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TikTok: Frequently Asked Questions and Issues for Congress

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TikTok: Frequently Asked Questions and Issues for Congress

Since 2018, the social media application TikTok, developed and owned by ByteDance Ltd. (ByteDance), has become one of the most popular social media platforms in the United States, and raised oversight and legislative issues for Congress. With short-form video format and sophisticated content recommendation algorithms and usability design, TikTok achieved significant market penetration in the United States, amid competition with other social media platforms such as Meta (formerly Facebook), Instagram, X (formerly Twitter), and Snapchat.

TikTok's short-form video application was initially developed by musical.ly, a company founded in the People's Republic of China (PRC or China), but primarily operating in the United States. In 2018, musical.ly was acquired by ByteDance, a firm incorporated in Cayman Islands with headquarters in Beijing, China, and relaunched as TikTok, operated by TikTok Ltd., also incorporated in the Cayman Islands and headquartered in Los Angeles and Singapore. TikTok Ltd. is owned by ByteDance Ltd. TikTok is not available in China.

Since its launch in the United States, some policymakers, technical experts, and Members of Congress have expressed concerns regarding TikTok's ownership structure and potential implications for U.S. national security and the data privacy and security of U.S. users. Some Members have argued that ByteDance, as a PRC-headquartered company, is subject to potential PRC government pressure through various PRC laws and regulations governing intelligence, cybersecurity, and data security. They argue that the PRC government could apply these laws and regulations to compel ByteDance to turn over U.S. user data. Some Members have contended that the PRC government could potentially use TikTok as a platform for influencing public opinion in the United States or conducting malign activities such as spreading misinformation or interfering in elections. Some Members have also expressed broader concerns related to TikTok's content moderation and online safety policies, particularly those that govern online protection for minors. Proponents of TikTok emphasize its role as a platform for accessing information, sharing content, generating revenue for small businesses and entrepreneur, as well as its relatively similar data and content moderation practices compared to other social media competitors.

To date, both the executive branch and Congress have taken actions to address concerns about TikTok's ownership structure and implications for national security and data privacy. In 2020, the Trump Administration issued orders that would, among other things, prohibit U.S. entities from conducting transactions with TikTok and require TikTok's parent company ByteDance to divest from TikTok. TikTok challenged these actions in court. In January 2021, the Biden Administration rescinded some of the Trump Administration's actions and issued new executive actions to address the broader national security implications of PRC social media platforms in the United States. In the 118th Congress, Members have introduced legislation to build on and expand existing executive authorities and actions taken against TikTok, including S. 686, the Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act (RESTRICT Act), which was introduced in the Senate, and H.R. 7521, The Protecting Americans from Foreign Adversary Controlled Applications Act, which passed the House on March 13, 2024.

This report compiles responses to frequently asked questions (FAQs) regarding TikTok, its ownership and the corporate structure of ByteDance Ltd., and potential national security and data privacy concerns related to the platform. This report also summarizes past executive action and legislation that sought to address these concerns, and examines potential constitutional considerations and policy implications for legislation and oversight that Congress could consider related to TikTok.

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Background

This report compiles frequently asked questions (FAQs) regarding TikTok, its ownership and the corporate structure of ByteDance Ltd., and potential national security and data privacy concerns related to the platform. This report also summarizes past executive action and legislation that sought to address these concerns, and examines potential constitutional considerations and policy implications for legislation and oversight that Congress could consider related to TikTok.

TikTok’s Functionality, Users, and Business Operations

What is TikTok?

TikTok is a social media application—one of the most popular social media platforms in the United States—that allows users to easily generate, post, and share short-form videos, typically ranging from 15 to 60 seconds in length. TikTok selects and displays videos for individual users based on their user interactions (likes, shares, and comments), video metadata (hashtags, captions, and sounds), and the device and account settings (language preference, device type, etc.). TikTok is owned by TikTok Ltd., a subsidiary of ByteDance Ltd. (hereinafter referred to as ByteDance), and is the global counterpart to *Douyin*, ByteDance’s short-form video application that the company launched for users in China in 2016.¹ TikTok and *Douyin* share certain core features, though they reportedly use separate algorithms tailored to promote content to their respective audiences.²

How many users does TikTok claim to currently have?

According to TikTok’s estimates, as of March 2024, its user base had more than 170 million monthly active users (MAUs) in the United States and 7 million businesses that market or advertise on the platform.³ In 2021, TikTok announced that it had surpassed more than 1 billion MAUs across the world.⁴ According to the Pew Research Center, TikTok “stands out for growth of its user base” among U.S. adults, with 33% of adults reporting using it in 2023, up 12% from 2021.⁵

How did TikTok become so popular?

Some experts attribute the rapid growth of TikTok’s user base in the United States in part to the ByteDance 2018 acquisition of competitor musical.ly, which had an estimated base of approximately 100,000 U.S. MAUs at the time of the acquisition.⁶ In August 2018, ByteDance

¹ Emma Lee, “Toutiao Parent Launches Global Competitor to musical.ly,” *Technode*, September 14, 2017.

² Su, C., & Valdovinos Kaye, B. “Borderline practices on Douyin/TikTok: Content transfer and algorithmic manipulation,” 2023, *Media, Culture & Society*, 1534–1549, available at <https://doi.org/10.1177/01634437231168308>.

³ TikTok, “Oxford Economics Reports: TikTok Contributed \$24 Billion to U.S. Economy in 2023,” March 13, 2024, available at <https://newsroom.tiktok.com/en-us/tiktok-economic-impact-report-2024-smb>.

⁴ TikTok, “Thanks a billion!” September 27, 2021, <https://newsroom.tiktok.com/en-us/1-billion-people-on-tiktok>.

⁵ Jeffrey Gottfried, “Americans’ Social Media Use,” Pew Research Center, January 31, 2024, <https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/>

⁶ William Alan Reinsch, Patrick Saumell, et.al, “TikTok Is Running out of Time: Understanding the CFIUS Decision and Its Implications,” *Center for Strategic and International Studies*, September 2, 2020.

officially rebranded the musical.ly app as TikTok and migrated musical.ly users to new TikTok accounts.⁷ A key feature of TikTok's service is the company's recommendation algorithm, which is a system that sorts, curates, and disseminates content deemed relevant to specific users.

Who owns TikTok?

TikTok Ltd., a holding company incorporated in the Caribbean Overseas British Territory of Cayman Islands, directly owns TikTok. ByteDance Ltd., a holding company incorporated in the Cayman Islands and with core business operations and leadership located in China, directly owns TikTok Ltd.⁸ TikTok Ltd. lists its global headquarters as Los Angeles and Singapore.⁹ Its Chief Executive Officer (CEO), Shou Zi Chew, a citizen of Singapore, operates out of both headquarters, according to statements Chew made to a U.S. media outlet in February 2024.¹⁰

Who owns ByteDance and where is it located?

ByteDance is incorporated in the Cayman Islands. The company has listed its operational headquarters and primary place of business as Beijing, China (PRC or China).¹¹ Some legal experts also note that the majority of granted patents related to ByteDance's core software applications are registered in China and held by Beijing Douyin Information Services Co., Ltd., a subsidiary of ByteDance that houses ByteDance's key personnel, infrastructure, and conducts the firm's operations in China. In March 2023 testimony before the House Energy and Commerce Committee, TikTok CEO Shou Zi Chew, when asked whether ByteDance is a PRC company, said "ByteDance owns many businesses that operate in China," and "was founded by Chinese entrepreneurs."¹² In January 2024 testimony before the Senate Judiciary Committee, Shou stated that "ByteDance is a global company and not a Chinese company."¹³

What is ByteDance's relationship to the People's Republic of China (PRC)?

ByteDance is a privately-held company, and details on its global operations and ultimate shareholding structure are not widely available, beyond information published by ByteDance. Several experts and policymakers consider ByteDance to be ultimately subject to the jurisdiction of the PRC.¹⁴ In its official corporate structure, ByteDance currently lists all of its global

⁷ Dami Lee, "The popular Musical.ly app has been rebranded as TikTok," *The Verge*, August 2, 2018.

⁸ Marks & Clerk, "Artificial Intelligence fuels TikTok's popularity; but could that very asset prevent its sale?" September 15, 2020, available at <https://www.lexology.com/library/detail.aspx?g=3f68400b-2d73-43e2-88d5-510c85ea6759>.

⁹ TikTok, "About TikTok," available at <https://www.tiktok.com/about?lang=en>.

¹⁰ Dexter Thomas, "Over Time the Trust Will Come": An exclusive Interview With TikTok's CEO," *Wired*, February 1, 2024.

¹¹ Leadership and management position vacancies currently listed at ByteDance appear to be based in the company's Beijing, Shanghai, and Hong Kong offices: https://jobs.ByteDance.com/en/position?location=CT_11. For broader profiles of the company's operations in China, see Wei Sheng and Tony Xu, "A tour of ByteDance headquarters," *Technode*, September 11, 2019; Jing Yang and Juro Osawa, "ByteDance's China Business is Slowing, Putting Spotlight on TikTok," *The Information*, August 10, 2023.

¹² House of Representatives Committee on Energy and Commerce, *TikTok: How Congress Can Safeguard American Data Privacy and Protect Children From Online Harms*, Hearing, 118th Congress, 1st sess., March 23, 2023, p. 131, <https://www.congress.gov/118/meeting/house/115519/documents/HHRG-118-IF00-Transcript-20230323.pdf>.

¹³ U.S. Senate Committee on The Judiciary, *Big Tech and the Online Child Sexual Exploitation Crisis*, Full Committee Hearing, January 31, 2024, <https://www.judiciary.senate.gov/committee-activity/hearings/big-tech-and-the-online-child-sexual-exploitation-crisis>.

¹⁴ Roger Chen and Rui Ma, "How ByteDance Became the World's Most Valuable Startup," *Harvard Business Review*, (continued...)

subsidiaries and offices, including its original PRC-based firm Beijing ByteDance Technology Co., Ltd. (Beijing ByteDance), as subsidiaries of ByteDance, Ltd. in the Cayman Islands. In February 2023, ByteDance published an updated corporate structure in which it had renamed Beijing ByteDance as Beijing Douyin Information Services Co., Ltd. (Beijing Douyin).¹⁵

ByteDance uses a variable interest entity (VIE) structure.¹⁶ China prohibits foreign investors from investing in China's internet and telecommunications companies (among other types of companies). To access international capital under these restrictions, firms in China's technology sectors (including ByteDance) frequently use a VIE structure. This structure relies on an offshore holding company tied through a series of contracts to the PRC firm, which holds the core assets and conducts the firm's global business. Overseas investors invest in the offshore entity, commonly a holding company incorporated in a jurisdiction such as the Cayman Islands or British Virgin Islands, and receive a share of the firm's revenue without making any direct equity investment in the core assets of the business.¹⁷

Is TikTok available in China?

Internet users in China are not able to easily access TikTok; they are able to access *Douyin*, TikTok's predecessor-turned-companion-application.¹⁸ U.S. and multinational digital platforms, including TikTok, are unable to operate legally in China due to restrictions on foreign investment and operations in various technology sectors.¹⁹

National Security and Data Privacy Concerns

Is ByteDance a PRC company?

