TikTok ban and what it means for influencers in the UAE (and elsewhere)?

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On 6 August 2020, President Trump signed an Executive Order to stop the "*spread in the United States of mobile applications developed and owned by companies in the People's Republic of China (China) [which] continues to threaten the national security, foreign policy, and economy of the United States*" by imposing restriction against the application 'TikTok' as of 20 September 2020.

The US is the second country to legislate against TikTok in recent months. India banned the app, along with over 50 other Chinese-made apps and games, in June. The ban cost the app an estimated 15 million new users.

TikTok, a video-sharing mobile application owned by the Chinese company ByteDance Ltd. (a company valued at approximately USD 100 billion), has reportedly been downloaded over 175 million times in the United States (20% of TikTok's revenue stems from the US) and over one billion times globally.

With the Executive Order in place and the newest form of influencers attempting to deal with the impending circumstances, the question lies, what can we learn from the wording of the Executive Order and what will this mean for TikTok influencers across the globe?

The Wording of the Order

Section 1(a) of the Executive Order states:

"The following actions shall be prohibited beginning 45 days after the date of this order, to the extent permitted under applicable law: 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. Zìjié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest."

This means that the Executive Order notably bars transactions with ByteDance, not 'TikTok' as a branded application. This presumably opens up the possibility of TikTok continuing to operate under a US company such as Microsoft, which has been in talks about buying some or all of TikTok. However, until the ownership of TikTok is transferred from ByteDance, the ban will remain.

The Executive Order goes on to stipulate, *inter alia,* that transactions are prohibited between ByteDance (subsequently, TikTok) and any person or any property which is subject to the jurisdiction of the United States.

With the Executive Order in place, no person or company in the United States is permitted to perform transactions or deals with any person who is under the banner of TikTok; as a result, TikTok influencers in the UAE and across the globe are put in a difficult limbo.

'Person'

The wording of the Order stipulates that "*any transaction by any person… subject to the jurisdiction of the United States*" is prohibited.

Pursuant to Title 31, Subtitle B, Chapter 5, Section 315.329 of the US Code of Federal Regulations:

"The terms person subject to the jurisdiction of the United States and person subject to U.S. jurisdiction include:

(a) Any individual, wherever located, who is a citizen or resident of the United States;

(b) Any person within the United States as defined in § 515.330;

(c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and

(d) Any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c) of this section."

Pursuant to Title 31, Subtitle B, Chapter 5, Section 515.330 of the US Code of Federal Regulations:

"(a) The term person within the United States, includes:

(1) Any person, wheresoever located, who is a resident of the United States;

(2) Any person actually within the United States;

(3) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and

(4) Any corporation, partnership, association, or other organization, wherever organized or doing business, which is owned or controlled by any person or persons specified in paragraphs (a)(1) or (a)(3) of this section."

Arguably, the Order engulfs US citizens, foreign branches of US companies, and foreign companies owned or controlled by any person who is a resident of the United States, or US company, who are outside of the US – restricting them from transacting

with ByteDance (TikTok).

‘Property’

Furthermore, the Order also prohibits *“any transaction… with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd.”*.

As per Title 31, Subtitle B, Chapter 5, Section 315.313 of the US Code of Federal Regulations:

“(a) The phrase property subject to the jurisdiction of the United States includes, without limitation, securities, whether registered or bearer, issued by:

(1) The United States or any State, district, territory, possession, county, municipality, or any other subdivision or agency or instrumentality of any thereof; or

(2) Any person with the United States whether the certificate which evidences such property or interest is physically located within or outside the United States.

(b) The phrase property subject to the jurisdiction of the United States also includes, without limitation, securities, whether registered or bearer, by whomsoever issued, if the instrument evidencing such property or interest is physically located within the United States.”

Arguably, if a company outside of the US has a shareholder who is a US citizen notwithstanding the gravity of control over the company by the person, that company will also not be permitted to do business or perform transactions with ByteDance and TikTok.

The coverage of property is quite excessive as it includes money, deposits and financial instruments, evidences of title or ownership, powers of attorney, movables, intellectual property, licenses, contracts of any nature whatsoever, services, and any other property, real, personal, or mixed,

tangible or intangible, or interest or interests therein, present, future or contingent.

The wording of the law creates a significant extra-jurisdictional coverage on the TikTok ban.

Looking at the What this means for TikTok influencers in the UAE (and elsewhere)

With 20 September 2020 closing in quick, it is important for creative agencies, marketing firms, and social media influencers (amongst others) involved in the industry to start reviewing their contracts.

In influencer contracts, there are multiple stakeholders in the relationship, but dominantly: (1) the influencer, (2) the management company that manages the influencer, and (3) the party paying for and receiving the promotion from the TikTok influencer.

Usually, an influencer enters into a contract with the management group so that the management group can seek profitable opportunities for the influencer in return for a cut of the profits. At which point, the brand would contract the influencer via the management group seeking exposure in exchange for a payment to the influencer.

With the ban in place, it is advisable that these transactions and their respective contracts are revised by all stakeholders.

If the contracts can no longer be complied with, parties will also have to review their force majeure provisions, lacking any thereof the parties must seek guidance on whether foreign change in law constitutes a force majeure event.

Companies must also run internal audits and due diligence on their contractual relationships and transactions to identify any high-risk areas that create exposure to the Executive

Order.

There are 431 TikTok influencers in the UAE; these influencers have an average of 170,075 followers and 42,085 plays per video, and an average engagement rate of 12.8%. As the ban comes into effect, they will have to navigate the contracts they have in place (if any) in order to avoid the loss of following, profits, and exposure that they will potentially face.

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