

Restricting TikTok (Part II): Legislative Proposals and Considerations for Congress

Updated September 28, 2023

This Legal Sidebar is the second installment in a two-part series on U.S. efforts to regulate the video-sharing application (app) TikTok. The [first installment](#) provided legal background on executive branch-led efforts to restrict TikTok's U.S. presence and operations. This Sidebar analyzes proposals to create new authorities to restrict TikTok and examines constitutional and other legal issues for Congress to consider.

Legislative Proposals

Against the backdrop of executive branch efforts discussed in [Part I](#) of this series, some [Members](#) of the 118th Congress have [debated](#) whether new legislation is needed to address TikTok's alleged national security risks. The 117th Congress took legislative action by passing the [No TikTok on Government Devices Act](#), which mandates the app's removal from executive branch information technology systems. The President signed this act on December 29, 2022. [Several](#) legislative [proposals](#) in the [118th Congress](#) would take more far-reaching actions by [authorizing](#) or [requiring](#) the executive branch to restrict transactions involving TikTok in ways that could result in a nationwide ban of the app. Several distinctions among bills are outlined in [Table 1](#).

Trends in Bills That Would Authorize or Require TikTok Bans

While each bill has unique provisions, general trends across multiple bills include the following features.

Removing IEEPA Exceptions: One common element in many TikTok-related bills is to eliminate [exceptions](#) to the President's statutory powers under the International Emergency Economic Powers Act (IEEPA). These proposed provisions seek to address the legal grounds discussed in [Part I](#) on which [two](#) courts [enjoined](#) the Trump Administration's August 2020 executive order ([2020 Order](#)) that would have imposed a nationwide ban of TikTok. Examples of legislation in this category include the No TikTok on United States Devices Act ([H.R. 503/S. 85](#)) and the Averting the National Threat of Internet Surveillance, Oppressive Censorship and Influence, and the Algorithmic Learning by the Chinese Communist Party Act (ANTI-SOCIAL CCP Act, [H.R. 1081/S. 347](#)).

Congressional Research Service

<https://crsreports.congress.gov>

LSB10942

Removing IEEPA Exceptions and Adding New Authorities: Some bills that would eliminate IEEPA exceptions would also provide the executive branch new authorities and obligations beyond IEEPA. The Protecting Personal Data from Foreign Adversaries Act ([H.R. 57](#)), for example, would authorize the President to invoke IEEPA and impose visa restrictions in response to certain foreign entities' misuse of social media apps. The Stopping Attempts by Foreign Entities to Target Youths on Social Media Act of 2023 (SAFETY on Social Media Act of 2023, [S. 872](#)) would authorize IEEPA actions, mandate visa restrictions on foreign persons employed by designated companies, and require U.S. nationals employed by designated companies to register as foreign agents under the [Foreign Agents Registration Act](#). The Deterring America's Technological Adversaries Act (DATA Act, [H.R. 1153](#)) would allow the President to use IEEPA authorities while also giving the Secretary of the Treasury new powers to prohibit transactions with parties that knowingly provide [sensitive personal data](#) of persons subject to U.S. jurisdiction to companies subject to the PRC's ownership, control, jurisdiction, or influence.

Non-IEEPA-Based Review Systems: Some legislation would create new systems, not linked to IEEPA, to review transactions for national security risks. For example, the [SAFETY on Social Media Act of 2023](#) would require the Federal Communications Commission (FCC) to issue rules that prohibit certain platforms designated by the President from being carried in app stores and rules that require internet service providers to block designated entities from receiving internet services. The Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act (RESTRICT Act, [S. 686](#)) would authorize two new non-IEEPA-based national security review programs. The RESTRICT Act invokes elements of two existing review systems discussed in [Part I](#) of this Sidebar: the Information and Communications Technology and Services (ICTS) supply chain rule ([Supply Chain Rule](#)) and the Committee on Foreign Investment in the United States (CFIUS). Unlike the Supply Chain Rule, the bill's proposed process to review ICTS transactions would not depend on IEEPA for its underlying authority, and therefore would not be subject to IEEPA's exceptions. The RESTRICT Act would also create a new CFIUS-like process for the executive branch to review foreign adversaries' holdings (i.e., investments) in ICTS companies. Biden Administration [officials](#) have [expressed support](#) for the bill.