ByteDance's executives have maintained that ByteDance's incorporation in the Cayman Islands means that it should not be considered a PRC company. PRC officials have referred to ByteDance as a PRC company and have cited the company's obligations to comply with PRC data security and export control regulations as factors that may impede or block a ByteDance divestment from TikTok.²⁰

February 24, 2022; Yaqui Wang, "The Problem with TikTok's Claim of Independence From Beijing," *Human Rights Watch*, March 24, 2023.

¹⁵ For a graphical representation of ByteDance's corporate structure (as published by the company), see <https://www.bytedance.com/en/>.

¹⁶ For more details on the variable interest entity structure, see CRS In Focus IF11803, *U.S. Capital Markets and China: Issues for Congress*, by Michael D. Sutherland and Karen M. Sutter; U.S. Securities and Exchange Commission, "Investor Bulletin: U.S.-Listed Companies Operating Chinese Businesses Through a VIE Structure," September 20, 2021.

¹⁷ For more details on the variable interest entity structure, see CRS In Focus IF11803, *U.S. Capital Markets and China: Issues for Congress*, by Michael D. Sutherland and Karen M. Sutter; U.S. Securities and Exchange Commission, "Investor Bulletin: U.S.-Listed Companies Operating Chinese Businesses Through a VIE Structure," September 20, 2021.

¹⁸ Zeyi Yang, "How China Takes Extreme Measures to Keep Teens Off TikTok," *MIT Technology Review*, March 8, 2023.

¹⁹ Beina Xu and Eleanor Albert, "Media Censorship in China," *Council on Foreign Relations*, February 17, 2017.

²⁰ Xinhua, "Planned TikTok Deal Entails China's Approval under Revised Catalogue: Expert," August 30, 2020; China Global Television Network, "MOFCOM: China will firmly oppose a forced sale of TikTok," March 24, 2023; Meaghan Tobin, "China Condemns U.S. Proposal to Force the Sale of TikTok," *New York Times*, March 13, 2024.

Some experts contend that the PRC government controls ByteDance, or at least exerts a degree of influence over ByteDance, through a 2021 investment in Beijing Douyin Information Services Co., Ltd. (Beijing Douyin) (the entity that owns TikTok's core technology) by WangTouZhongWen (Beijing) Technology.²¹ The company financed its stake in ByteDance with funding from the China Internet Investment Fund (CIIF), a PRC government-run investment fund capitalized by joint capital contributions from the Cyberspace Administration of China (CAC) and China's Ministry of Finance.²² Through this investment, WangTouZhongWen—and the CIIF by extension—acquired a 1% stake in Beijing Douyin and a seat on the firm's board.²³ Some experts describe this 1% share as a “golden share,” a reference to the PRC government's strategy of making small, targeted investments that, in the view of these experts, gives the PRC government visibility, influence, and control over the decisions and operations of certain strategic firms in China's private sector.²⁴ Following this acquisition in December 2021, CAC official Wu Shugang was appointed to Beijing Douyin's board of directors.²⁵

Does the government of the People's Republic of China (PRC) exercise control over ByteDance?

The PRC government has tools that it may use to exert control over ByteDance (and potentially by extension TikTok) and other PRC digital platform developers. These tools may include, for example:

- **Communist Party of China (CPC) Party Organizations:** Since 1993, the PRC government has required companies in China's private sector that employ three or more Party members to establish internal Party organizations. Since becoming CPC General Secretary in 2013, Xi Jinping has taken action to expand the role and influence of Party organizations inside PRC firms,²⁶ including in the selection of executives in larger PRC companies.²⁷
- **Official Content Guidelines and Censorship Rules:** The PRC government maintains a robust online censorship regime that it uses to shape the content published to China's social media platforms. Some observers have cited instances of content suppression and promotion that TikTok and ByteDance representatives later acknowledged.²⁸

²¹ Keith Zhai, “China Steps Up Direct Involvement in Internet-Content Firms,” *Wall Street Journal*, August 17, 2021.

²² Zheping Huang, “Beijing Tightens Grip on ByteDance with Rare China Board Seat,” *Bloomberg*, August 17, 2021.

²³ Juro Osawa and Shai Oster, “Beijing Tightens Grip on ByteDance by Quietly Taking Stake, China Board Seat,” *The Information*, August 16, 2021.

²⁴ Ryan McMorro, Qianer Liu, and Cheng Leng, “China moves to take ‘golden shares’ in Alibaba and Tencent units,” *Financial Times*, January 12, 2023.

²⁵ “Fretting About Data Security, China's Government Expands Its Use of ‘Golden Shares’,” *Reuters*, December 16, 2021.

²⁶ Scott Livingston, “The New Challenge of Communist Corporate Governance,” Center for Strategic and International Studies, January 15, 2021.

²⁷ “Chinese Communist Party Cells in Private Companies: Though Not Yet Universal, Increasingly Situated to Play Greater Roles in Corporate Governance,” *Sayari*, April 7, 2021.

²⁸ In September 2019, a review of TikTok internal guidelines published by The Guardian revealed that TikTok had been suppressing the visibility of (and in some cases removing) content that could be seen as portraying LGBTQ+ individuals or their lifestyles positively, alongside content that was deemed politically sensitive to Beijing. TikTok later stated that it had also been suppressing the visibility of content that portrayed individuals that were overweight or displayed conspicuous disabilities, noting that elements of the policy were adopted to comply with broader ByteDance (continued...)

- **Data Security, Export Controls, and Cybersecurity Regulations:** The PRC government has applied existing cybersecurity and data security laws to influence corporate activity in China. PRC officials have indicated that they could apply China’s export control laws to block ByteDance from divesting TikTok, stating that social media algorithms developed by PRC firms fall under China’s export control regulations.²⁹

What laws and regulations in China could influence ByteDance operations?

Since 2015, the PRC government and the CPC have adopted interrelated laws, economic security measures, and data restrictions that enhance their control over data and commercial activity within and outside of China, which could influence ByteDance operations. They have expanded data localization requirements, placed data under export controls, and, since 2021, required security reviews for PRC firms listing or operating overseas. Some PRC provisions require firms to adhere to PRC requirements even when those requirements conflict with U.S. laws. Relevant laws in China include, for example:

- **The PRC National Security Law (2015)** requires information systems in China to be “secure and controllable.” Since 2016, the PRC government has required U.S. technology firms to store data and cryptographic keys in China.³⁰
- **The PRC National Cybersecurity Law (2017)** requires firms to store personal information and data within China, and it underpins requirements to place PRC data and related infrastructure in China.³¹
- **The PRC Data Security Law (2021)** covers data processing inside and outside of China if it “harms the national security, public interest, or the legitimate rights and interests of citizens or organizations of the PRC.” The law requires PRC government approval for the transfer of data stored in China and calls for classifying data according to its importance to China’s economic development and national security interests.³²
- In August 2020, the PRC government added algorithms used in social media platforms to China’s **Catalogue of Technologies Prohibited and Restricted from Export**, which is regularly updated according to China’s **Export Control Law (2020)**.³³ The addition followed the Trump Administration’s announcement

content moderation policies, and that those policies had been replaced with localized content moderation guidelines. In 2020, TikTok released an apology message for a “technical glitch” that made it “temporarily appear as if posts uploaded using #BlackLivesMatter and #GeorgeFloyd would receive 0 views. See Alex Hern, “TikTok’s local moderation guidelines ban pro-LGBT content,” *The Guardian*, September 26, 2019; Umberto Bacchi, “TikTok apologises for censoring LGBT+ content,” Reuters, September 22, 2020; Vanessa Pappas and Kudzi Chikumbu, “A message to our Black community,” TikTok June 1, 2020.

²⁹ Raffaele Huang, “China Signals Opposition to Forced Sale of TikTok in the U.S.,” *Wall Street Journal*, March 15, 2024.

³⁰ National Security Law of the People’s Republic of China, July 1, 2015, English translation available at <https://www.chinalawtranslate.com/en/2015nsl/#:~:text=Article%201%3A%20This%20Law%20is,of%20the%20refor m%20and%20opening.>

³¹ Cybersecurity Law of the People’s Republic of China, June 1, 2017, English translation available at <https://digichina.stanford.edu/work/translation-cybersecurity-law-of-the-peoples-republic-of-china-effective-june-1-2017/>.

³² Data Security Law of the People’s Republic of China, September 1, 2021, English translation available at <https://digichina.stanford.edu/work/translation-data-security-law-of-the-peoples-republic-of-china/>.

³³ Export Control Law of the People’s Republic of China, October 17, 2020, English translation available at <https://www.chinalawtranslate.com/en/export-control/>.

earlier in August 2020 of executive actions targeting PRC social media applications, including TikTok.³⁴

Does ByteDance share user data with the government of the People’s Republic of China (PRC)?

TikTok has denied that it shares data with the PRC government or the CPC. In its responses to Questions for the Record following TikTok CEO Shou Zi Chew’s testimony in March 2023 before the House Energy and Commerce Committee, TikTok provided a response indicating that the company “has never shared, or received a request to share, U.S. user data with the Chinese government.”³⁵ In response to Questions for the Record about ByteDance and its adherence to PRC government policies, TikTok provided a response indicating that “ByteDance’s products follow the local laws and regulations of the countries they operate in.”³⁶ Neither TikTok nor ByteDance have issued a statement to date on whether ByteDance or any of its subsidiaries in China have received requests to share data from the PRC government. One former ByteDance executive reportedly has alleged that ByteDance did share certain user data with the company’s internal CPC committee.³⁷

Where does TikTok store user data?

TikTok provided a response to Questions for the Record following CEO Shou Zi Chew’s March 2023 testimony before the House Energy and Commerce Committee, indicating that at least seven years’ worth of U.S. users’ TikTok data—specifically data related to paid content creators—is stored in data centers located in China.³⁸ As part of its efforts related to Project Texas (an initiative started by TikTok that it has claimed would address U.S. government security concerns), TikTok issued a statement indicating that it is “committed to storing all U.S. user data in the United States” in cooperation with Oracle and other U.S. firms. (See *What is Project Texas?*) TikTok also has issued statements claiming that, “as of July 2022, all new U.S. user data is stored automatically in Oracle’s U.S. cloud infrastructure, and access is managed exclusively by the TikTok US Data Security Team.”³⁹ Some experts contend that whether and where TikTok stores data could potentially be unrelated to the Chinese government’s ability to access TikTok’s data—as reported in 2022, there appear to be incidences of ByteDance employees located in China remotely accessing U.S. TikTok user data from ByteDance offices in Beijing in support of Project Texas.⁴⁰

³⁴ “Planned TikTok deal entails China’s approval under revised catalogue: expert,” *Xinhua*, August 30, 2020.

³⁵ TikTok, *Additional Responses to Questions for the Record*, May 4, 2023, p. 13, available at <https://docs.house.gov/meetings/IF/IF00/20230323/115519/HHRG-118-IF00-Wstate-ChewS-20230323-SD030.pdf>.

