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Commerce Department Issues, Then Withdraws WeChat Ban Rules; Federal Court Blocks the Ban

[U.S. TECH LAW UPDATE](#)¹

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I. Introduction.

On September 18, 2020, the U.S. Department of Commerce (the “Commerce Department”) issued unpublished rules² (the “WeChat Rules”) identifying the transactions prohibited by the August 6, 2020 Executive Order on Addressing the Threat Posed by WeChat³ (the “WeChat Order”), with such rules largely banning WeChat within the United States. The WeChat Rules would have become effective on Sunday, September 20, 2020, but on Saturday, September 19, 2020, the U.S. District Court for the Northern District of California granted a nationwide injunction against implementing the WeChat Order on First Amendment grounds.⁴ On Monday, September 21, 2020, the Commerce Department withdrew the WeChat Rules.⁵

The WeChat Rules were accompanied by similar unpublished rules⁶ (the “TikTok Rules”) identifying the transactions prohibited by the Executive Order on Addressing the Threat Posed by TikTok⁷ (the “TikTok Order”). The TikTok Rules also would have become effective on Sunday, September 20, 2020, but on Saturday, September 19, 2020, the Commerce Department delayed the effectiveness of the rules until September 27, 2020,⁸ due to the U.S. President’s announcement that he agreed in concept to a deal under which TikTok will partner with Oracle and Walmart for U.S. and other international operations.⁹ Then on Monday, September 21, 2020, the Commerce Department also withdrew the TikTok Rules.¹⁰

On September 17, 2020, White House scrutiny of Tencent Holdings Ltd. (“Tencent”), owner and operator of WeChat, expanded when the Committee on Foreign Investment in the United States (“CFIUS”) sent letters to popular game developers Riot Games, Inc. and Epic

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² You can read the full text of the rules banning WeChat [here](#).

³ [Executive Order on Addressing the Threat Posed by WeChat](#) (August 6, 2020).

⁴ [Order Granting Mot. for Prelim. Inj. at 22](#), U.S. WeChat Users Alliance v. Donald J. Trump, No. 3:20-cv-05910-LB (N.D. Cal. 2020), ECF. No. 59.

⁵ [Notice of Withdrawal of WeChat Rules](#), Federal Register (retrieved September 21, 2020).

⁶ You can read the full text of the rules banning TikTok [here](#).

⁷ [Executive Order on Addressing the Threat Posed by TikTok](#) (August 6, 2020).

⁸ [Statement on Delayed Prohibitions Related to TikTok](#), U.S. Department of Commerce, (September 19, 2020).

⁹ Brian Fung, [Trump says he has approved a deal for purchase of TikTok](#), CNN.com (September 20, 2020).

¹⁰ [Notice of Withdrawal of TikTok Rules](#), Federal Register (retrieved September 21, 2020).



Games, Inc. inquiring about their data security protocols involving Tencent.¹¹ Tencent acquired most of Riot Games (developer of League of Legends) in 2011 and purchased a 40% stake in Epic Games (developer of Fortnite) in 2012, each well before legislative reforms in 2018 expanded CFIUS jurisdiction to cover certain minority investments, including those that involve sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security.¹²

Nonetheless, CFIUS likely does have the authority to unwind these transactions in the event that the committee finds credible U.S. national security threats hidden in access to user gameplay statistics. The Riot Games transaction would have been within CFIUS jurisdiction at the time of completion since it involved the acquisition of a U.S. business by a foreign buyer, and if no CFIUS filing was completed then there is no statute of limitations prohibition on when CFIUS might review the transaction.¹³ Tencent's purchase of a minority stake in Epic Games would not have triggered CFIUS review at the time of completion, but following the 2018 legislative reforms falls squarely within CFIUS's authority. The retroactive application of laws raises concerns about the U.S. Constitution's prohibition on ex post facto laws, but courts have found that this prohibition only applies to criminal laws.¹⁴ Since CFIUS doesn't involve any criminal penalties, any CFIUS action related to Tencent's investment in Epic will likely pass constitutional muster.

In our prior legal update [POTUS Bans WeChat](#), we discussed the details of the WeChat Order and noted that some key questions would not be answered until the Secretary of Commerce identified the prohibited transactions. This legal update examines the WeChat Rules and considers their likely impact in the event that the WeChat Order eventually overcomes the recent injunction and becomes effective.

II. The WeChat Rules.

The WeChat Rules prohibit 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, or any subsidiary of that entity, involving:¹⁵

1. App Store Ban. Any provision of services to distribute or maintain the WeChat mobile application, constituent code, or mobile application updates through an online mobile application store, or any online marketplace where mobile users within the United States may download or update applications for use on their mobile devices;

¹¹ Jenny Leonard, Saleha Mohsin, and David McLaughlin, [Tencent's Gaming Stakes Draw U.S. National Security Scrutiny](#), Bloomberg.com (September 17, 2020.)

¹² For a brief overview of the CFIUS reforms enacted in 2018, please see our Tech Law Update "[Foreign Investment Update: CFIUS Reform](#)", published by Pillar Legal, P.C. on September 26, 2018.

¹³ The definition of a "covered transaction" (transactions that would be subject to CFIUS review) in 31 CFR § 800.213 contains no limitations on requiring CFIUS to review a transaction within a certain time period, and there is no statute of limitations specified in 31 CFR § Part 800.