Data Privacy Frameworks and Related Legislation

While the bills discussed above would authorize actions that could result in a national ban of TikTok, not every TikTok-related proposal contains authority to ban the app. During a [hearing](#) with [TikTok's CEO](#) before the House Energy and Commerce Committee on March 23, 2023, some Members of Congress discussed limiting TikTok's potential national security risks by expanding [data privacy frameworks](#) to apply more stringent privacy protections to a broader set of entities. Some Members suggested the [American Data Privacy and Protection Act](#), which was introduced in the 117th Congress and is examined in this [Legal Sidebar](#), could be a legislative avenue to obligate TikTok to embrace greater data privacy. Other [legislative proposals in the 118th Congress](#) would create new restrictions on cross-border transfer of personal data by subjecting some categories of personal data to export controls. Another set of bills would require companies to provide notices to U.S. users if the companies' apps are [banned](#) from U.S. government devices, have certain [connections](#) to the PRC or Chinese Communist Party (CCP), or allow the PRC or CCP to [access](#) Americans' user data. Some Members have proposed mandating [algorithmic transparency](#) to address concerns over PRC and CCP influence on TikTok's video-recommendation methods. Still other legislative proposals would restrict TikTok in limited contexts, such as on [college campuses](#) or when used by [federal employees](#) on accounts [classified as belonging](#) to government entities, politicians, and political parties.

Considerations for Congress

Any time Congress considers legislation that could allow the United States to regulate private commercial transactions on national security grounds, a variety of constitutional and legal considerations, examined in this [CRS Legal Sidebar](#), may be relevant. Given TikTok's popularity and role as a platform that facilitates personal expression and exchange of information, several issues are especially salient.

First Amendment

Regulating mediums of expression can trigger the [First Amendment](#)'s protections for speech and association. In the litigation challenging the Trump Administration's restrictions on TikTok and in the separate case challenging similar restrictions on the WeChat app, which are discussed in [Part I](#), the plaintiffs alleged the executive branch violated the First Amendment by shutting down these platforms for speech. State laws limiting TikTok use or operations have also been [subject](#) to First Amendment [challenges](#). If a regulation specifically [targets](#) a medium of communication as opposed to generally regulating a variety of businesses, it might trigger heightened constitutional scrutiny—particularly if there is evidence the government targeted a platform because of its viewpoint or the type of speech it hosts. Even if a regulation is aimed at a platform's non-expressive conduct, First Amendment concerns can arise if that law is [applied to speech](#). For instance, the Berman Amendment added the informational materials exception to IEEPA [in response](#) to executive branch seizures of magazines and books that Congress said were protected by the First Amendment.

While foreign corporations outside U.S. territory do not benefit from First Amendment rights, [separately incorporated organizations](#) within the United States may enjoy First Amendment protections. Further, the Supreme Court has [long recognized](#) that U.S. citizens have a right to receive information and ideas from abroad. [TikTok](#) and [WeChat](#) users in the United States also challenged the Trump Administration restrictions by raising their own rights to receive and share content.

Assuming that a particular regulation broadly affects all speech on the regulated platform and does not target particular viewpoints or types of content, a court would likely review any First Amendment claims under an analysis known as [intermediate scrutiny](#). This constitutional standard applies to regulations that are content-neutral, or only [incidentally restrict speech](#) in the course of permissibly regulating conduct. The standard generally requires the government to [show](#) the regulation “furthers an important or substantial governmental interest” that is “unrelated to the suppression of free expression,” and that “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” Courts might also [ask](#) whether a regulation “leave[s] open ample alternative channels for communication” of the affected speech. (It is also possible certain types of regulations might be challenged as [prior restraints on speech](#), triggering additional constitutional considerations.)

The court reviewing the WeChat ban [concluded](#) that the restrictions likely failed intermediate scrutiny. The court acknowledged the government's significant interests in national security—an area where courts have sometimes been more [deferential](#) to the political branches. Nonetheless, the court concluded the restrictions were not appropriately tailored to this interest, [noting](#) “obvious alternatives to a complete ban, such as barring WeChat from government devices . . . or taking other steps to address data security.” Courts applying intermediate scrutiny must look closely at the government's evidence to [ensure](#) “that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” This inquiry is heavily dependent on context, and Congress might consider whether to include evidence demonstrating these elements in the legislative record.

Due Process

Congress may also consider whether TikTok-related bills afford sufficient safeguards to comply with procedural due process standards. When a person is deprived of a protected property right, the Fifth Amendment's [Due Process Clause](#) requires the United States to provide notice of the government action and a [meaningful opportunity](#) to contest it. Due process protections apply to foreign individuals and entities that enter U.S. territory and [establish substantial connections](#) with the United States. In one relevant example, a federal court of appeals [held](#) that, before the President could order a PRC-based company to divest an acquisition under the CFIUS process, the government needed to provide the affected company with the unclassified information on which it based its decision and the chance to respond. Due process standards may be different when Congress directly affects property rights through a legislative determination rather than through a judicial or administrative process. For legislative determinations, the legislative process may provide "[all the process that is due](#)" unless the law is [palpably arbitrary](#).

