

China's Expanded Export Controls Add Drama to the TikTok Saga, Could Trigger Unprecedented CFIUS Issues

AUGUST 31, 2020 • BY [HDEEL ABDELHADY](#) • [U.S.-CHINA TECH LAW & POLICY INSIGHTS](#)

On August 14, President Trump ordered ByteDance to divest its assets and interests in TikTok. What happens if ByteDance does not comply? The question may seem academic, given historical compliance with divestment orders and ByteDance's talks with U.S. companies about TikTok's sale. But a recent legal move by China—its expansion of a list of technologies that require government approval for export, including apparently in a sale of TikTok—renders real the issue of non-compliance with the August 14 divestment order, and potentially raises unprecedented issues.

On Friday, August 28, China took a page from the U.S. national security legal playbook and expanded its list of technologies subject to export controls.¹ According to reports, the expanded list includes technologies that would be transferred by ByteDance in a sale of TikTok to a U.S. party, to comply with President Trump's August 14 order mandating, among other actions, ByteDance to divest of all assets and interests "used to enable or support ByteDance's operation of the TikTok application in the United States."² The Order requires divestment by 90 days after August 14, with provision for a maximum extension of 30 days.³

ByteDance has been in talks with prospective U.S. buyers, including [Microsoft](#), [Oracle](#), and even [Walmart](#). It seemed that compliance with the August 14 Order was on course, until China expanded its export controls list to include technologies relevant to a sale of TikTok, such as "[personal information push services based on data analysis and artificial intelligence interactive interface technology](#)." ByteDance, [according to news sources](#), has stated that it will comply with China's expanded export restrictions. Such compliance could, and is likely to, delay the sale of TikTok (assuming all other circumstances remain unchanged). According to some observers, China expanded its export restrictions to [delay TikTok's sale](#), such as until after the U.S. presidential election. Or, perhaps, the legal move has more ambitious aims, such as to avoid a forced sale, a fire sale, or a sale all together.

China's expanded export rules, and the resulting requirement of Chinese government approval of, effectively, ByteDance's sale of TikTok, raises the prospect of an unprecedented scenario: that a foreign company ordered by a U.S. President to divest assets, pursuant to Section 721 of the Defense Production Act (**DPA**),⁴ does not comply with the divestment order on time or otherwise.

Compliance with Presidential blocking and divestment orders has been the historical norm.⁵ And while it is not unusual that the laws of another country would come into play in relation to a foreign investment transaction subject to CFIUS review or mitigation, it is unusual that the laws of another country would be implicated in a divestment scenario. Making matters more complex, and less

predictable, is the country in question: the U.S. government has labeled China a foreign adversary or rival, including in the Trump Administration's 2017 National Security Strategy. In prior cases of CFIUS-conducted national security reviews of foreign investment under the DPA (not Presidential blocking or divestment orders), approval from foreign authorities was required, and foreign legal processes played out without issue or conflict with U.S. law. For example, ChemChina's acquisition of Syngenta required European [antitrust approval](#) and [approval by China](#), and approvals were given after CFIUS cleared the transaction (this is not to suggest that CFIUS clearance was a prerequisite to other approvals).

In prior cases of U.S. blocking orders, such as President Obama's order regarding Aixtron, the blocked transactions were proposed acquisitions, and not concluded transactions subject to divestment orders.⁶ In cases of divestment, such as CFIUS' mandating of the divestment of the Grindr dating app by its former Chinese company owners—years after the Chinese company acquired the app—no foreign law conflicts or issues were known to have arisen. Nor were conflicting foreign laws at play in the *Ralls* divestment case.

So, what will happen if ByteDance does not, because of its compliance with Chinese law, complete divestment of covered TikTok assets in time or as otherwise required by the August 14 Order? Under ordinary circumstances, the United States would be expected to acknowledge the applicability of a foreign law and prerogative of a foreign sovereign, and permit the foreign legal process to play out (within reason). It is not at all clear that such comity would be extended here, at least not initially.

In such a scenario, would the Trump Administration attempt to force ByteDance's compliance with the divestment order, notwithstanding any obligation of ByteDance to comply with Chinese law? The Defense Production Act contemplates non-compliance with a divestment order and authorizes the President to, in his or her discretion, seek enforcement of a divestment order in the courts, through the Attorney General.⁷ Court-enforced compliance is one avenue.

