goals of the Clean Networks program. It is also uncertain if the WeChat Order can only prohibit monetary transactions through the WeChat pay function, or if the WeChat Order may effectively ban all use cases of the mobile application, including communication and information functions.

#### **IV. Should U.S. Companies Using WeChat in China Worry?**

Will the China subsidiaries of U.S. companies—in particular, consumer facing companies—be prohibited from using WeChat in connection with their China operations? WeChat is a nearly essential mobile application for daily life in many parts of China. For consumer facing businesses, WeChat is critical as both a marketing channel and a payment channel. Mobile phone enabled cashless payments are much more common in China than they are in the U.S., and WeChat along with Alipay are the two main mobile payment channels, equivalent in relevance to Visa and Mastercard in the U.S. Prohibiting China subsidiaries of U.S. companies from using WeChat payment and marketing channels would irritate their customers, inspire consumer boycotts and generally be a disaster for U.S. business interests in China.

The list of possible implications of a WeChat ban for U.S. companies operating in China is long and onerous, but U.S. companies will generally want to take a wait and see approach between now and September 20, 2020. Although on its face the Administration's WeChat Order raises alarms for U.S. companies operating overseas in China, the policy objectives of the White House clearly do not include harming U.S. business interests in China. The WeChat Order itself is focused on issues of national security, with particular attention to propaganda channels and the accumulation of large amounts of personal data from U.S. citizens and federal employees. None of these policy concerns involve handicapping the operations of U.S. companies in China. The Department of Commerce will make its determination on the types of transactions prohibited by September 20, 2020, and it is likely that in doing so the department will also provide clarification on how U.S. companies operating in China will be effected by the WeChat ban, if they are affected at all.