Takings Clause

Litigants have sometimes argued that U.S. restrictions on cross-border transactions and investments violate the Fifth Amendment's [Takings Clause](#), which prohibits the United States from taking private property for public use without just compensation. The Takings Clause applies to the actual acquisition of property and to regulatory actions that so severely restrict a property owner's rights that they rise to the level of a [regulatory taking](#). In the context of foreign actors asserting constitutional rights, the Takings Clause protects foreign individuals and entities with [substantial connections](#) to the United States, including those whose [property in the United States](#) is taken by the federal government. Although Takings Clause challenges to IEEPA-based actions have been [largely unsuccessful](#), some plaintiffs continue to raise them. In TikTok's challenge to the 2020 Order, for example, the company argued that President Trump's [discussion](#) of securing a payment to the Department of the Treasury if TikTok were to be sold to an American company amounted to an attempt to secure an unconstitutional taking. This issue did not ultimately feature in the court's [opinion](#), as the court based its decision on IEEPA interpretation issues.

Bill of Attainder

The [Bill of Attainder Clause](#) has also been a [topic of discussion](#) in TikTok-related legislation. This clause prohibits Congress from using legislation to [determine](#) guilt and inflict punishment without a judicial trial. As explored in this CRS [In Focus](#), there are several unresolved questions about whether the clause applies to modern economic restrictions on foreign corporations. In two recent judicial challenges, courts held that legislation restricting transactions with PRC-based [Huawei](#) and Russia-based [Kaspersky Lab](#) did not violate the Bill of Attainder Clause because the laws sought to protect U.S. security, not punish a private actor.

Other Legal Considerations

Apart from constitutional considerations, Congress may consider procedural and statutory issues that could affect how proposed TikTok restrictions operate. A selection of these issues, which are also examined in [Table 1](#), are discussed below.

Judicial Review: Congress could consider legislative mechanisms to limit or streamline judicial review of challenges to any new transaction-restriction authorities it enacts. Some existing statutes limit judicial review of similar restrictions by [exempting](#) the decision to impose restrictions from the Administrative Procedure Act (APA) or from [judicial review](#) in general. Some laws [require](#) legal challenges to be brought before a specific court—usually, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) because of its familiarity with [special procedures](#) in cases involving classified information. Among TikTok-related

bills, the RESTRICT Act would [limit](#) judicial review to actions that are “unconstitutional or in patent violation of a clear and mandatory statutory command” and give the D.C. Circuit exclusive jurisdiction over those cases.

Classified and Other Sensitive Information: In anticipating judicial challenges, Congress may consider prescribing how courts handle classified and other legally protected information during litigation. The [CFIUS statute](#) is one example of streamlined procedures. It provides that, if a court determines that classified or other protected information that is in the administrative record is necessary to resolve a legal challenge, that information must be submitted *ex parte* and *in camera* (i.e., only the court may view it) and maintained under seal so that it cannot be made public. The CFIUS statute also exempts the United States from [statutory requirements to provide notice](#) to U.S. persons when using information obtained under the Foreign Intelligence Surveillance Act of 1978 ([FISA](#)).

Confidentiality and Freedom of Information Act: When Congress creates new processes to review private commercial transactions, it may seek to balance public interest in the process with the private entities’ desire for confidentiality. Some existing national security review systems [prohibit the government](#) from disclosing parties’ private information gathered during the review process unless an exception applies. CFIUS’s legal authorities provide even stricter confidentiality by stating that materials submitted during its review process are [exempt](#) from the Freedom of Information Act (FOIA) absent an exception. Among the bills in [Table 1](#), the DATA Act places certain special confidentiality requirements on Congress, and the RESTRICT Act generally incorporates CFIUS’s confidentiality rubric and FOIA exemption.

Naming TikTok: Another topic of [discussion](#) is whether legislation should identify TikTok by name. Whether TikTok is identified in a bill’s text could be relevant in a Bill of Attainder challenge as part of a broader argument that the government targeted the company for punishment. The issue might also feature in the due process context if Congress were to make a legislative determination that TikTok presents a national security threat. Some [proposals](#) in the [118th Congress](#) expressly include TikTok among a defined set of entities with whom transactions would be restricted. [Other bills name](#) TikTok, but do not mandate that the bill’s restrictions apply to it. Instead, these proposals would require a presidential determination on whether the bill’s provisions apply to the company. A [third set would](#) create transaction-review frameworks that the executive branch could interpret to include TikTok, but that do not name the company in the legislative text.

Congressional Oversight: Congress may consider options to ensure that it is informed about executive branch actions in implementing any legislation that passes and can exercise [effective oversight](#). For example, the No TikTok on American Devices Act would require the executive branch to provide a classified briefing on its implementation of the bill. Another example is the DATA Act, which would require the President to share information about the bill’s implementation with designated congressional committees. The DATA Act also proposes to facilitate greater congressional involvement by requiring the President to respond to the designated committees’ requests for determinations on whether specific individuals or entities are subject to the bill’s sanctions and restrictions.



