
Continued Deterioration of U.S.-China Economic Relations: An Update

August 25, 2020

Alexander W. Koff | D.E. (Ed) Wilson | Joshua R. Gorsky

Reportedly, when President Nixon visited Chinese Premier Zhou Enlai on his historic visit in February 1972, Nixon asked what Zhou thought of the French Revolution, to which Zhou responded, “It’s too soon to tell.”¹ China takes the long view. Its approach to the current economic relationship between the United States and China, which is continuing to deteriorate, is no exception. As advised on June 1, [the cold war is heating up](#). Since then, numerous actions between the two countries are ratcheting up tensions, perhaps most prominently the orders related to TikTok and WeChat, the fallout from Hong Kong, the potential delisting of Chinese companies on U.S. stock exchanges, and export control measures targeting Huawei.² We address these four issues in greater detail here. Before we do so, however, we ask that you schedule time on your calendar on September 16 and 23 from noon to 1 pm EST (Washington, DC time) to join us for a two-part webinar series.

Webinar Series: What TikTok Teaches Us

The U.S.-China relationship is evolving so quickly that often it is difficult to keep track of developments. To permit a more informed discussion regarding these issues, Venable is hosting a two-part panel series, “What TikTok Teaches Us.” The first panel, on September 16, will focus on the deterioration of Sino-U.S. economic relations, how policies may change under a second Trump or new Biden administration, and the impact of recent measures on companies. The presentation examines the importance of protecting U.S. intellectual property rights, but also how measures are impacting manufacturing, sourcing, supply chains, and corporate decision-making—and how things are likely to change after January 2021. The second panel, on September 23, will focus on issues shaping business between U.S. and non-U.S. companies, with a focus on the impacts of doing business with foreigners in the United States and abroad. The presentation examines the changing U.S. compliance landscape and the broader participation of foreign entities in U.S. markets. To register, please click [here](#).

Executive Orders Related to TikTok and WeChat

On August 6, 2020, using his authority under the International Emergency Economic Powers Act (IEEPA), President Trump issued two executive orders related to two immensely popular mobile applications owned by Chinese companies TikTok and WeChat.³ One prohibits transactions with ByteDance Ltd. (the Chinese company that owns TikTok), while the other prohibits transactions with Tencent Holdings Ltd. (the Chinese company that owns WeChat). Both cite national security concerns as reasons for the prohibitions and provide the Secretary of Commerce 45 days to identify the transactions subject to the prohibitions.⁴ Specifically, the orders focus on the fact that both TikTok and WeChat capture the personal information of their users. The orders claim that the Chinese companies engage in censorship and that the information they gather “may be used for disinformation campaigns that benefit the Chinese Communist Party.”⁵ In the case of TikTok, the order claims this potentially “allow[s] China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.”⁶ The impact of these executive orders is not yet known, although there were rumblings soon after the order that TikTok planned a legal challenge.

TikTok’s legal challenge materialized on August 24, 2020, when the company filed a lawsuit in Los Angeles federal court.⁷ TikTok’s complaint follows a lawsuit filed in San Francisco federal court on August 21, 2020, on behalf of the U.S. WeChat Users

Alliance and several individual entities—the Alliance is a New Jersey nonprofit organization established to oppose the order focused on WeChat and is composed of U.S. users who are not affiliated with WeChat.⁸ Among other things, TikTok argues that its order violates the due process protections of the Fifth Amendment because the order “ban[s] TikTok with no notice or opportunity to be heard (whether before or after the fact)[.]”⁹ TikTok argues also that its order violates the free speech protections of the First Amendment and focuses on its computer code.¹⁰ The Alliance argues similarly that its order violates both the First and Fifth Amendments. For the First Amendment, however, the complaint argues that the order impermissibly “regulates constitutionally protected speech, expression, and association and is not narrowly tailored to restrict only that speech which presents national security risks to the United States.”¹¹