³⁶ *Ibid.*

³⁷ In June 2023, a former ByteDance executive who was engaged in litigation against the company claimed that ByteDance’s internal CPC committee was granted access to data of users based in Hong Kong in 2018. The former executive claimed that this access was to facilitate efforts to pressure ByteDance internally to support the PRC government’s efforts at the time to crack down on Hong Kong’s pro-democracy movement. ByteDance denies the claim. Georgia Wells, “Former ByteDance Executive Claims Chinese Communist Party Accessed TikTok’s Hong Kong User Data,” *Wall Street Journal*, June 5, 2023.

³⁸ TikTok, *Additional Responses to Questions for the Record*, May 4, 2023, p. 13, available at <https://docs.house.gov/meetings/IF/IF00/20230323/115519/HHRG-118-IF00-Wstate-ChewS-20230323-SD030.pdf>.

³⁹ TikTok, “TikTok Facts: How we secure personal information and store data,” press release, October 12, 2023.

⁴⁰ Emily Baker-White, “Leaked Audio From 80 Internal TikTok Meetings Shows That US User Data Has Been Repeatedly Accessed From China,” *Buzzfeed News*, June 17, 2022.

The U.S.-based company Oracle currently provides cloud infrastructure for TikTok. According to TikTok, “100% of [U.S.] user traffic is being routed to Oracle Cloud Infrastructure” and U.S. and Singapore data centers are used as backup.⁴¹

How does TikTok moderate content and recommend content?

TikTok has maintained that its content moderation policies and recommendation algorithms operate independently of ByteDance and its other products, and that TikTok tailors these policies and recommendation algorithms to be compliant with the laws of each country where it operates and also to promote content specific to each country where it operates.⁴² In its responses to Questions for the Record following TikTok CEO Shou Zi Chew’s March 2023 testimony before the House Energy and Commerce Committee, TikTok indicated that it promotes certain content but claimed that it does not do so at the request of any government.⁴³ Some observers have cited instances of content suppression and promotion that TikTok and ByteDance representatives later acknowledged.⁴⁴

Efforts to Regulate TikTok

What actions has the executive branch taken to address alleged national security risks TikTok poses?

With regard to ByteDance and TikTok, the executive branch has sought to address identified national security concerns related to the firms’ presence and operations in the United States using two separate authorities and legal frameworks: (1) the Committee on Foreign Investment in the United States (CFIUS), and (2) the International Emergency Economic Powers Act (IEEPA). These two actions are discussed in the questions that immediately follow.

What are the details of the Committee on Foreign Investment in the United States (CFIUS) investigation of the ByteDance acquisition of musical.ly?

In 2019, CFIUS conducted a retroactive national security review and investigation of the ByteDance completed acquisition of musical.ly, which had originally not been submitted by the parties for CFIUS review.⁴⁵ Following its investigation, CFIUS referred the transaction to President Trump for a presidential decision. The presidential decision, issued in March 2020, concluded that the acquisition threatened U.S. national security.⁴⁶ In referring the case to the President, CFIUS signaled it could not mitigate the identified national security risks arising from

⁴¹ Albert Calamug, “Delivering on our US data governance,” TikTok, June 17, 2022, available at <https://newsroom.tiktok.com/en-us/delivering-on-our-us-data-governance>; TikTok, “The Truth About TikTok: Separating Fact from Fiction,” press release, April 17, 2023.

⁴² TikTok, “The Truth About TikTok: Separating Fact from Fiction,” press release, April 17, 2023.

⁴³ TikTok, *Additional Responses to Questions for the Record*, May 4, 2023.

⁴⁴ See footnote 28.

⁴⁵ The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee chaired by the Secretary of the Treasury. It serves the President in overseeing the national security risks of certain foreign direct investment (FDI) in the U.S. economy. For more details, see CRS In Focus IF11334, *CFIUS: New Foreign Investment Review Regulations*, by Cathleen D. Cimino-Isaacs.

⁴⁶ White House Office of the Press Secretary, “Regarding the Acquisition of Musical.ly by ByteDance, Ltd.,” August 14, 2020, <https://home.treasury.gov/system/files/136/EO-on-TikTok-8-14-20.pdf>.

the transaction. CFIUS does not publicly comment on investigations or mitigation negotiations, including with respect to TikTok.

What actions followed the 2019 Committee on Foreign Investment in the United States (CFIUS) investigation of the ByteDance acquisition of musical.ly?

In August 2020, President Trump concluded that the ByteDance acquisition of musical.ly threatened U.S. national security and issued a Presidential Order under CFIUS's authorities directing ByteDance to divest (1) any asset or property used to enable or support the operation of TikTok in the United States and (2) data obtained or derived from TikTok or musical.ly app users in the United States.⁴⁷ In a statement issued following the order, then-Treasury Secretary Steven Mnuchin said that “CFIUS conducted an exhaustive review of the case and unanimously recommended this action to the President in order to protect U.S. users from exploitation of their personal data.”⁴⁸

In November 2020, ByteDance and TikTok contested the order through a legal challenge, arguing, among other things, that the order was an unconstitutional taking of their private property without just compensation and that it violated their due process rights under the Fifth Amendment.⁴⁹ The case is currently held in abeyance at the request of both parties. The court directed the government to file status reports every 60 days, and the government has reported as directed. According to the February 2024 report, the parties continue to negotiate whether the litigation can be resolved by mutual agreement.⁵⁰

What actions did the U.S. government take under International Emergency Economic Powers Act (IEEPA) authorities?

IEEPA⁵¹ gives the President broad authority to block a variety of economic transactions following the declaration of a national emergency.⁵² Based on the national emergency declared in E.O. 13873 in May 2019, in August 2020 President Trump issued E.O. 13942, which exercised authority provided by IEEPA to restrict TikTok's U.S. operations.⁵³ The then-Secretary of Commerce subsequently implemented this order by issuing a list of prohibited transactions, including maintaining TikTok on a mobile app store or providing internet hosting services to it.⁵⁴

⁴⁷ Executive Office of the President, “Regarding the Acquisition of Musical.ly by ByteDance Ltd.,” 85 *FR* 51297, August 14, 2020.

⁴⁸ U.S. Department of the Treasury, “Statement by Secretary Steven T. Mnuchin on the President’s Decision Regarding the Acquisition by ByteDance Ltd. of the U.S. Business of musical.ly,” August 14, 2020.

⁴⁹ Petition for Review, *TikTok v. CFIUS*, No. 20-1444 (D.C. Cir. Nov. 10, 2020).

⁵⁰ Status Report, *TikTok v. CFIUS*, No. 20-1444 (D.C. Cir. Feb. 20, 2024).

⁵¹ P.L. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§1701–1708).

⁵² 50 U.S.C. § 702(a). For further background on the President’s powers under IEEPA, see CRS Report R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, coordinated by Christopher A. Casey.

⁵³ Executive Order 13942, “Addressing the Threat Posed by TikTok, and Taking Additional Steps to Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain,” 85 *Federal Register* 48637, August 11, 2020.

⁵⁴ Department of Commerce, “Identification of Prohibited Transactions to Implement Executive Order 13942 and Address the Threat Posed by TikTok and the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain,” 85 *Federal Register* 60061, September 24, 2020.

Have the actions the U.S. government took under International Emergency Economic Powers Act (IEEPA) authorities been challenged in court?

Two lawsuits were filed challenging E.O. 13942: one brought by TikTok and its parent company ByteDance,⁵⁵ and the other brought by a group of TikTok users.⁵⁶ The plaintiffs in these suits argued, among other things, that the President exceeded his authority under IEEPA by regulating conduct that they contended falls under two statutory exceptions.⁵⁷ First, under the personal communication exception, the President may not rely on IEEPA to regulate or prohibit any “personal communication, which does not involve a transfer of anything of value.”⁵⁸ Second, under the informational materials exception, the President may not rely on IEEPA to regulate or prohibit the importation or exportation of most “informational materials.”⁵⁹ The plaintiffs argued that TikTok’s core function—creating and sharing short-form videos—involved transmitting personal communications and informational materials, albeit in a modern format.⁶⁰

In both suits, the courts issued preliminary injunctions temporarily barring the United States from enforcing the restrictions.⁶¹ In June 2021, before the injunctions expired, the Biden Administration rescinded E.O. 13942 and replaced it with a broader E.O. 14034. E.O. 14034 directs the Secretary of Commerce to create a program to identify and address the potential national security risks arising from foreign internet-based and software-tied operations in the United States. These could include apps that are operated by entities owned by, controlled by, or subject to the jurisdiction of the PRC or other countries the Secretary of Commerce has designated as “foreign adversaries.”⁶²

What legislation has Congress introduced to regulate TikTok?

In 2022, Congress enacted a law directing the Office of Management and Budget (OMB) to develop standards and guidelines that require executive agencies to remove TikTok from government computers and other government information technology.⁶³ On February 27, 2023, OMB issued implementation guidance, which included instructions and deadlines for removing TikTok from federal devices.⁶⁴

⁵⁵ Complaint, *TikTok v. Trump*, 1:20-cv-02658 (D.D.C. Sept. 18, 2020) [hereinafter *TikTok Complaint*].

⁵⁶ Amended Complaint, *Marland v. Trump*, 2:20-cv-04597 (E.D. Pa. Oct. 1, 2020) [hereinafter *TikTok Users Complaint*].

⁵⁷ See *TikTok Complaint*, *supra* footnote 55, at ¶¶ 75–81; *TikTok Users Complaint*, *supra* footnote 56, at ¶¶ 73–79.

⁵⁸ 50 U.S.C. §1702(b)(1).

⁵⁹ *Ibid.* §1702(b)(2).

⁶⁰ See Memorandum In Support of Plaintiff’s Motion for Preliminary Injunction, *TikTok v. Trump*, 1:20-cv-02658, at 18–20 (Sept. 23, 2020); Memorandum of Law In Support of Plaintiffs’ Motion for Preliminary Injunction, *Marland v. Trump*, 2:20-cv- 04597, at 21–22 (Oct. 13, 2020).

⁶¹ In the case brought by TikTok and ByteDance, the court concluded that the plaintiffs were likely to prevail on the argument that the ban ran afoul of both relevant exceptions. *TikTok v. Trump*, 507 F. Supp. 3d 92, 107–09, 112 (D.D.C. 2020). In the TikTok users’ case, the court limited its decision to the informational materials exception. *Marland v. Trump*, 498 F. Supp. 3d 624, 636–41 (E.D. Pa. 2020).

⁶² Executive Order 14034, “Protecting Americans’ Sensitive Data From Foreign Adversaries,” 86 *Federal Register* 31423, June 9, 2021.

⁶³ Consolidated Appropriations Act, 2023, P.L. 117-328, div. R, 136 Stat. 4459, 5258 (Dec. 29, 2022); see also 40 U.S.C. §11101(6) (defining “information technology”).

⁶⁴ OMB, memorandum from Shalanda D. Young, Director of OMB, “No TikTok on Government Devices” Implementation Guidance,” M-23-13, February 27, 2023.