Table I. Comparison of Select TikTok Bills Introduced in the 118th Congress

	H.R. 503 / S. 85: No TikTok on American Devices Act	H.R. 57: Protecting Personal Data from Foreign Adversaries Act	H.R. 1153: DATA Act	S. 686: RESTRICT Act	H.R. 1081 / S. 347: ANTI-SOCIAL CCP Act	S. 872: SAFETY on Social Media Act of 2023
Actions Authorized	Invoke IEEPA	Invoke IEEPA; visa restrictions	Title I: Prohibit specified transactions; Title II: Invoke IEEPA	§ 3: Investigate, prohibit, regulate, and mitigate covered transactions; § 4: compel divestment or mitigate risk of covered holdings	Invoke IEEPA	§ 4: Invoke IEEPA; § 5: ban from app stores and prohibit and internet services; § 6: visa restrictions, foreign agent registration
Exercising Official or Agency	President	President (IEEPA); State Dep't (visa restrictions)	Title I: Secretary of the Treasury; Title II: President	§ 3: Secretary of Commerce; § 4: President	President	§ 4: President, § 5: FCC; § 6: State Dep't (visas); Justice Dep't (registration)
IEEPA Exceptions	All IEEPA exceptions removed	All IEEPA exceptions removed	Personal communication and info. materials exceptions removed	Not applicable	All IEEPA exceptions removed	All IEEPA exceptions removed
Authorizes Visa Restrictions	No	Yes	No	No	No	Yes

	H.R. 503 / S. 85: No TikTok on American Devices Act	H.R. 57: Protecting Personal Data from Foreign Adversaries Act	H.R. 1153: DATA Act	S. 686: RESTRICT Act	H.R. 1081 / S. 347: ANTI-SOCIAL CCP Act	S. 872: SAFETY on Social Media Act of 2023
Covered Transactions	Transactions by ByteDance (or its successor) or any entity owned by ByteDance involved in TikTok-related matters	Transactions using mobile application or software programs that: (1) engage in theft or unauthorized transmission of user data to servers in the PRC, and (2) provide certain PRC-related entities access to user data	Title I: Transactions with those that knowingly provide U.S. persons' sensitive personal data to certain entities; Title II: seven categories of sanctionable conduct	Transactions or holdings involving foreign adversaries that pose certain undue or unacceptable risks to U.S. national security or safety of U.S. persons	Transactions by covered social media companies with certain connections to countries of concern	Transactions with companies on a presidentially prepared list of foreign-owned-or-controlled untrustworthy applications and social media entities
Exceptions from Review	Law enforcement activities, national security interests and activities, and security research activities	Compliance with U.N. Headquarters Agreement	Law enforcement activities, national security interests and activities, security research activities, compliance with international agreements	Certain transactions authorized under a U.S. government-industrial security program or that meet national security or law enforcement functions	Intelligence activities; importation of goods	No
Presidential Waiver	No	Case-by-case up to 180 days if President certifies vital to national security	Case-by-case up to 180 days if President certifies vital to national security	No	No	No
TikTok Named	TikTok named as a "covered company"	Presidential determination on bill's applicability to TikTok is mandatory	Presidential determination on bill's applicability to TikTok is mandatory	No	TikTok named as a "deemed company"	No
Confidentiality and FOIA Provisions	No	No	No congressional disclosure of confidential information	Confidentiality procedures defined; FOIA inapplicable	No	No
Classified Info. Procedures and FISA Exemptions	No	No	No	Yes	No	No

	H.R. 503 / S. 85: No TikTok on American Devices Act	H.R. 57: Protecting Personal Data from Foreign Adversaries Act	H.R. 1153: DATA Act	S. 686: RESTRICT Act	H.R. 1081 / S. 347: ANTI-SOCIAL CCP Act	S. 872: SAFETY on Social Media Act of 2023
Congressional Oversight Provisions	Requires report on national security threat posed by TikTok within 120 days; briefing on implementation within 180 days	Requires report on statute's applicability to TikTok	Authorizes congressional requests for determinations, information, and reports; requires report on applicability to TikTok	No	No	No
Limits on Judicial Review	No	No	No	Unconstitutional actions or patent violations of law; D.C. Circuit has exclusive jurisdiction	No	No
Sunset	No	Jan. 1, 2026	Title II terminates five years after enactment	No	No	No

Source: CRS, based on information in cited bills, as introduced.

Author Information

Stephen P. Mulligan
Legislative Attorney

Valerie C. Brannon
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as

a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.