

Restricting TikTok (Part I): Legal History and Background

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The video-sharing platform TikTok has experienced a [dramatic rise](#) in users in the United States in recent years, while at the same time [some Members of Congress](#) and Biden Administration [officials](#) have described the application (app) as a national security threat. During the Trump Administration, concerns about TikTok’s data security and connections to the People’s Republic of China (PRC) led to the attempt to [restrict](#) the app’s U.S. operations. In decisions that inform the current legislative debate, two [federal district courts](#) concluded that aspects of the restrictions were unlawful because they exceeded the President’s statutory authority. Other elements of the Trump Administration’s efforts are ongoing and have been continued by the Biden Administration. This Sidebar discusses these past executive branch-led efforts. A [companion Sidebar](#) examines current legislative proposals to restrict TikTok and constitutional and other legal considerations for Congress to consider when crafting legislation.

Trump Administration Initiatives

President Trump sought to leverage two legal frameworks to restrict TikTok’s U.S. presence and operations: the International Emergency Economic Powers Act ([IEEPA](#)) and the [legal authorities](#) underpinning the Committee on Foreign Investment in the United States ([CFIUS](#)).

IEEPA-Based Restrictions

As discussed in this [CRS Report](#), IEEPA authorizes the President to regulate a variety of commercial transactions and to block (i.e., freeze) foreign-owned property and assets subject to the jurisdiction of the United States. Before invoking these authorities, the President, following the procedures of the [National Emergencies Act](#), must declare a national emergency related to an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States.”

In 2019, President Trump laid the groundwork to invoke IEEPA by declaring a national emergency ([2019 Emergency Declaration](#)) based on foreign adversaries’ ability to exploit vulnerabilities in the U.S. information and communication technology and services (ICTS) supply chain. In August 2020, the President issued an executive order ([2020 Order](#)), which invoked the President’s IEEPA authority to restrict TikTok’s U.S. operations in response to the ICTS emergency. Under authority delegated by the

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2020 Order, the Secretary of Commerce [issued](#) a list of prohibited transactions, which included maintaining TikTok on a mobile app store or providing internet hosting services to it.

Contemporaneously, President Trump issued another executive order ([WeChat Order](#)) that restricted U.S. operations of WeChat—a PRC-based messaging, social media, and electronic payment app, discussed in this [CRS Report](#). This Sidebar largely focuses on TikTok regulation except when the WeChat Order may be relevant.

Judicial Challenges to the IEEPA-Based Restrictions

Two sets of lawsuits followed the Trump Administration’s restrictions on TikTok—one filed by TikTok and its parent company, ByteDance, Ltd., and [another](#) by a group of TikTok users. The plaintiffs in both suits raised several statutory and constitutional claims that the restrictions were unlawful, but the courts’ decisions focused on whether the Trump Administration exceeded its statutory authority by regulating conduct that fell into IEEPA’s exceptions.

While IEEPA grants extensive authority to the President to restrict or prohibit transactions under certain conditions, the statute also [lists](#) categories of conduct that the President cannot regulate. Two exceptions were the focus of the litigation. Under the *personal communication exception*, the President may not restrict “any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value.” Under the *informational materials exception* (sometimes called the Berman Amendment after its legislative sponsor, Representative Howard Berman), the President cannot restrict most “information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs ... artworks, and news wire feeds.”

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. The Department of Commerce (Commerce) had sought to avoid this argument by limiting its restrictions to “[business-to-business transactions](#)” rather than TikTok users’ personal exchange of communication and information. The courts ultimately sided with the plaintiffs and issued preliminary injunctions temporarily barring the United States from enforcing the restrictions. [Both](#) courts [described](#) the government actions as effectively banning TikTok from operating in the United States. 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. In the TikTok users’ case, the court limited its [decision](#) to the informational materials exception.

A group of WeChat users also challenged the Trump Administration’s restrictions on that app in a separate case. A federal district court similarly granted a preliminary injunction in favor of the WeChat users, but it did so on [First Amendment grounds](#), which are analyzed in [Part II of this Sidebar](#). The United States appealed the injunctions in both sets of cases. After the Biden Administration [withdrew](#) the underlying executive orders in June 2021, the parties agreed to voluntarily dismiss all of the cases before the appeals were decided.