Members of Congress have also introduced a number of bills that would regulate TikTok. Some bills would limit the application of the IEEPA exceptions when the President invokes IEEPA to regulate TikTok.⁶⁵ For example, the No TikTok on United States Devices Act would direct the President to exercise his authority under IEEPA to prohibit transactions involving ByteDance’s property and would provide that the exceptions to IEEPA—which courts relied on to preliminarily enjoin an earlier exercise of IEEPA authority to regulate TikTok⁶⁶—would not apply to the exercise of the President’s authority pursuant to the bill.⁶⁷

Other legislative proposals would create new administrative authorities that could be used to regulate TikTok. An example is the SAFETY on Social Media Act of 2023.⁶⁸ That bill would direct the President to publish a list of “untrustworthy applications and social media entities”⁶⁹ and would direct the Federal Communications Commission to issue rules that prohibit app stores and internet service providers from supporting the listed applications.⁷⁰ Proposals to expand data privacy frameworks or to create new restrictions on cross-border transfers of data could also regulate TikTok’s—as well as other entities’—collection, use, and transfer of data.⁷¹

On March 13, 2024, the House passed the Protecting Americans from Foreign Adversary Controlled Applications Act (H.R. 7521), which expressly names TikTok as a “foreign adversary controlled application” subject to its provisions.⁷² H.R. 7521 would prohibit app stores and internet hosting services from supporting TikTok and other foreign adversary controlled applications in the United States unless their owners execute a “qualified divestiture.”⁷³

What are the main elements of H.R. 7521, the Protecting Americans from Foreign Adversary Controlled Applications Act?

H.R. 7521, as passed by the House, would regulate “foreign adversary controlled applications” and the app stores and internet hosting services through which users access the applications.⁷⁴ The bill’s definition of foreign adversary controlled application includes two categories of applications. First, applications operated by TikTok, ByteDance, or a subsidiary or successor of either company that is controlled by a foreign adversary qualify as foreign adversary controlled applications.⁷⁵ In addition to TikTok and applications operated by TikTok’s parent company, ByteDance, this definition would capture applications operated by Beijing Douyin Information Services Co., Ltd., ByteDance’s core operating subsidiary in China in which the Chinese

⁶⁵ Courts have cited IEEPA’s exceptions when enjoining executive orders that were issued under IEEPA and that would have applied to TikTok. See *supra* “**What actions did the U.S. government take under International Emergency Economic Powers Act (IEEPA) authorities?**”

⁶⁶ See *supra* footnote 61, and “**What actions did the U.S. government take under International Emergency Economic Powers Act (IEEPA) authorities?**”

⁶⁷ H.R. 503, 118th Cong. (2023); S. 85, 118th Cong. (2023).

⁶⁸ S. 872, 118th Cong. (2023).

⁶⁹ Section 3 of S. 872.

⁷⁰ Section 5 of S. 872.

⁷¹ See, for example, H.R. 7520, 118th Cong. (2024); S. 1974, 118th Cong. (2023).

⁷² H.R. 7521, 118th Cong. (2024). The Protecting Americans’ Data from Foreign Adversaries Act of 2024 (H.R. 7520) also passed the House in March 2024 but does not expressly name TikTok.

⁷³ Section 2(g)(3) of H.R. 7521. For more information about legislative proposals to regulate TikTok, see CRS Legal Sidebar LSB10942, *Restricting TikTok (Part II): Legislative Proposals and Considerations for Congress*, coordinated by Peter J. Benson.

⁷⁴ Section 2 of H.R. 7521.

⁷⁵ Section 2(g)(3) of H.R. 7521.

government holds an equity stake. Second, the President may designate an application as a foreign adversary controlled application if

- (1) the application allows users to share and view text, images, videos, or similar content; has more than 1,000,000 monthly active users; and meets related definitional requirements;⁷⁶
- (2) the application is operated by a person domiciled in, headquartered in, maintaining a principal place of business in, or organized under the laws of a “foreign adversary country,” defined to include the countries listed in 10 U.S.C. §4872(d)(2), or is operated by a company for which persons owning at least a 20% stake are domiciled in, headquartered in, maintaining a principal place of business in, or organized under the laws of a foreign adversary country;⁷⁷ and
- (3) the President determines that the application presents a significant national security threat.⁷⁸

Beginning 180 days after an application is designated as a foreign adversary controlled application,⁷⁹ H.R. 7521 would prohibit app stores and internet hosting services from enabling the distribution, maintenance, or updating of the application for U.S. users.⁸⁰

Before the ban on app stores and internet hosting services supporting the application takes effect, the owner of a foreign adversary controlled application would be required to provide U.S. users, upon request, with all data related to their accounts, including posts, photos, and videos, in a machine readable format.⁸¹

App stores and internet hosting services would not be prohibited from enabling the distribution, maintenance, or updating of TikTok or another foreign adversary controlled application if the application’s owners execute a “qualified divestiture.”⁸² H.R. 7521 defines *qualified divestiture* as a divestiture or similar transaction for which the President, through an interagency process, has determined that the application will no longer be controlled by a foreign adversary and will no longer have any operational relationship with entities controlled by a foreign adversary.⁸³

A qualified divestiture that is completed within 180 days of an application being designated a foreign adversary controlled application would allow app stores and internet hosting services to continue distributing, maintaining, and updating the application without interruption.⁸⁴ Regardless of when a qualified divestiture takes place, H.R. 7521’s restrictions would cease to apply once a qualified divestiture had been completed.⁸⁵

⁷⁶ If the “primary purpose” of an application “is to allow users to post product reviews, business reviews, or travel information and reviews,” it does not meet the definitional requirements. Section 2(g)(2)(B) of H.R. 7521.

⁷⁷ Section 2(g)(1) of H.R. 7521.

⁷⁸ Section 2(g)(3)(B) of H.R. 7521.

⁷⁹ For TikTok, this time period would run 180 days from the date H.R. 7521 was enacted. Section 2(a)(2)(A) of H.R. 7521. For an application designated as a foreign adversary controlled application by the President, the 180 days would run from the date of the President’s determination. Section 2(a)(2)(B) of H.R. 7521.

⁸⁰ Section 2(a) of H.R. 7521.

⁸¹ Section 2(b) of H.R. 7521.

⁸² Section 2(c) of H.R. 7521.

⁸³ Section 2(g)(6) of H.R. 7521.

⁸⁴ Section 2(c)(1)(A) of H.R. 7521.

⁸⁵ Section 2(c)(1)(B) of H.R. 7521. For more information about H.R. 7521, see CRS Legal Sidebar LSB10942, *Restricting TikTok (Part II): Legislative Proposals and Considerations for Congress*, coordinated by Peter J. Benson; and CRS Legal Sidebar LSB11127, *H.R. 7521 Regulation of TikTok: Analysis of Selected Legal Issues*, by Peter J. Benson, Valerie C. Brannon, and Joanna R. Lampe.

Who could be penalized under H.R. 7521 and what penalties could be imposed?

H.R. 7521, as passed by the House, would provide for civil penalties in two circumstances.⁸⁶ First, if H.R. 7521 were enacted, an entity that violated the enacted law by providing a marketplace or internet hosting service that enabled distribution, maintenance, or updates of a foreign adversary controlled application could be subject to civil penalties of up to \$5,000 multiplied by the number of U.S. users who accessed, maintained, or updated the application.⁸⁷ Second, if the bill were enacted, an entity that owned or controlled a foreign adversary controlled application and violated H.R. 7521 by failing to provide machine readable user data in response to requests from U.S. users could be subject to civil penalties of up to \$500 multiplied by the number of affected users.⁸⁸

Would H.R. 7521 force any ByteDance or TikTok owners to divest from either company?

H.R. 7521, as passed by the House, would not directly force ByteDance or TikTok owners to divest from either company. If H.R. 7521 were to be enacted and ByteDance and TikTok owners were to elect not to execute a qualified divestiture, that election, in and of itself, would not constitute a violation of any provision in H.R. 7521. Nor would the election alone subject any party to the civil penalties provided in the bill. Under H.R. 7521, the primary consequence of a decision not to divest would be a prohibition on app stores and internet hosting services enabling access to TikTok in the United States, as opposed to an affirmative requirement to divest under penalty of legal liability.

The combination of an election not to divest with additional conduct could subject ByteDance, TikTok, or other entities to civil penalties. If H.R. 7521 were to be enacted, ByteDance and TikTok owners were to elect not to execute a qualified divestiture, and TikTok were to fail to properly comply with requests for U.S. user data during the first 180 days after enactment, TikTok could be subject to civil penalties.⁸⁹ After those 180 days, an entity that provides a marketplace for or internet hosting service that enables distribution, maintenance, or updates of TikTok for U.S. users could be subject to civil penalties.⁹⁰ However, if TikTok were to properly comply with all user data requests, and if all app stores and internet hosting services serving U.S. users were to stop supporting TikTok, no party would be subject to H.R. 7521's civil penalties simply because of the lack of divestiture.⁹¹

If enacted, how could H.R. 7521 be challenged in court?

If H.R. 7521, as passed by the House, were enacted, there are several ways a challenge to the enacted law might proceed in federal court. First, to the extent H.R. 7521 would authorize the Attorney General to enforce the bill through administrative proceedings, an entity that was subject to such administrative proceedings could file a petition for review of the agency action in

⁸⁶ Section 2(d)(1) of H.R. 7521.

⁸⁷ Sections 2(a) and 2(d)(1)(A) of H.R. 7521.

⁸⁸ Sections 2(b) and 2(d)(1)(B) of H.R. 7521.

⁸⁹ *Ibid.*

⁹⁰ Sections 2(a) and 2(d)(1)(A) of H.R. 7521.

⁹¹ Section 2(d)(1) of H.R. 7521.

the U.S. Court of Appeals for the D.C. Circuit.⁹² Second, if the Attorney General sued a person or entity for violating the act, the defendant might raise a constitutional claim as a defense to liability (which is sometimes called a defensive challenge).⁹³ Third, regulated entities or others alleging harm under the act could sue to prevent enforcement of the act. This might take the form of a pre-enforcement challenge (sometimes called an offensive challenge) to the act seeking to bar the Attorney General from enforcing it.⁹⁴ Parties seeking to bring pre-enforcement challenges would need to demonstrate standing to sue, including showing that they faced actual or imminent harm if the act were enforced.⁹⁵ H.R. 7521 provides that the D.C. Circuit “shall have exclusive jurisdiction over any challenge to this Act or any action, finding, or determination under this Act.”⁹⁶

What actions have been taken at the state level to regulate TikTok?

A number of states⁹⁷ have prohibited the installation or use of TikTok on state-owned devices through executive actions,⁹⁸ legislative enactments,⁹⁹ or both.¹⁰⁰ Some states have also adopted broader bans on installing applications or communication technologies provided by entities based in the PRC on state-owned devices.¹⁰¹

In May 2023, Montana enacted a law, SB 419, that would prohibit TikTok from “operat[ing] within the territorial jurisdiction of Montana.”¹⁰² SB 419 provides that its effective date is January

⁹² See Section 3(a) of H.R. 7521. As discussed in a CRS Legal Sidebar, it is not clear whether and to what extent H.R. 7521 authorizes administrative enforcement or other agency actions apart from civil suits. See CRS Legal Sidebar LSB11127, *H.R. 7521 Regulation of TikTok: Analysis of Selected Legal Issues*, by Peter J. Benson, Valerie C. Brannon, and Joanna R. Lampe.

