

Articles + Publications | January 25, 2021

Locke Lord QuickStudy: Who's In Your Mobile Device??

Locke Lord LLP

WRITTEN BY

[Theodore P. Augustinos](#) | [Berne C. Kluber](#)

RELATED OFFICES

[Houston](#)

George Orwell raised the spectre of Big Brother peeking into all aspects of our lives. On Tuesday, January 5, 2021, President Trump upped the ante. By issuing Executive Order 13971 entitled, "[Addressing the Threat Posed by Applications and Other Software Developed or Controlled by Chinese Companies](#)," he redefines Big Brother to include the Government of the People's Republic of China and the Chinese Communist Party. The order claims that software applications developed or controlled by the Chinese on personal electronic devices and computers are accessing the personal and proprietary information of Americans. This "would permit China to trace the locations of Federal employees and contractors, and build dossiers of personal information."

Beginning February 19, forty-five days after the date of the order, the Order prohibits transactions with persons that develop or control the software applications Alipay, CamScanner, QQ Wallet, SHAREit, Tencent QQ, VMate, WeChat Pay, and WPS Office by any person, or with respect to any property, subject to the jurisdiction of the United States.

The Secretary of Commerce is charged with adding more Chinese apps to the list. The order points out that India has banded 200+ Chinese apps, asserting "that the applications were 'stealing and surreptitiously transmitting users' data in an unauthorized manner to servers which have locations outside India.'" Here's a list of 267 Chinese apps banned in India as of November 24th, 2020: [Check full list of Chinese apps on Android, iPhone banned by government | Technology News – India TV \(indiatvnews.com\)](#)

The Commerce Secretary, in consultation with the Attorney General and the Director of National Intelligence, has 45 days to present a report with recommendations designed to keep United States user data from being sold or transferred to or accessed by "foreign adversaries." The recommendations are to include "regulations and policies to identify, control, and license the export of such data." Since the list is coming from the Commerce Secretary, expect changes to the U.S. Export Administration Regulations to address this issue. This could have a big impact on the offshore data processing industry if companies are required to get licenses before exporting personally identifying information. We'll have to wait and see how the Secretary's recommendations, regulations and policies will jibe with our privacy laws.

Secretary Ross will be busy in January because he also has 45 days "to identify the transactions and persons that develop or control the Chinese connected software applications that are subject to the order." The 45 day

requirement will, however, provide a few days for the Biden Administration to pick up the mantle.

A couple of key terms, such as “foreign adversaries” and “subject to the jurisdiction of the United States” remain undefined in the order. Not to worry, “foreign adversary” is defined the Secure and Trusted Communications Network Act of 2019 as “any foreign government or foreign nongovernment person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons.” For those of us who practice in the area of economic sanctions, “persons subject to the jurisdiction of the United States” is a familiar term.

The meaning of “transactions with persons that develop or control the software applications” is also not defined at this time. For example, it is unclear whether a U.S. person downloading the Tencent QQ app, and agreeing to its terms of use, has entered into a transaction with the developer or controller of the application. Courts may well need to examine whether the banning of these social media apps by the federal government infringes on the First Amendment. This is a TikTok security vs censorship problem cubed and dropped on the American public in an Executive Order.

So welcome to 2021 and the world in Orwellian overdrive, where we worry about threats presented by the newly designated Big Brother, and the prying eyes, ears, microphones, snaps, and servers of its related current and future providers of tech services. Before you share that contact with your friend traveling in China, Russia, or Iran, consider that it could be a prohibited export! Will the Secretary adopt the Indian list, or otherwise require you to check your devices and delete listed games, dictionary, music players, and chat apps? Will you be able to post a vacation pic on Facebook, but not WeChat? Stay tuned, and remember, Big Brother (etc.) is watching.

RELATED INDUSTRIES + PRACTICES

- [Privacy + Cyber](#)