Here, however, resort to the courts might not be necessary. The President's August 6, 2020 Order "banning" TikTok takes effect 45 days after the date of its issuance (*i.e.*, prior to the 90-day deadline for divestment). If the August 6, 2020 order takes effect as issued (*e.g.*, is not withdrawn, modified, or limited by license issuances),⁸ the operation of the August 6 Order would, it seems, effectively neutralize ByteDance's assets and interests in TikTok in and related to the United States.⁹

ByteDance and TikTok filed suit challenging the August 6 Order, and have asked the court to declare the Order unlawful or enjoin its implementation on a temporary basis.¹⁰ Should enforcement of the August 6 order be temporarily enjoined prior to its implementation date, and if such an injunction were to remain in effect by the date on which divestment is required under the August 14 Order, a non-compliance scenario could unfold on center stage.

The Trump Administration has used national security legal authorities (*e.g.*, sanctions, tariffs measures, and the DPA) aggressively and unconventionally. China's latest response to the Trump Administration's action potentially sets in motion yet another unconventional scenario: non-compliance with a divestment order issued under the DPA.

For more information about this piece or [MassPoint PLLC](#), please contact the author, [Hdeel Abdelhady](#). View MassPoint's U.S.-China technology law and policy publications [here](#).

NOTES

¹ This is not the first time China has mirrored U.S. national security-based measures. As MassPoint PLLC indicated last June, [China stated it might adopt national security-based rare earths export controls](#).

² “Order Regarding the Acquisition of Musical.ly by ByteDance Ltd.” Oddly, the August 14 document is not styled as an “Executive order,” but has the characteristics of an Executive order (e.g., it cites legal authority, requires publication in the Federal Register). President Trump’s [2017 order blocking the acquisition of Lattice Semiconductor](#) was similarly styled. President Obama’s [2016 order blocking the acquisition of Aixtron](#) was styled a “Presidential Order.”

³ The August 14 Order followed Executive Order 13942 of August 6, 2020, *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*. The August 6 Order prohibits “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zijié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest, as identified by the Secretary of Commerce.” ByteDance and TikTok filed suit in federal court challenging the August 6 Order. No legal challenge to the August 14 divestment Order has been made public (the parties are clearly in talks with and involving CFIUS).

⁴ 50 U.S.C. § 4565, as amended most recently by the Foreign Investment Risk Review Modernization Act of 2018 (FIRREA).

⁵ The known exception is *Ralls Corp. v. Committee on Foreign Investment in the United States*, a 2014 case in which Ralls, a Delaware company owned by Chinese nationals, was ordered by President Obama to divest four U.S. windfarm development companies. 758 F.3d 296 (D.C. Cir. 2014). Ralls raised a Due Process challenge to the CFIUS process that preceded President Obama’s divestment order, and the D.C. Circuit Court of Appeals concluded that Ralls had valid Due Process claims.

⁶ Aixtron was at the time a German company but was a “U.S. business” for CFIUS/Defense Production Act purposes because it was engaged in interstate commerce in the United States. The same was true of Syngenta, a Swiss company at the time of the ChemChina proposed acquisition.

⁷ Pursuant to the Defense Production Act, the “President may direct the Attorney General of the United States to seek appropriate relief, including divestment relief, in the district courts of the United States.” 50 U.S.C.A. § 4565(d)(3).

⁸ The August 6 Order contemplates the issuance of licenses by the Secretary of Commerce. This is standard in orders issued pursuant to the International Emergency Economic Powers Act.

⁹ Additionally, if the August 6 Order takes full effect 45 days after August 6, the Commerce Department would presumably have to approve any subsequent transactions effectuating the August 14 divestment order, as U.S. persons would, by the terms of the August 6 Order, be prohibited from engaging in “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zijié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest, as identified by the Secretary of Commerce.”

¹⁰ The ByteDance-TikTok complaint seeks a declaratory judgment that the August 6 Order is unlawful and unconstitutional, and seeks as well a preliminary or permanent injunction and other appropriate relief.