¹⁴ *Johannessen v. United States*, 225 U.S. 227, 228 (1912).

¹⁵ See WeChat Rules, page 5.



2. Ancillary Service Ban. Any provision of internet hosting services,¹⁶ content delivery services,¹⁷ internet transit services¹⁸ or peering services¹⁹ that enable the functioning or optimization of the WeChat mobile application, within the United States;
3. WeChat Pay Ban. Any provision of services through the WeChat mobile application for the purpose of transferring funds or processing payments to or from parties within the United States;²⁰ or
4. Ancillary Software Ban. Any utilization of the WeChat mobile application's constituent code, functions, or services in the functioning of software or services developed and/or accessible within the United States.²¹

III. What Would the WeChat Rules Mean for WeChat Users in the U.S.?

The WeChat Rules indicate that their various prohibitions do not apply to “the exchange between or among WeChat mobile application users of personal or business information using the WeChat mobile application, to include the transferring and receiving of funds”.²² In addition, the WeChat Rules clearly state that each of the prohibitions applies only to business-to-business transactions.²³ As a result, even if the WeChat Rules do become effective, they would not directly ban the use of WeChat in the United States by individual end users.

Comments from the U.S. Department of Justice further strengthen this understanding of the WeChat Rules. The Justice Department indicated that the Commerce Secretary “does not intend to take actions that would target persons or groups whose only connection with WeChat is their use or downloading of the app to convey personal or business information between users,”²⁴ and that such users “will not be targeted or subject to penalties.”²⁵

The intent of the WeChat Rules, however, is clearly to make use of the mobile application difficult by cutting off all access to new downloads, to updates or to related support services needed to make WeChat usable in the United States. Commerce officials stated that while users may be able to find work-arounds to the WeChat Rules, such as using virtual private networks or other means to download updates, the effect of the WeChat Rules will be to slow internet speed for WeChat users so much that they will time-out of the application.²⁶ As a result,

¹⁶ Internet hosting service means a service through which storage and computing resources are provided to an individual or organization for the accommodation and maintenance of one or more websites or Internet services. See WeChat Rules definition section.

¹⁷ Content delivery service means a service that copies, saves, and delivers content, for a fee, from geographically dispersed servers to end-users for the purposes of enabling faster delivery of content. See WeChat Rules definition section.

¹⁸ Internet transit service means a service where a network operator provides connectivity, transport and routing for another network, enabling them to reach broader portions of the Internet. See WeChat Rules definition section.

¹⁹ Peering service means a relationship between Internet service providers (ISP) where the parties directly interconnect to exchange Internet traffic, most often on a no-cost basis. See WeChat Rules definition section.

²⁰ See WeChat Rules, page 6.

²¹ See WeChat Rules, page 6.

²² See WeChat Rules, page 6.

²³ See WeChat Rules, page 6.

²⁴ Sherisse Pham, *Is this the end of WeChat in the US? It's still not clear*, CNN.com (September 18, 2020).

²⁵ *Id.*

²⁶ Katy Stech Ferek and John D. McKinnon, *U.S. Bans Chinese Apps TikTok and WeChat Citing Security Concerns*, Wall Street Journal (September 18, 2020).



if the WeChat Order does become effective at some point, unless practical work-around solutions are found, WeChat might no longer function in the U.S.²⁷

IV. What Would the WeChat Rules Mean for U.S. Companies in China?

In our prior legal update [POTUS Bans WeChat](#), we argued that the then as-yet-to-be-issued WeChat Rules would not prohibit U.S. companies in China from using WeChat. We noted that due to the ubiquity of mobile payments in China, banning U.S. company use of WeChat would be like prohibiting businesses in the U.S. from using Visa or Mastercard. Since harming U.S. companies in China is clearly not the intent of the WeChat Order, we were confident that the forthcoming WeChat Rules would not affect U.S. businesses in China.

Shortly after issuance of the WeChat Order, dozens of U.S. companies with operations in China approached the White House to express their concern about the potential harmful effects of the executive order.²⁸ In addition, a survey of members by the American Chamber of Commerce in Shanghai noted that nine in ten of their respondents said that a ban on WeChat would hurt their operations in China, and over half of those polled said it would result in a loss of competitiveness in the market.²⁹

As anticipated, each prohibition set forth in the WeChat Rules is limited to activities within the land or maritime borders of the United States and its territories, meaning that the prohibitions generally do not apply to activities of individuals or businesses outside of the United States.³⁰ In addition the text of the WeChat Rules specifically exempts any activities related to mobile applications intended for distribution, installation or use outside of the United States by any person, including but not limited to any person subject to U.S. jurisdiction.³¹ The Commerce Department also stated that U.S. companies will be allowed to continue using WeChat outside of the United States.³² As a result, it is clear that even if the WeChat Order does take effect one day, U.S. companies operating in China will be free to continue to use WeChat without restriction.

²⁷ *Id.*

²⁸ Liza Lin, [U.S. Firms in China Say Trump's WeChat Ban Will Hit Them Where It Hurts](#), Wall Street Journal (August 26, 2020).

²⁹ *Id.*

³⁰ See WeChat Rules, pages 5-6.

³¹ See WeChat Rules, page 7.

³² Sherisse Pham, [Is this the end of WeChat in the US? It's still not clear](#), CNN.com (September 18, 2020).