CFIUS Review

The Trump Administration’s other public TikTok initiative, which the Biden Administration has continued to pursue, is based on the CFIUS process. CFIUS is an interagency committee chaired by the Secretary of the Treasury that reviews foreign investments in the United States for potential national security risks. Its statutory authority derives from Section 721 of the [Defense Production Act](#), as amended and codified in [50 U.S.C. § 4565](#). CFIUS traditionally reviews mergers, acquisitions, and takeovers that could result in a foreign entity taking [control](#) of a U.S. business. [Amendments](#) to its statutory authorities enacted in 2018 (discussed in this [In Focus](#)) expanded CFIUS’s jurisdiction to cover a select set of non-controlling investments and real estate transactions.

When a transaction falls in its ambit and CFIUS determines there is sufficient national security risk, CFIUS can impose [mitigation measures](#) and recommend to the President whether to prohibit or suspend the transaction. The President has the [ultimate authority](#) to prohibit or suspend a covered transaction if the President finds there is credible evidence that the transaction would threaten to impair national security and could not be addressed using authorities in other laws. The President's authority to block transactions is both forward- and backward-looking, meaning Presidents can block planned transactions and require parties to divest (i.e., unwind) completed deals.

In TikTok's case, CFIUS's review concerned ByteDance's acquisition of another video-based social media company called musical.ly. ByteDance purchased musical.ly for \$1 billion in 2017 and merged its operations into the TikTok app the next year. By 2020, President Trump concluded that this acquisition threatened U.S. national security and issued an order ([Divestment Order](#)) directing ByteDance to divest (1) its assets used to support TikTok's U.S. operations and (2) data obtained or derived from TikTok or musical.ly users in the United States. Since that order, [media outlets](#) have [reported](#) that TikTok has been negotiating with CFIUS on an agreement that would allow the app to continue to operate in the United States if TikTok accepts certain obligations to mitigate national security risks. CFIUS has not formally commented on these negotiations, but TikTok has publicly described some elements of the negotiations in [letters](#) and meetings with the [media](#). These negotiations remain ongoing, and the United States thus far has not sought to enforce the Divestment Order in court.

The Information and Communications Technology and Services (ICTS) Supply Chain Rule and Data Executive Order

In January 2021, Commerce issued an interim final rule and request for comments ([Supply Chain Rule](#)) that does not name TikTok directly, but could be relevant to U.S. efforts to restrict the app's operations. Discussed in this [In Focus](#), the Supply Chain Rule creates a new interagency process led by Commerce that can review certain *ICTS transactions*—a term now broadly defined in [regulation](#). If a covered ICTS transaction involves [foreign adversaries](#) and presents certain undue or unacceptable risks [identified](#) in the precursor executive order, Commerce can either prohibit the transaction or negotiate mitigation measures to address national security risks.

In June 2021, President Biden expanded on the Supply Chain Rule through an executive order titled *Protecting Americans' Sensitive Data from Foreign Adversaries* ([Data Executive Order](#)). The Data Executive Order rescinded several Trump Administration orders, including the 2020 Order and WeChat Order, and replaced them with new initiatives designed to address risks posed by foreign-owned and -controlled apps. The Data Executive Order left other Trump-era orders in place, including the 2019 Emergency Declaration and the Divestment Order.

As one initiative, the Data Executive Order directed Commerce to consider special criteria when evaluating whether to block ICTS transactions that involve apps under the Supply Chain Rule's review process. Commerce issued a [Notice of Proposed Rulemaking](#) in November 2021 followed by a June 2023 [Final Rule](#), effective July 17, 2023, that adds new app-specific risk factors and clarifies that transactions involving apps may be subject to the Supply Chain Rule. Some [observers](#) viewed these developments as a [signal](#) that the Biden Administration would use the Supply Chain Rule's review process to restrict foreign-owned apps like TikTok. As of June 2023, Commerce has not blocked any transactions using the Supply Chain Rule, and its only public action under the rule has been to subpoena [PRC-based companies](#) that provide ICTS in the United States.

One possible explanation for the lack of executive action may be the Supply Chain Rule's legal foundations. The authorities that undergird the rule include elements of IEEPA and the 2019 Emergency Declaration—the same authorities used for the 2020 Order that was enjoined by federal courts and later rescinded. Because the Supply Chain Rule is IEEPA-based, it is likely that it would be subject to the same

personal communications and informational materials exceptions that were at issue in litigation during the Trump Administration.

The limitations that IEEPA's exceptions place on the President's power to restrict cross-border transactions have led some Members of Congress to propose additional legislative authorities that, among other things, would remove the personal communications and informational materials exceptions. These proposals and the constitutional provisions that they could implicate are explored in a [second installment](#) of this two-part Sidebar.

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