Prior to TikTok’s lawsuit, on August 14, 2020, this time pursuant to the Defense Production Act of 1950, as amended, which is the authority for the Committee on Foreign Investment in the United States (CFIUS), President Trump issued an additional executive order addressing ByteDance’s acquisition of Musical.ly.¹² (This second order is mentioned at paragraph 62 of the complaint filed by TikTok on August 24, 2020.) As a result of the acquisition, ByteDance merged TikTok with Musical.ly’s social media application to create a single integrated social media application. Among other things, the order requires that within 90 days ByteDance divest all of its interest and rights in (i) any tangible or intangible assets or property, wherever located, used to enable or support ByteDance’s operation of the TikTok application in the United States; and (ii) any data obtained or derived from the TikTok application users in the United States.¹³ The order requires a certification that all data required to be divested has been destroyed and places restrictions on the sale or transfer of TikTok to any third party. The order also empowers CFIUS to “implement measures it deems necessary and appropriate to verify compliance with [the] order and to ensure that the operations of the TikTok application are carried out in such a manner as to ensure protection of the national security interests of the United States.”¹⁴ To ensure compliance, the order grants CFIUS broad authority to inspect and copy books and records (including correspondence memoranda and other documents), audit data (including information systems, networks, and other property), and interview officers, employees, or agents of ByteDance or TikTok.

Sanctions of Hong Kong Government Officials

On August 7, 2020, the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury sanctioned a group of 11 Hong Kong government officials, adding them to the Specially Designed Nationals (SDN) List.¹⁵ U.S. Secretary of State Pompeo explained that the designation was for “curtailing promised freedoms” by implementing a national security law that was passed by the Chinese government in June.¹⁶ The U.S. designations block or freeze all of the U.S. property and interests in U.S. property, if any, that are majority-owned by the Hong Kong 11. This means that U.S. persons—including banks—are prohibited from engaging in trade or financial transactions with the sanctioned individuals unless specifically granted a license by OFAC or unless the transaction is exempted by statute.

On August 10, 2020, in response, China imposed its own set of sanctions on 11 U.S. citizens, including 6 members of Congress (U.S. Senators Ted Cruz, Marco Rubio, Tom Cotton, Josh Hawley, and Pat Toomey and U.S. Representative Chris Smith) and 5 heads of organizations that promote democratic causes (National Endowment for Democracy President Carl Gershman, National Democratic Institute President Derek Mitchell, International Republican Institute President Daniel Twining, Human Rights Watch Executive Director Kenneth Roth, and Michael Abramowitz, President of Freedom House).¹⁷ The Chinese government did not offer details on what the sanctions would entail.¹⁸ But China’s foreign ministry spokesperson Zhao Lijian did urge the United States to stop interfering in China’s affairs.¹⁹ The same day, Hong Kong arrested media tycoon and democracy activist Jimmy Lai, his sons, and at least seven others suspected of colluding with foreign powers under Hong Kong’s new national security law.²⁰

Delisting Chinese Companies

At the end of July, the President's Working Group on Financial Markets (the PWG) issued policy proposals requiring Chinese companies to comply with U.S. auditing requirements.²¹ On August 10, U.S. Treasury Secretary Steven Mnuchin, who chairs the PWG, said that Chinese firms that do not comply with accounting standards risk being delisted from U.S. stock exchanges as of the end of 2021.²²

The PWG recommends that the U.S. Securities and Exchange Commission (SEC) implement the five recommendations in the report, namely enhanced listing standards on U.S. exchanges. Certain jurisdictions, such as China, do not provide the Public Company Accounting Oversight Board (PCAOB) with sufficient access to work papers of the principal audit firm for the audit of the listed company.²³ The PCAOB serves as the U.S. government's audit watchdog. Companies unable to satisfy that standard because of government restrictions may be able to satisfy the requirement by instead providing a co-audit from an audit firm with comparable resources and experience. "To reduce market disruption, the new listing standards could provide for a transition period until January 1, 2022 for currently listed companies."²⁴

Other PWG recommendations include (a) requiring enhanced disclosures for Chinese companies regarding the risks of investing in a "non-cooperative jurisdiction" like China; (b) requiring enhanced disclosures for registered funds that have exposures to issuers from China; (c) encouraging or requiring registered funds that track indexes to perform greater due diligence on an index and its index provider, prior to the selection of the index to implement a particular investment strategy or objective; and (d) issuing guidance to investment advisers with respect to fiduciary obligations when considering investments in China.²⁵

Targeting Huawei

The Trump administration is using the Export Administration Regulations (EAR) as another arrow in its quiver against Chinese entities.²⁶ The Bureau of Industry and Security (BIS) of the U.S. Department of Commerce administers the EAR. In May 2020, BIS amended the long-standing foreign-produced direct product (FDP) rule. BIS makes no secret that the amendment was intended "to target Huawei's acquisition of semiconductors that are the direct product of certain U.S. software and technology."²⁷ Huawei is a major Chinese technology company, and this is not the first time BIS has targeted Huawei.