⁹³ See, for example, Howard M. Wasserman, “Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication,” 23 *Lewis & Clark L. Rev.* 1077 (2020), pp. 1086–89.

⁹⁴ See, for example, *ibid.* at 1086.

⁹⁵ See CRS, *Overview of Standing*, Constitution Annotated, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited Mar. 22, 2024); CRS, *Actual or Imminent Injury*, Constitution Annotated, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-4/ALDE_00012999/ (last visited Mar. 22, 2024).

⁹⁶ Section 3(b) of H.R. 7521. For additional analysis of the act’s judicial review provisions, see CRS Legal Sidebar LSB11127, *H.R. 7521 Regulation of TikTok: Analysis of Selected Legal Issues*, by Peter J. Benson, Valerie C. Brannon, and Joanna R. Lampe.

⁹⁷ See Cailey Gleeson, “These 39 States Already Ban TikTok From Government Devices,” *Forbes*, March 12, 2024, available at <https://www.forbes.com/sites/caileygleeson/2024/03/12/these-39-states-already-ban-tiktok-from-government-devices/?sh=342082366705>; see also Andrew Adams, “Updated: Where Is TikTok Banned? Tracking State by State,” *Government Technology*, December 14, 2022, available at <https://www.govtech.com/biz/data/where-is-tiktok-banned-tracking-the-action-state-by-state>.

⁹⁸ See, for example, State of Arizona, *Executive Order 2023-10*, April 4, 2023, available at https://azgovernor.gov/sites/default/files/eo_2023-10_protecting_the_states_cybersecurity_interests.pdf; Shawn Nailor, Secretary, Vermont Agency of Digital Service and State CIO, Memorandum: Cybersecurity Standard Update 2023-01 (February 16, 2023), available at https://digitalservices.vermont.gov/sites/digitalservices/files/doc_library/Cybersecurity_Standard_Update_2023-01.pdf.

⁹⁹ House Bill 3127, 82nd Oregon Legislative Assembly (2023), available at <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB3127/Enrolled>.

¹⁰⁰ See *Coalition for Independent Technology Research v. Abbott*, No. 1:23-cv-783, 2023 WL 8582597, at *1 (W.D. Tex. Dec. 11, 2023).

¹⁰¹ See Senate Bill 258, Florida Legislature (2023), available at <https://www.flsenate.gov/Session/Bill/2023/258/BillText/er/PDF>; State of South Dakota Office of the Governor, *Executive Order 2023-02*, January 20, 2023, available at <https://governor.sd.gov/doc/EO%202023-02.pdf>.

¹⁰² Senate Bill 419 §1, 68th Montana Legislature (2023), available at <https://leg.mt.gov/bills/2023/billpdf/SB0419.pdf>.

1, 2024,¹⁰³ but on November 30, 2023, a federal court preliminarily enjoined that effective date.¹⁰⁴ As of March 2024, the court’s injunction remains in effect pending a final determination in the case. The Attorney General of Montana has appealed the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit.¹⁰⁵

If SB 419 were to take effect, TikTok and mobile app stores could be fined each time a user in Montana accesses TikTok or is offered the ability to access or download TikTok.¹⁰⁶ The law would become “void” if TikTok were sold to a company that was not, at the time of the sale, incorporated in a country “designated as a foreign adversary in 15 C.F.R. [§]7.4.”¹⁰⁷

Have TikTok or other entities challenged any state actions to regulate TikTok in court?

TikTok and a group of TikTok users each challenged SB 419, Montana’s ban on TikTok operating within the state.¹⁰⁸ The challengers asked a federal district court to invalidate and enjoin SB 419 on multiple grounds. They argued that the law was preempted by several federal statutes, that it regulated aspects of national security and foreign affairs that are reserved to the federal government, and that it violated the Constitution’s First Amendment, the Commerce Clause, the Bill of Attainder Clause, and the Fourteenth Amendment’s Due Process Clause.¹⁰⁹ The court, finding that TikTok and its users were likely to succeed on some of these arguments, granted a request to preliminarily enjoin the law from taking effect while the litigation proceeds.¹¹⁰ In the court’s view, SB 419 likely violates the First Amendment¹¹¹ and the Commerce Clause,¹¹² and it is likely preempted under the foreign affairs field preemption doctrine¹¹³ and by Section 721 of the Defense Production Act.¹¹⁴ The Attorney General of Montana has appealed the ruling to the U.S. Court of Appeals for the Ninth Circuit.¹¹⁵

In addition, an organization of academics, journalists, researchers, and scientists filed a lawsuit challenging Texas’s prohibition against using TikTok on government-issued devices.¹¹⁶ The organization argued that the ban, as applied to faculty at public universities, violated its members’

¹⁰³ Ibid. §5.

¹⁰⁴ *Alario v. Knudsen*, Nos. CV 23-56-M-DWM & CV 23-61-M-DWM, 2023 WL 8270811, at *18 (D. Mont. Nov. 30, 2023), *appeal filed*, No. 24-34 (9th Cir. Jan. 3, 2024).

¹⁰⁵ See Notice of Preliminary Injunction Appeal, *TikTok v. Knudsen*, No. 9:23-cv-61 (D. Mont. Jan. 2, 2024).

¹⁰⁶ Senate Bill 419 §1, 68th Montana Legislature (2023), available at <https://leg.mt.gov/bills/2023/billpdf/SB0419.pdf>.

¹⁰⁷ Ibid. §4. For more information about Montana’s SB 419, see CRS Legal Sidebar LSB10972, *Montana’s TikTok Ban, an Injunction, and Pending Legal Actions*, by Sanchitha Jayaram and Madeline W. Donley.

¹⁰⁸ *Alario*, 2023 WL 8270811, at *18.

¹⁰⁹ Complaint ¶¶85–138, *TikTok v. Knudsen*, No. 9:23-cv-61 (D. Mont. May 22, 2023).

¹¹⁰ *Alario*, 2023 WL 8270811, at *18.

¹¹¹ *Alario*, 2023 WL 8270811, at *12.

¹¹² Ibid. at *17.

¹¹³ For more information about the doctrine of foreign affairs preemption, see CRS Legal Sidebar WSLG1836, *Constitutional Limits on States’ Efforts to “Uphold” the Paris Agreement*, by Steve P. Mulligan.

¹¹⁴ *Alario*, 2023 WL 8270811, at *15. Section 721 of the Defense Production Act is codified at 50 U.S.C. §4565.

¹¹⁵ See Notice of Preliminary Injunction Appeal, *TikTok v. Knudsen*, No. 9:23-cv-61 (D. Mont. Jan. 2, 2024). For more information about the federal district court’s preliminary injunction of Montana’s law, see CRS Legal Sidebar LSB10972, *Montana’s TikTok Ban, an Injunction, and Pending Legal Actions*, by Sanchitha Jayaram and Madeline W. Donley.

¹¹⁶ *Coalition for Independent Technology Research v. Abbott*, No. 1:23-cv-783, 2023 WL 8582597, at *1–2 (W.D. Tex. Dec. 11, 2023).

First Amendment rights.¹¹⁷ In this case, the court disagreed with the challengers' arguments. The court held that, because Texas's ban reaches only "state-owned and -managed devices," the regulation was subject to a lower level of First Amendment scrutiny, which it satisfied.¹¹⁸ The court dismissed the case.¹¹⁹

Are foreign governments regulating TikTok?

The European Union (EU) has undertaken regulation of TikTok as part of its effort to regulate the digital economy, and some countries have restricted, blocked, or banned the app. Countries have banned TikTok on government devices (e.g., Australia, Canada, the United Kingdom) or temporarily blocked or banned TikTok due to concerns about content (e.g., Indonesia) or during times of political unrest (e.g., Pakistan).¹²⁰ Some countries have banned the app outright, including India, which banned TikTok in 2020 and currently has a ban on 509 apps developed in China.¹²¹ Nepal, Afghanistan, and Somalia have also banned TikTok due to concerns about the content being posted on the platform.¹²²

Implications of a Potential Ban or Divestiture of TikTok

How might a divestiture of TikTok work?

Some options ByteDance might consider if it chooses to divest TikTok could include the following:

- Some of the investors of ByteDance might create a new company to operate TikTok.¹²³

¹¹⁷ *Ibid.* at *2.

¹¹⁸ *Ibid.* at *7–9. The court held that Texas's ban was a "a restriction on a nonpublic forum." *Ibid.* at *7. For more information about the First Amendment standards applicable in public and nonpublic forums, see CRS Legal Sidebar LSB10383, *Religious Speech and Advertising: Current Circuit Split and its Implications for Congress*, by Whitney K. Novak, and CRS Legal Sidebar LSB10151, *From Clamor to Calm: Restrictions on Speech at Polling Places*, by Valerie C. Brannon.

¹¹⁹ *Coalition for Independent Technology Research*, 2023 WL 8582597, at *9. The following sections of this Report address the First Amendment and other constitutional considerations that could potentially be raised by regulations of TikTok: "**What First Amendment considerations might be raised by government regulation of TikTok?**"; "**How might the Bill of Attainder Clause apply to legislation that names TikTok?**"; and "**What Takings Clause considerations might be raised by future legislation that regulates TikTok?**," and "**What Due Process considerations might be raised by government regulation of TikTok?**" For more information about legal considerations potentially raised by regulations of TikTok, see CRS Legal Sidebar LSB10942, *Restricting TikTok (Part II): Legislative Proposals and Considerations for Congress*, coordinated by Peter J. Benson; and CRS Legal Sidebar LSB11127, *H.R. 7521 Regulation of TikTok: Analysis of Selected Legal Issues*, by Peter J. Benson, Valerie C. Brannon, and Joanna R. Lampe.

¹²⁰ Jennifer Hassan et. al, "The U.S. could ban TikTok. These countries have blocked or restricted it," *Washington Post*, March 13, 2024.

¹²¹ Reuters, "India adds 54 more Chinese apps to ban list; Sea says it complies with laws," February 15, 2022.

¹²² *Ibid.*; Alex Travelli and Suhasini Raj, "What Happened When India Pulled the Plug on TikTok," *New York Times*, March 22, 2024; Bashir Mohamed Caato, "Outcry in Somalia over government decision to ban TikTok," *Al Jazeera*, August 26, 2023; "Afghanistan: Taliban orders TikTok, PUBG ban for 'misleading' youths," *BBC*, April 22, 2022; "Nepal bans TikTok and says it disrupts social harmony," *Associated Press*, November 13, 2023.

¹²³ For more information on investors of ByteDance, see "**Where Is ByteDance Based?**"

- ByteDance might sell TikTok to a third-party, such as a group of investors or a company.

The PRC government might not allow either of these options to occur.¹²⁴ Under H.R. 7521, as passed by the House, these two options would need to meet the requirements of a “qualified divestiture,” which requires that the app not be controlled by, and have no operational relationship with, a foreign adversary.¹²⁵

Are there potential buyers for TikTok if it was for sale?

