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POTUS Uses CFIUS to Unwind TikTok Deal, Fears Chinese Government Will Get Americans' Private Data While rare, this use of CFIUS powers may be a harbinger.

By Dan Mogin and Jennifer M. Oliver



Making good on his threats and citing national security risks, President Donald J. Trump signed an executive order on Friday, Aug. 14, 2020, demanding the unwinding of a Chinese company's acquisition of what would become TikTok, the short-form video-sharing-app sensation.

This begins the unspooling of Beijing-based ByteDance Ltd.'s \$1 billion acquisition of Shanghai-based Musical.ly in 2017, the predecessor to TikTok. ByteDance, which is incorporated in British territory in the Cayman Islands, must divest itself of U.S. TikTok assets and data. The company must certify on a weekly basis its compliance with the order to the Committee on Foreign Investment in the United States (CFIUS). ByteDance must also obtain approval of any proposed buyers, which CFIUS will have 10-days to reject.

While this executive order is one of a few seen under CFIUS, and only the fourth to unwind a completed transaction, it may be a harbinger. Parties and counsel working on international deals must be acutely aware: this committee considers personal data a serious national security issue. It can and will block or unwind tech deals that give foreign access to Americans' personal information.

TikTok has been very much on the president's mind and in his tweets lately. Driven by ongoing U.S.-China tensions over trade, intellectual property, and data privacy, and with the election drawing nearer, he commanded via an earlier order the end to all U.S. dealings with TikTok. Behind the scenes, CFIUS, which resides in the Treasury Department, has been investigating the deal. Musical.ly, whose U.S. operation is based in Santa Monica, Calif., has also acquired other U.S. companies.

Blackmail and Corporate Espionage Fears.

President Trump's Aug. 6 executive order stated: "TikTok automatically captures vast swaths of information from its users, including Internet and other network activity information such as location data and browsing and search histories. This data collection threatens 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 corporate espionage."

The order also says China's Communist Party used TikTok to "spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus."

[President Trump's Aug. 14 executive order](#) cited “credible evidence” that ByteDance “might take action” that threatens national security. The president cited the Defense Production Act and the International Emergency Economic Powers Act as his authority for retroactively ending the deal. ByteDance has 90 days to follow conditions imposed by CFIUS to divest all interest and rights to “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,” as determined by CFIUS. ByteDance must also divest “any data obtained or derived from TikTok application or Musical.ly application users in the United States.”

Speaking of Potential Buyers...

At the same time, Microsoft Corp. is in negotiations to acquire TikTok’s U.S. assets from ByteDance. And, according to the Financial Times, Oracle Corp. is also considering a purchase of TikTok’s U.S. assets, as well as those in Canada, Australia, and New Zealand. The Microsoft news also grabbed the president’s attention. If his administration approves the deal, the U.S. Treasury should essentially get a commission, the president quipped.

[CNBC’s Salvador Rodriguez wrote](#) that the TikTok deal would be a mixed bag for Microsoft, but would enable it to better compete with Facebook and Twitter. TikTok offers Microsoft an “immense amount of potential in the digital marketing sector,” he wrote, saying it could make the company “an advertising revenue powerhouse.” However, he said, “this potential is not without its own risk. Like other social apps, TikTok is a target for all kinds of problematic content that must be dealt with. This includes basic problems such as spam and scams, but more complicated content could also become headaches for Microsoft.”

TikTok has 1.5 billion monthly users, including 26.5 million in the U.S. Such traffic volumes have helped fuel concerns about the collection of private data by a Chinese company, and whether, as the president fears, that data would be handed over to the Chinese government. TikTok says this has not happened. TikTok is also the platform used by comedian Sarah Cooper whose lip-syncing parodies of the president have generated hundreds of thousands of views on TikTok and millions more on Twitter and Facebook.

Sen. Lindsey Graham (R-SC) said he shares the president’s data privacy concerns, but called having an American company like Microsoft acquire TikTok a “Win-win,” adding, “This keeps competition alive and data out of the hands of the Chinese Communist Party.” Other U.S. legislators and officials want the app deleted from government devices. The Pentagon wants it off devices used by service members and their families. Presidential candidate, former Vice President Joe Biden, reportedly wanted it removed from all campaign staff devices.

Enhanced Authority.

The president’s authority over international deals got a shot in the arm earlier this year, especially where national security is in question. The Treasury Department’s regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) went into effect Feb. 13. The regs give CFIUS broader authority over investments and real estate transactions. Read our previous post.

Critics say the regs will change cross-border M&A deal-making for years to come, and advance increasingly protectionist U.S. policy. Treasury Secretary Steven T. Mnuchin says the regs will strengthen national security and “modernize the investment review process,” while maintaining “our nation’s open investment policy by encouraging investment in American businesses and workers, and by providing clarity and certainty regarding the types of transactions that are covered.” In an article for Barron’s, financial writer and author Robert Teitelman described CFIUS’s FIRRMA regs as “a creature from the shadows of the administrative state” that “defines obscurity in the federal government.” He said it “encourages the very practices the administration condemns in China.”

For additional background and insight, please read our prior CFIUS-related posts:

- [CFIUS: A Guardian of National Security or a Protectionist Tool?](#)
- [What Bankruptcy Counsel Need to Know About Antitrust Law: Nothing Is Free and Clear](#)
- [Treasury's New Regs Address Impact of Foreign Investments, Other Deals on National Security](#)
- [China's TikTok Facing Privacy & Security Scrutiny from U.S. Regulators, Lawmakers](#)
- [Free Competition or National Security? Chip Giant Qualcomm's Business Practices Pit the FTC Against the DOJ](#)



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