The EAR's "Entity List" is a list of foreign persons subject to specific license requirements.²⁸ In other words, if a U.S. business wants to export a good to a Chinese company, the U.S. business must ensure that the Chinese company entity is not on the Entity List. If the Chinese entity is on the list, the U.S. business must determine whether it needs a license from BIS to export the item. First published in February 1997, the initial purpose of the Entity List was to inform the public of entities that were engaged in activities that could result in the export, reexport, and transfer of items related to weapons of mass destruction.²⁹ Since then, the grounds for inclusion on the Entity List have expanded. Now the Entity List identifies entities and other persons reasonably believed to be involved, or to pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States.³⁰

On May 16, 2019, BIS made one of the most widely publicized additions to the Entity List—Huawei.³¹ Almost immediately thereafter, however, BIS issued a temporary general license (TGL) to prevent any economic disruptions to Huawei. The TGL partially restored the EAR privileges of Huawei.³² The TGL was extended regularly since then, with the last extension granted on May 18, 2020.³³ The May 18 notice created a new TGL expiration date of August 13, 2020. This time, however, BIS allowed the TGL to expire.

On August 17, 2020, four days later, BIS added an additional 38 Huawei affiliates across 21 countries to the Entity List.³⁴ The restrictions “imposed license requirements on any transaction involving items subject to Commerce export control jurisdiction where a party on the Entity List is involved, such as when Huawei (or other Entity List entities) acts as a purchaser, intermediate, or end user.”³⁵ According to BIS, “[t]hese actions . . . prevent Huawei’s attempts to circumvent the U.S. export controls to obtain electronic components developed or produced using U.S. technology.”³⁶ The removal of the TGL, the addition of Huawei non-U.S. affiliates to the Entity List, and amendments to the FPD rule were published in the *Federal Register* on August 20, 2020.³⁷

Conclusion

There are two major takeaways from this update. First, the current administration is implementing a full-court press on China and tapping all pressure points at its disposal as part of the effort—and it is showing no signs of fatigue. (If anything, it is increasing the pressure.) Second, these actions have a wide-ranging impact on business that likely will influence the relationship for decades to come.

The question—asked by Dan Coats, a former U.S. Senator from Indiana who served as director of national intelligence from 2017 to 2019—is whether the United States will emerge victorious from a new cold war.³⁸ His caution should trigger thoughts of Chinese President Xi Jinping’s speech from a rare earth minerals facility in Jiangxi.³⁹ For those who missed the symbolism, rare earth minerals power our high-tech devices—a symbol of the future. For non-China scholars, Jiangxi is where Mao and Zhou Enlai started the Long March in October 1934, which ended in October 1935, slightly over a year later. They were retreating tactically from the Kuomintang’s pursuit. The symbolism is clear: China is digging in for a prolonged, painful trudge through the tariffs and other U.S. measures. Just as clear is that Xi Jinping expects this “long march” will solidify China’s power and ultimate victory.

We hope that you will join us for the webinar series on September 16 and 23. Please contact the authors if you have specific questions about how the U.S.-China relationship is impacting your business.

¹ See, e.g., Geoffrey Aronson, How the Arab Spring Presages a Shifting World Order, *Foreign Policy*, May 17, 2011, available at <https://foreignpolicy.com/2011/05/17/how-the-arab-spring-presages-a-shifting-world-order/> and Brantley Womack, Henry Kissinger’s “On China,” *Washington Post*, June 3, 2011, available at https://www.washingtonpost.com/entertainment/books/henry-kissingers-on-china/2011/05/17/AGE7OLIH_story.html; but see W. Joseph Campell, *Media Myth Alert*, June 14, 2011, available at <https://mediamythalert.com/2011/06/14/too-early-to-say-zhou-was-speaking-about-1968-not-1789/> (arguing, according to retired American diplomat Charles W. (Chas) Freeman, Jr., who was reported to be present when Zhou made the comment, that Zhou was speaking about turmoil in France in 1968, not 1789). See also William Burr, Nixon’s Trip to China: Records now Completely Declassified, Including Kissinger Intelligence Briefing and Assurances on Taiwan, National Security Archive Electronic Briefing Book No. 106, National Security Archive, December 11, 2003, available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB106/>.