The parties interested in purchasing TikTok would likely depend on the sales price and the components of TikTok that would be included in the sale. ByteDance might sell TikTok for billions of dollars, which would likely limit the potential buyers. TikTok has a large number of U.S. users and has been expanding the services offered to U.S. users on the app.¹²⁶ The amount a buyer is willing to pay might be lower if, for example, the sale of TikTok does not include its algorithms or the data it has collected on its U.S. and other users. Although ByteDance was reportedly valued at \$268 billion in December 2023,¹²⁷ the current value of the U.S. portion of TikTok is unknown; some investors reportedly estimate that TikTok has been operating at a loss.¹²⁸

Other factors might also limit the potential buyers of TikTok. For example, proposals to purchase TikTok from large technology companies—such as Apple, Google, and Meta—might raise antitrust concerns. After the House passed H.R. 7521, several individuals and companies reportedly expressed interest in purchasing TikTok.¹²⁹

How would a prohibition on entities facilitating the provision or the sale of TikTok affect other social media platforms?

If entities were prohibited from facilitating the provision of TikTok to U.S. users, some U.S. users might start to use or spend more time on other social media platforms. In particular, U.S. users might increase use of social media platforms that offer short-form videos similar to TikTok, such as Meta’s Instagram Reels and Google’s YouTube Shorts, as well as other social media platforms

¹²⁴ For more information on PRC’s response to a potential sale of TikTok, see “**Does the PRC Government Exercise Control Over ByteDance?**”

¹²⁵ For more information on the requirements of H.R. 7521, see “**What are the Main Elements of H.R. 7521?**”

¹²⁶ For example, TikTok Shop in the United States started in September 2023 (see TikTok, “Introducing TikTok Shop,” September 12, 2023, available at <https://newsroom.tiktok.com/en-us/introducing-tiktok-shop>). For more information on the number of U.S. TikTok users, see “**How Many Users Does TikTok Have?**”

¹²⁷ Zheping Huang and Jane Zhang, “ByteDance Offers Investors a Buyback at \$268 Billion Valuation,” *Bloomberg*, December 6, 2023, available at <https://www.bloomberg.com/news/articles/2023-12-06/bytedance-offers-to-buy-back-5-billion-worth-of-shares-scmp>.

¹²⁸ Jing Yang, Kate Clark, and Erin Woo, “TikTok Ban Bill Spotlights Open Secret: App Loses Money,” *The Information*, March 13, 2024, available at <https://www.theinformation.com/articles/tiktok-ban-bill-spotlights-open-secret-app-loses-money>.

¹²⁹ For example, parties that have expressed interest in purchasing TikTok include former Treasury Secretary Steven Mnuchin, Bobby Kotick (former CEO of Activision, a video game publisher), Kevin O’Leary (an investor in the television show *Shark Tank*), and Rumble (an online video platform). See Rachel Louise Ensign and Gareth Viperz, “Steven Mnuchin Says He Is Putting Together a Group to Buy TikTok,” *Wall Street Journal*, updated March 14, 2024, available at <https://www.wsj.com/tech/steven-mnuchin-says-he-is-putting-together-a-group-to-buy-tiktok-3aac4a33>; and Daysia Tolentino, “Who Could Buy TikTok? These Are the People Who Could Acquire the App,” *NBC News*, March 14, 2024, available at <https://www.nbcnews.com/tech/social-media/tiktok-ban-sale-buy-bill-law-download-app-senate-date-rcna143413>.

such as Snapchat, X (formerly Twitter), or Reddit. A ban might also provide the opportunity for new social media platforms to emerge to serve the U.S. market, although a new platform might face difficulty competing with existing social media platforms.¹³⁰

If TikTok were sold, the effect on other social media platforms would depend on the actions taken by the entity that purchased TikTok. For example, if the entity were to stop offering certain services or implements changes that some users do not like, the users might start using or spending more time on other social media platforms. Alternatively, if the entity were to make improvements to TikTok, individuals might spend more time on TikTok and less time on, or stop using, other social media platforms.

Which online service providers would be affected by prohibiting the distribution, maintenance, or updating of TikTok in the United States?

Section 2 of H.R. 7521, as passed by the House, would prohibit any entity from distributing, maintaining, or updating (or enabling these services of) TikTok or foreign adversary controlled applications “within the land or maritime borders of the United States,” starting 180 days after the enactment of the law.¹³¹ Any entity that violates Section 2 would be subject to a civil penalty in an amount to be determined by the number of U.S. users that “have accessed, maintained, or updated” the TikTok or covered application using services provided by that entity.¹³² The Attorney General would “conduct investigations related to potential violations” and pursue enforcement against determined violations.¹³³

While the bill does not define “entity” under Section 2, the term could include at least the following two types of online service providers:

- **An online marketplace** that allows internet users to find, download, install, or update a software application. The example provided in the bill is an “online mobile application store.”¹³⁴ In the United States, the TikTok mobile app is mostly distributed through app stores operated by major mobile platform developers such as Apple Inc. (accessible through its iOS platform) and Google LLC (through its Android platform). TikTok is also available through third-party app stores, including those operated by Amazon.com, Inc. and Samsung Electronics Co., Ltd. To comply with Section 2 of the bill, these app stores would either have to remove TikTok from its offerings or make the app unavailable to U.S. users.¹³⁵
- **An internet hosting service vendor** that provides data storage and computing resources “for the accommodation and maintenance” of TikTok’s content and services.¹³⁶ The bill includes hosting services such as “file hosting, domain name

¹³⁰ For example, social media platforms benefit from network effects, where the perceived value of an online platform as the number of active users grows, which can make it difficult for a nascent platform to compete with incumbents. For more information about network effects and other characteristics of online platforms, see CRS Report R47662, *Defining and Regulating Online Platforms*, coordinated by Clare Y. Cho.

¹³¹ Section 2(a), (g)(3)(A) of H.R. 7521.

¹³² Section 2(d)(1) of H.R. 7521.

¹³³ Section 2(d)(2)(A) of H.R. 7521.

¹³⁴ Section 2(a)(1)(A) of H.R. 7521.

¹³⁵ *Ibid.*

¹³⁶ Section 2(g)(5) of H.R. 7521.

server hosting, cloud hosting, and virtual private server hosting.”¹³⁷ According to a network traffic analysis, TikTok may have used hosting service provided by at least 10 vendors, including U.S.-based cloud service providers Amazon Web Services (AWS), Google Cloud Platform, and Oracle Cloud.¹³⁸

In September 2020, the Oracle Corporation announced that it had become TikTok’s “secure cloud technology provider” to deploy, scale, and operate TikTok systems in the Oracle Cloud.¹³⁹ TikTok claims that it has “created a stand-alone version of the TikTok platform for the United States that is isolated inside servers in Oracle’s U.S. cloud environment but can communicate with the global TikTok service in controlled and monitored ways.”¹⁴⁰

To comply with Section 2 of the bill, an internet hosting service vendor would have to either stop hosting TikTok’s content and services or disable “the distribution, maintenance, or updating of” TikTok for U.S. users.¹⁴¹

Additionally, upon request, “the entity that owns or controls” TikTok would be required to provide “all the available data related to” a U.S. user’s account (including posts, photos, and videos) to the requesting user before the user lost access to the app.¹⁴² Such data would be intended to enable the user to transfer the content to “alternative applications.”¹⁴³

Would U.S. users still be able to access TikTok content under the current language in H.R. 7521 prohibiting the distribution, maintenance, or updating of TikTok in the United States?

H.R. 7521, as passed by the House, does not specifically address the topic of users within the land or maritime borders of the United States or U.S. citizens outside those borders accessing TikTok content or using its services after potential enactment of the bill. It also does not address users within the United States bypassing geographic restrictions to access non-U.S. instances of TikTok. For example, a user physically located in the United States could potentially access non-U.S. instances of TikTok or app stores by appearing to be located outside the United States using a Virtual Private Network (VPN) or other services that allow IP address masking.¹⁴⁴

¹³⁷ Ibid.

¹³⁸ “TikTok Application,” Netify.ai, available at <https://www.netify.ai/resources/applications/tiktok>, accessed March 2024.

¹³⁹ Oracle Corporation, “Oracle Chosen as TikTok’s Secure Cloud Provider,” press release, September 19, 2020, available at <https://www.oracle.com/news/announcement/oracle-chosen-as-tiktok-secure-cloud-provider-091920/>.

¹⁴⁰ “TikTok’s Commitment to U.S. National Security,” TikTok, available at <https://usds.tiktok.com/usds-about/>, accessed March 2024.

¹⁴¹ Section 2(a)(1)(B) of H.R. 7521.

¹⁴² Section 2(b) of H.R. 7521.

¹⁴³ Ibid.

¹⁴⁴ A VPN is “a virtual network built on top of existing networks that can provide a secure communications mechanism for data and IP information transmitted between networks.” National Institute of Standards and Technology, U.S. Department of Commerce, *Computer Security Resource Center (CSRC) Glossary: Virtual Private Network (VPN)*, available at https://csrc.nist.gov/glossary/term/virtual_private_network. See also Aliza Vigderman and Gabe Turner, “How to Hide IP Addresses,” *Security.org*, January 16, 2024, available at <https://www.security.org/vpn/hide-your-ip-address/>.

What First Amendment considerations might be raised by government regulation of TikTok?

Laws regulating a medium of expression, such as a newspaper or other platform for speech, can trigger First Amendment scrutiny, meaning that if subject to a legal challenge, a court might review the law for compliance with the First Amendment.¹⁴⁵ Federal and state restrictions on TikTok have been subject to legal challenges alleging the restrictions violate the First Amendment’s Free Speech Clause. One trial court held a Montana restriction on TikTok was likely unconstitutional, as discussed above.¹⁴⁶ Another trial court similarly issued a preliminary ruling on First Amendment grounds, preventing the federal government from enforcing an executive order restricting transactions related to WeChat.¹⁴⁷

One relevant issue in a First Amendment challenge is the type of free speech interest being asserted. While foreign corporations outside of a U.S. territory may not be able to claim First Amendment protections, separately incorporated organizations within the United States may raise First Amendment claims.¹⁴⁸ In prior legal challenges, both TikTok and the platform’s U.S. users have asserted First Amendment claims. U.S. users may have an interest both in receiving speech from abroad¹⁴⁹ as well as in purely domestic exchanges.

Generally, if a law burdens expressive activity, the level of constitutional scrutiny that a court applies depends in large part on the type of expression being regulated and how the law operates.¹⁵⁰ Laws that regulate speech based on its content usually trigger an analysis known as strict scrutiny, under which a law is presumptively unconstitutional and valid only if it is the least restrictive means to serve a compelling government interest.¹⁵¹ Thus, if a law targeted TikTok or other speech platforms because of the speech they host, or targets certain speech on those platforms, it could trigger strict scrutiny and would be more likely to be held unconstitutional.¹⁵²

In contrast, if a law did not target TikTok or another platform because of its speech and did not otherwise discriminate between particular viewpoints or types of content, it might be subject to review under intermediate scrutiny.¹⁵³ Intermediate scrutiny requires the government to show the law advances an “important or substantial” government interest unrelated to the suppression of speech and is “no greater than is essential” to further this interest.¹⁵⁴ Under some formulations of intermediate scrutiny, the government must also show that the law leaves open “ample alternative

¹⁴⁵ U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”); see, for example, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705–07 (1986) (explaining that while government regulation of conduct with “no element of protected expression” does not trigger First Amendment scrutiny, constitutional scrutiny is triggered by government action that targets “conduct with a significant expressive element” or “where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity”).

¹⁴⁶ See *supra* “Have TikTok or other entities challenged any state actions to regulate TikTok in court?”; *Alario v. Knudsen*, Nos. CV 23-56-M-DWM & CV 23-61-M-DWM, 2023 WL 8270811, at *5 (D. Mont. Nov. 30, 2023), *appeal filed*, No. 24-34 (9th Cir. Jan. 3, 2024). For further discussion of the *Alario* case, see CRS Legal Sidebar LSB10972, *Montana’s TikTok Ban, an Injunction, and Pending Legal Actions*, by Sanchitha Jayaram and Madeline W. Donley.

¹⁴⁷ *U.S. WeChat Users Alliance v. Trump*, 488 F. Supp. 3d 912, 917 (N.D. Cal. 2020).

¹⁴⁸ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082, 2086–87 (2020).

¹⁴⁹ See, for example, *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965).

¹⁵⁰ See generally, for example, CRS Report R47986, *Freedom of Speech: An Overview*, by Victoria L. Killion.

¹⁵¹ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); CRS In Focus IF12308, *Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional*, by Victoria L. Killion.

¹⁵² See, for example, *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229, 231 (1987).

¹⁵³ For example, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661–62 (1994).

¹⁵⁴ *Turner Broad. Sys.*, 512 U.S. at 662.

channels for communication of the information.”¹⁵⁵ Intermediate scrutiny is easier to satisfy than strict scrutiny but is still relatively robust: the trial court rulings referenced above concluded that the federal and state governments had likely failed to satisfy intermediate scrutiny.¹⁵⁶

How might the Bill of Attainder Clause apply to legislation that names TikTok?

Article I, Section 9, Clause 3 of the Constitution prohibits Congress from enacting bills of attainder—legislation that imposes punishment on an identifiable person or group without trial.¹⁵⁷ Because some recent legislative proposals identify TikTok or ByteDance by name, questions have arisen as to whether such proposals may be unconstitutional bills of attainder.¹⁵⁸

Courts analyzing bill of attainder challenges consider three questions. First, does the challenged bill apply with specificity? Second, does it impose punishment? Third, does it do so without a judicial trial? If all three factors are met, a court must strike down the legislation as a bill of attainder.¹⁵⁹

With respect to the first question, if a bill applies to a named individual or entity, courts are likely to hold that the specificity requirement is satisfied.¹⁶⁰ Historical bill of attainder cases involved legislation that targeted individuals or identifiable groups of people.¹⁶¹ Although the Supreme Court has not considered whether the Bill of Attainder Clause also protects corporations such as TikTok and ByteDance, federal appeals courts considering bill of attainder challenges brought by corporations have either held that the clause protects corporations¹⁶² or assumed that it does.¹⁶³ Identifying TikTok or ByteDance by name in legislation may meet the specificity requirement.

The second question, whether a bill imposes punishment, is the most complex. Courts apply three tests for assessing whether a law imposes punishment, known as the historical, functional, and motivational tests.¹⁶⁴ The historical test deems a law to be punitive if it is one of a limited set of

¹⁵⁵ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹⁵⁶ *U.S. WeChat Users Alliance v. Trump*, 488 F. Supp. 3d 912, 927–28 (N.D. Cal. 2020); *Alario v. Knudsen*, Nos. CV 23-56-M-DWM & CV 23-61-M-DWM, 2023 WL 8270811, at *8 (D. Mont. Nov. 30, 2023), *appeal filed*, No. 24-34 (9th Cir. Jan. 3, 2024). For a more in-depth discussion of possible First Amendment limitations on the federal government’s ability to regulate TikTok, see CRS Legal Sidebar LSB10942, *Restricting TikTok (Part II): Legislative Proposals and Considerations for Congress*, coordinated by Peter J. Benson; and CRS Legal Sidebar LSB11127, *H.R. 7521 Regulation of TikTok: Analysis of Selected Legal Issues*, by Peter J. Benson, Valerie C. Brannon, and Joanna R. Lampe.

¹⁵⁷ *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). A related provision prohibits state bills of attainder. U.S. Const. art. I, §10, cl. 1.

¹⁵⁸ With respect to H.R. 7521 specifically, a CRS Legal Sidebar discusses why courts may be unlikely to strike down that legislation as a bill of attainder. See CRS Legal Sidebar LSB11127, *H.R. 7521 Regulation of TikTok: Analysis of Selected Legal Issues*, by Peter J. Benson, Valerie C. Brannon, and Joanna R. Lampe.

¹⁵⁹ *Nixon*, 433 U.S. at 470–73.

¹⁶⁰ See, for example, *ibid.* at 471–72 (acknowledging the challenged act’s “specificity—the fact that it refers to appellant by name”).

¹⁶¹ See, for example, *ibid.* at 473–75; see also *United States v. Lovett*, 328 U. S. 303 (1946) (barring certain named individuals from drawing federal salaries); *United States v. Brown*, 381 U. S. 437 (1965) (prohibiting Communists from serving as labor union officers); *Ex parte Garland*, 4 Wall. 333 (1867) (barring former Confederate sympathizers from holding certain jobs); *Cummings v. Missouri*, 4 Wall. 277 (1867) (same).

¹⁶² For example, *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002).

¹⁶³ For example, *Kaspersky Lab, Inc. v. U.S. Dept. of Homeland Sec.*, 909 F.3d 446, 543–54 (D.C. Cir. 2018); *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 234 (5th Cir. 1998).

¹⁶⁴ *Nixon*, 433 U.S. at 473–83.

legislative actions that were held to be bills of attainder from before the Founding of the United States through the mid-20th century, including banishment, imprisonment, confiscation of property, or employment bans.¹⁶⁵ The functional test is generally given the most weight of the three tests and considers “whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.”¹⁶⁶ The third test for punishment considers whether the legislature that enacted a challenged law was motivated by an intent to punish the targeted entity.¹⁶⁷ The question of whether a bill imposes punishment is highly fact-dependent. A court reviewing legislation naming TikTok would assess the provisions aimed at TikTok under these three tests to determine whether the law was punishing TikTok. As a general matter, review of whether legislation is punitive for purposes of the Bill of Attainder Clause is deferential, and federal courts rarely strike down laws as bills of attainder.¹⁶⁸

With respect to the third question, if a bill provides for a judicial trial before imposing sanctions, it falls outside the prohibition on bills of attainder.¹⁶⁹ Thus, a bill that imposed legal consequences on TikTok or another entity only after a trial likely would not be struck down as a bill of attainder.¹⁷⁰

What Takings Clause considerations might be raised by future legislation that regulates TikTok?

The Fifth Amendment’s Takings Clause prohibits the United States from taking private property without just compensation.¹⁷¹ The Takings Clause’s protections apply to U.S. persons and to 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.¹⁷²

The Supreme Court has distinguished between two types of takings: physical takings and regulatory takings.¹⁷³ Physical takings are the “paradigmatic” example of a taking and occur

¹⁶⁵ *Ibid.* at 473–75.

¹⁶⁶ *Ibid.* at 475–76; see also *Kaspersky Lab*, 909 F.3d at 455.

¹⁶⁷ *Nixon*, 433 U.S. at 478.

¹⁶⁸ For additional discussion of bill of attainder doctrine, see CRS., *Bills of Attainder Doctrine*, Constitution Annotated, available at https://constitution.congress.gov/browse/essay/artI-S9-C3-2/ALDE_00013187/ (last visited Mar. 21, 2024).

¹⁶⁹ See, for example, *Nixon*, 433 U.S. at 538–39 (“Under our cases, therefore, bills of attainder require two elements: first, a specific designation of persons or groups as subjects of the legislation, and, second, a[n] . . . arbitrary deprivation . . . without notice, trial, or other hearing.”).

¹⁷⁰ Some federal appeals courts have held or assumed that the Bill of Attainder Clause does not apply to actions of the executive branch. See *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999) and cases cited. The Supreme Court has not considered this question, and the facts in prior cases differ from agency enforcement against TikTok that might be authorized under existing legislative proposals. However, the limited available authority suggests that legislation imposing legal consequences only after discretionary agency action may not be struck down as a bill of attainder.

¹⁷¹ *Ibid.*; *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005).

¹⁷² For example, *Atamirzayeva v. United States*, 77 Fed. Cl. 378, 385 (Fed. Cl. 2007) (“Regarding the Takings Clause of the Fifth Amendment, nonresident aliens may invoke the Takings Clause to seek remuneration for the expropriation of their property located within the United States. . . . However, the precise issue regarding whether a nonresident alien must demonstrate a substantial connection with the United States to have standing to invoke the Takings Clause regarding property outside the United States remains unsettled”) (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931)).

¹⁷³ See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002) (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.”).

when the government directly appropriates or physically invades private property.¹⁷⁴ Regulatory takings involve a government acting in its “regulatory capacity”¹⁷⁵ and are typically analyzed under the framework created by the Supreme Court in *Penn Central Transportation Company v. New York City*.¹⁷⁶ Under the *Penn Central* framework, courts consider the following three factors to determine if there is a regulatory taking: (1) “[t]he economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the government action,” such as whether it is akin to a physical invasion or whether it is “adjusting the benefits and burdens of economic life to promote the common good.”¹⁷⁷

TikTok might challenge future legislation as a violation of the Takings Clause if it believes the law’s restrictions have a severe economic impact on its business and interferes with its investors’ expectations.¹⁷⁸ Such a challenge would likely be analyzed under the *Penn Central* factors.¹⁷⁹ This analysis is inherently fact-specific and could depend, for example, on the extent of the legislation’s economic impact and the reasonableness of ByteDance’s expectations when it invested in musical.ly.¹⁸⁰ As a general matter, any national security arguments invoked by the government could make it difficult for a Takings Clause challenge to succeed. Courts have observed that national security is a paramount governmental interest, and courts have said that valid regulatory actions serving substantial national security interests weigh against a determination that a compensable taking has occurred.¹⁸¹

What Due Process considerations might be raised by government regulation of TikTok?

Under the Fifth Amendment’s Due Process Clause, the federal government may not deprive any person of a protected property interest unless it provides them with notice of the deprivation and an opportunity to be heard before a neutral party.¹⁸² As with the Taking Clause, the Due Process

¹⁷⁴ *Lingle*, 544 U.S. at 537 (“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”).

¹⁷⁵ *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006).

¹⁷⁶ 438 U.S. 104 (1978).

¹⁷⁷ *Ibid.* at 124.

¹⁷⁸ In 2020, ByteDance and TikTok raised arguments under the Takings Clause in a challenge to a Presidential Order that had been issued under CFIUS authorities. See Petition for Review, *TikTok v. CFIUS*, No. 20-1444 (D.C. Cir. Nov. 10, 2020). Those arguments have not been ruled on by a court. See *supra* “**What actions followed the 2019 Committee on Foreign Investment in the United States (CFIUS) investigation of the ByteDance acquisition of musical.ly?**”

¹⁷⁹ *Tahoe-Sierra*, 535 U.S. at 330 (“Anything less than a ‘complete elimination of value,’ or a ‘total loss’ . . . would require the kind of analysis applied in *Penn Central*.”) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019–20, n.8 (1992)).