² Other issues that popped up in the first two weeks of June alone that captured headlines include threatened passenger flight cancellations (Order 2020-6-1, Notification and Order Disapproving Schedules, U.S. Department of Transportation, June 3, 2020, Docket DOT-OST-2020-0052), NIOSH approval delays of Chinese N95 respirators (China’s BYD Gets Extension on \$1 Billion California Mask Deal, *Wall Street Journal*, June 4, 2020), and restrictions on Chinese graduate students (Presidential Proclamation 10043 of May 29, 2020, 85 *Fed. Reg.* 34353, June 4, 2020). By the end of July, consulates in Houston and Chengdu were ordered closed.

³ In the executive orders, TikTok is described as a “video-sharing mobile application” and WeChat is described as a “messaging, social media, and electronic payment application[.]” Executive Order on Addressing the Threat Posed by TikTok, August 6, 2020, available at <https://www.whitehouse.gov/presidential-actions/executive-order-addressing-threat-posed-tiktok/>; Executive Order on Addressing the Threat Posed by WeChat, August 6, 2020, available at <https://www.whitehouse.gov/presidential-actions/executive-order-addressing-threat-posed-wechat/>.

⁴ See *id.*

⁵ See *id.*

⁶ See Executive Order on Addressing the Threat Posed by TikTok.

⁷ See *TikTok Inc. v. Trump*, No. 2:20-cv-7672 (C.D. Cal. filed Aug. 24, 2020) (TikTok Complaint).

⁸ See *U.S. WeChat Users Alliance v. Trump*, No. 3:20-cv-05910 (N. D. Cal. filed Aug. 21, 2020) (Alliance Complaint).

⁹ TikTok Complaint at ¶ 5.

¹⁰ *Id.* at ¶ 121 *et seq.*

¹¹ Alliance Complaint at ¶ 8.

¹² Order Regarding the Acquisition of Musical.ly by ByteDance Ltd., August 14, 2020, available at <https://www.whitehouse.gov/presidential-actions/order-regarding-acquisition-musical-ly-bytedance-ltd/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Treasury Sanctions Individuals for Undermining Hong Kong's Autonomy, Press Release, August 7, 2020, available at <https://home.treasury.gov/news/press-releases/sm1088>; see also <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20200807.aspx> (Hong-Kong-related Designations).

¹⁶ See The United States Designates Individuals in Hong Kong for Curtailing Promised Freedoms, Press Statement, U.S. Department of State, August 7, 2020, available at <https://www.state.gov/the-united-states-designates-individuals-in-hong-kong-for-curtailing-promised-freedoms/>.

¹⁷ Siladitya Ray, China Sanctions 11 U.S. Citizens Including Ted Cruz, Marco Rubio, Says Foreign Ministry Spokesperson, *Forbes*, August 10, 2020, 10:42 AM EDT, available at <https://www.forbes.com/sites/siladityaray/2020/08/10/china-sanctions-11-us-citizens-including-ted-cruz-marco-rubio-says-foreign-ministry-spokesperson/#1cbbcba742336>; Sha Hua, China Sanctions 11 Americans Over U.S. Moves Against Hong Kong, *Wall Street Journal*, August 10, 2020, 1:55 PM EDT, available at <https://www.wsj.com/articles/china-imposes-sanctions-on-11-americans-over-hong-kong-11597056487>.

¹⁸ *Id.*

¹⁹ Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on August 10, 2020, available at <http://www.china-embassy.org/eng/fyrth/t1805288.htm>.

²⁰ Shibani Mahtani, Hong Kong Media Tycoon Jimmy Lai Arrested under National Security Law, *Washington Post*, August 10, 2020, available at https://www.washingtonpost.com/world/asia_pacific/hong-kong-jimmy-lai-arrest/2020/08/09/d7312f20-daa4-11ea-b205-ff838e15a9a6_story.html.

²¹ See President's Working Group on Financial Markets: Report on Protecting United States Investors from Significant Risks from Chinese Companies, July 24, 2020, available at <https://home.treasury.gov/system/files/136/PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf>. (PWG Report).