¹⁸⁰ See *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1159 (Fed. Cir. 2014) (“Assessing the reasonableness of a plaintiff’s [distinct investment-backed] expectations ‘is an objective, but fact-specific inquiry into what, under all the circumstances, the [plaintiff] should have anticipated.’” (quoting *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003))).

¹⁸¹ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”); *Paradissiotis v. United States*, 304 F.3d 1271, 1275 (Fed. Cir. 2002) (“Valid regulatory measures taken to serve substantial national security interests may adversely affect individual contract-based interests and expectations, but those effects have not been recognized as compensable takings for Fifth Amendment purposes.”).

¹⁸² *Kerry v. Din*, 576 U.S. 86, 111 (2015) (Breyer, J., dissenting) (“Due Process Clause procedures . . . normally include notice of an adverse action, an opportunity to present relevant proofs and arguments, before a neutral decisionmaker, and reasoned decisionmaking.”); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (“An (continued...)”).

Clause’s protections apply to U.S. persons and to foreign persons or entities that have “developed substantial connections” with the United States through presence or property.¹⁸³ The Due Process Clause is primarily applied to actions taken by the executive branch; for legislative determinations, the Supreme Court has said that the legislative process may provide “all the process that is due”¹⁸⁴ unless the law is “palpably arbitrary.”¹⁸⁵

Beyond the core requirement of notice and an opportunity for a hearing, the Due Process Clause’s procedural requirements are flexible and may vary depending on the particular situation.¹⁸⁶ To determine what procedures are required in any given case, courts apply a three-factor balancing test that the Supreme Court articulated in *Mathews v. Eldridge*.¹⁸⁷ Under this test, the reviewing court must weigh: (1) the private interests affected by the determination; (2) the risk of erroneous deprivation of such interests through the procedures the government used and the probable value, if any, of additional or substitute procedures; and (3) the government’s interest at stake.¹⁸⁸

The application of this test can lead to different requirements in different circumstances. For example, the U.S. Court of Appeals for the D.C. Circuit has held that, before the President can order a company to divest an acquisition under the CFIUS process, the government must first provide the affected company with notice of the determination and an opportunity to rebut the evidence supporting it.¹⁸⁹ On the other hand, when the government has added persons to sanctions lists without prior notice, courts have concluded that the government’s interest in preventing “asset flight” outweighs litigants’ need for a pre-deprivation hearing.¹⁹⁰

Courts have found it problematic when a party is unable to examine and challenge the evidence on which a determination is based.¹⁹¹ However, when a determination is based on classified information, courts have recognized that forcing the executive branch to disclose such information would “compel a breach in the security which that branch is charged to protect.”¹⁹² In some cases, courts have deemed it sufficient for the government to provide unclassified summaries of the evidence or have required the government to submit the classified information in camera for the court’s review (i.e., permitting only the court to view it).¹⁹³

essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.”) (internal quotation marks and citation omitted).

¹⁸³ See *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 203 (D.C. Cir. 2001) (holding that a foreign entity, which had been designated by the State Department as a foreign terrorist organization, was entitled to due process protections because it “entered the territory of the United States and established substantial connections with this country”).

¹⁸⁴ *Atkins v. Parker*, 472 U.S. 115, 116 (1985).

¹⁸⁵ *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 3 of Sevier County, Ark.*, 266 U.S. 379, 386 (1924).

¹⁸⁶ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¹⁸⁷ 424 U.S. 319, 334 (1976).

¹⁸⁸ *Nelson v. Colorado*, 581 U.S. 128, 135 (2017); *Mathews*, 424 U.S. at 335.

¹⁸⁹ *Ralls Corp. v. CFIUS*, 758 F.3d 296, 319–21 (D.C. Cir. 2014).

¹⁹⁰ For example, *Al Haramain Islamic Foundation, Inc., v. U.S. Dep’t of Treasury*, 686 F.3d 965, 985 (9th Cir. 2012) (“As the district court noted, and as many courts have held, the potential for ‘asset flight’ almost certainly justifies [the Office of Foreign Asset Control’s] decision not to provide notice before freezing the assets.”).

¹⁹¹ *Ralls Corp.*, 758 F.3d at 318 (“Both the Supreme court and this Court have recognized that the right to know the factual basis for the action and the opportunity to rebut the evidence supporting the action are essential components of due process.”).

¹⁹² *Fares v. Smith*, 901 F.3d 315, 324 (D.C. Cir. 2019).

¹⁹³ See *ibid.* at 322–24 (discussing cases where courts have required in camera review of classified evidence or have found sufficient unclassified summaries in lieu of classified evidence).

Should Congress consider potential TikTok-related legislation, Due Process Clause analysis would be particularly relevant if the legislation provided for executive branch determinations. To comply with the Due Process Clause, any executive branch decision implicating TikTok or ByteDance's property rights would likely need to provide, at a minimum, notice of the determination, ability to examine any unclassified evidence on which the decision was based, and an opportunity to rebut that evidence.

What is Project Texas?

Formally announced by TikTok in January 2023, Project Texas is a program currently being implemented by TikTok to address what it claims are the key national security concerns expressed by the U.S. government during the company's negotiations with the U.S. Department of Justice following the 2019 CFIUS investigation (see *What was the result of the 2019 CFIUS Investigation of ByteDance?*).¹⁹⁴ The Department of Justice and CFIUS have declined to comment on the U.S. government's view of Project Texas, citing confidentiality obligations.

The core element of Project Texas, according to TikTok, is a localization of all data generated by U.S. users and monitoring of cross-border data flows by a team based in the United States. TikTok plans to do this through the establishment of a new subsidiary, TikTok U.S. Data Security (USDS), based in the United States, which would be monitored by Oracle. USDS would also manage the migration of all TikTok data traffic to Oracle Cloud, and, according to TikTok, would establish a dedicated "transparency center" to allow Oracle employees to inspect TikTok's source code.¹⁹⁵ As of August 2023, media reporting indicates that access to TikTok's source code is a point of contention between Oracle and TikTok employees, and that TikTok is imposing access restrictions and surveillance requirements on Oracle employees that impedes their ability to implement Project Texas.¹⁹⁶ Several experts and Members of Congress contend that even if Project Texas were to be fully implemented, it does not address the core problem of ByteDance employee access to U.S. user data, which some experts argue could be maintained despite a localization of data in the United States depending on how ByteDance and TikTok structure internal data security protocols and access permissions.¹⁹⁷

Could a ban, divestiture, sale or other efforts to regulate TikTok have broader policy implications for digital trade?

Until 2023, the United States promoted the free flow of data across borders and opposed data localization requirements in its free trade agreements.¹⁹⁸ These policies were included as negotiating objectives in trade agreements beginning with the passage of the most recent Trade Promotion Authority in 2015 (TPA-2015, P.L. 114-26). In fall 2023, the Office of the United States Trade Representative (USTR) withdrew its support for proposals at the World Trade Organization (WTO) that supported open cross-border data flows and opposed data localization. USTR also suspended digital trade talks in the Indo-

¹⁹⁴ Matt Perault and Samm Sacks, "Project Texas: The Details of TikTok's Plan to Remain Operational in the United States," January 26, 2023.

¹⁹⁵ TikTok, "When will Project Texas be fully operational?" press release, March 23, 2023.

¹⁹⁶ Emily Baker-White, "As TikTok Ban Looms, ByteDance Battles Oracle For Control Of Its Algorithm," *Forbes*, August 24, 2023; Anissa Gardizy, "TikTok Says U.S. Survival Plan is Going Forward. Its Cloud Provider Isn't So Sure," *The Information*, May 22, 2023.

¹⁹⁷ Matt Perault, "What Happened to TikTok's Project Texas?" *Lawfare*, March 20, 2024.

¹⁹⁸ Data localization policies require that data generated within a country be stored and processed on servers within that country. For more information on issues related to cross-border data flows and digital trade policy, see CRS In Focus IF12347, *Digital Trade and Data Policy: Select Key Issues*, by Danielle M. Trachtenberg.

Pacific Economic Framework for Prosperity. USTR Katherine Tai attributed the decision to the need for domestic policy “space” on digital economy issues given rapid technological advancement and shifting domestic conversations on regulation of the technology sector.¹⁹⁹

Data security

Both Congress and the Biden Administration are considering restricting cross-border data flows or supporting data localization in instances when national security or the security of sensitive data on U.S. citizens is at risk. A February 2024 executive order by the Biden Administration aims to restrict access to Americans’ personal data and American government related data when access poses an “unacceptable national security risk” by prohibiting and restricting certain transactions with foreign adversaries, including China.²⁰⁰ Recent proposed legislation also aims to prevent access to Americans’ personal data by foreign adversaries by restricting the activities of data brokers, including the Protecting Americans’ Data from Foreign Adversaries Act (H.R. 7520) and the Protecting Military Servicemembers’ Data Act of 2023 (H.R. 6573).

Data localization

A component of Tik Tok’s Project Texas is the storage of U.S. user data in servers in Oracle’s U.S. cloud environment with access to that data controlled by TikTok USDS, which would be overseen by an independent board.²⁰¹ This component of Project Texas, if mandated by the Committee on Foreign Investment in the United States (CFIUS) or another U.S. government entity, would be an example of an attempted data localization requirement.

Digital trade policy

USTR has not announced new digital trade policy goals for future discussions with other countries or put forth new proposals at the WTO. U.S. trade partners, industry, and other interests could regard U.S. action on TikTok as a signal of the future direction of U.S. digital trade policy.

Further Reading

CRS Report R47662, *Defining and Regulating Online Platforms*, coordinated by Clare Y. Cho.

CRS Legal Sidebar LSB10940, *Restricting TikTok (Part I): Legal History and Background*, by Steve P. Mulligan.

CRS Legal Sidebar LSB10942, *Restricting TikTok (Part II): Legislative Proposals and Considerations for Congress*, coordinated by Peter J. Benson.

CRS Legal Sidebar LSB10972, *Montana’s TikTok Ban, an Injunction, and Pending Legal Actions*, by Sanchitha Jayaram and Madeline W. Donley.

¹⁹⁹ Fireside chat with USTR Katherine Tai, Aspen Security Forum, December 7, 2023. Remarks available at <https://www.aspensecurityforum.org/dc-2023-videos>.

²⁰⁰ Executive Office of the President, Executive Order 14117 Preventing Access to Americans’ Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern, February 28, 2024.

²⁰¹ TikTok U.S. Data Security, “About Project Texas,” available at <https://usds.tiktok.com/usds-about/>.

CRS Legal Sidebar LSB11127, *H.R. 7521 Regulation of TikTok: Analysis of Selected Legal Issues*, by Peter J. Benson, Valerie C. Brannon, and Joanna R. Lampe.

CRS In Focus IF11334, *CFIUS: New Foreign Investment Review Regulations*, by Cathleen D. Cimino-Isaacs.

CRS In Focus IF11803, *U.S. Capital Markets and China: Issues for Congress*, by Michael D. Sutherland and Karen M. Sutter.

CRS In Focus IF12347, *Digital Trade and Data Policy: Select Key Issues*, by Danielle M. Trachtenberg.

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