²² Chinese Firms That Fail U.S. Accounting Standards to be Delisted as of 2022—Mnuchin, Nasdaq, August 10, 2020, available at <https://www.nasdaq.com/articles/chinese-firms-that-fail-u.s.-accounting-standards-to-be-delisted-as-of-2022-mnuchin-2020>;

²³ President's Working Group on Financial Markets Releases Report and Recommendations on Protecting Investors from Significant Risks from Chinese Companies, Press Release, U.S. Department of the Treasury, August 6, 2020, available at <https://home.treasury.gov/news/press-releases/sm1086>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, e.g., Expansion of Export, Reexport, and Transfer (in-Country) Controls for Military End Use or Military End Users in the People's Republic of China, Russia, or Venezuela, 85 *Fed. Reg.* 23459, April 28, 2020 (expanding the licensing requirements for China to include "military end-users," in addition to "military end use"; broadening the list of items for which the licensing requirements and review policy apply; and expanding the definition of "military end use"); see also Elimination of License Exception Civil End Users (CIV), 85 *Fed. Reg.* 23470, April 28, 2020 (Removing License Exception CIV); and Modification of License Exception Additional Permissive Reexports (APR), 85 *Fed. Reg.* 23496, April 28, 2020 (Modify License Exception APR).

²⁷ Commerce Department Further Restricts Huawei Access to U.S. Technology and Adds Another 38 Affiliates to the Entity List, Press Release, U.S. Department of Commerce, August 17, 2020, available at <https://www.commerce.gov/news/press-releases/2020/08/commerce-department-further-restricts-huawei-access-us-technology-and>.

²⁸ Entity List, U.S. Department of Commerce, Bureau of Industry and Security, available at <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list>.

²⁹ *Id.*

³⁰ *Id.*

³¹ On May 16, 2019, BIS amended the EAR by adding Huawei Technologies Co. Ltd. and certain non-U.S. affiliates of Huawei (collectively, Huawei) to the Entity List (Supplement No. 4 to Part 744). Addition of Entities to Entity List, 84 *Fed. Reg.* 22961, May 21, 2019, available at <https://www.federalregister.gov/documents/2019/05/21/2019-10616/addition-of-entities-to-the-entity-list>.

³² 84 *Fed. Reg.* 23468, May 22, 2019.

³³ 85 *Fed. Reg.* 29610, May 18, 2020.

³⁴ See also Clarification of Entity List Requirements for Listed Entities When Acting as a Party to the Transaction Under the Export Administration Regulations (EAR), 85 *Fed. Reg.* 51335, August 20, 2020 (clarifying the Entity List's supplemental licensing requirements to state that its end-user controls apply to any listed entity when that entity is acting as a purchaser, intermediate or ultimate consignee, or end-user as defined in the Export Administration Regulations (EAR), with an effective date of August 17, 2020).

³⁵ Commerce Department Further Restricts Huawei Access to U.S. Technology and Adds Another 38 Affiliates to the Entity List, Press Release, U.S. Department of Commerce, August 17, 2020, available at <https://www.commerce.gov/news/press-releases/2020/08/commerce-department-further-restricts-huawei-access-us-technology-and>

³⁶ *Id.*

³⁷ Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule), 85 *Fed. Reg.* 51596, August 20, 2020, available at https://www.govinfo.gov/content/pkg/FR-2020-08-20/pdf/2020-18213.pdf?utm_campaign=subscription+mailing+list&utm_source=federalregister.gov&utm_medium=email.

³⁸ Dan Coats, There's No Cold War with China—and if There Were, We Couldn't Win, *Washington Post*, Opinion, July 28, 2020, available at <https://www.washingtonpost.com/opinions/2020/07/28/new-cold-war-between-us-china-is-dangerous-myth/> (urging creation of a deliberate strategy that is aimed at managing this great-power conflict rather than vanquishing a foe).

³⁹ Zhou Xin et al., Chinese President Xi Jinping Sounds Long March Rallying Call as US Trade War Tensions Rise, *South China Morning Post*, May 20, 2019, available at <https://www.scmp.com/economy/china-economy/article/3010977/xi-jinping-visits-rare-earth-minerals-facility-amid-talk-use>.