

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIKTOK INC., et al.,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United
States, et. al.,

Defendants.

Civil Action No. 1:20-cv-02658 (CJN)

MEMORANDUM OPINION

On May 15, 2019, acting pursuant to the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701–08, among other authorities, the President declared a national emergency relating to the “unrestricted acquisition or use in the United States of information and communications technology or services . . . supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries.” On August 6, 2020, the President invoked that national emergency declaration; determined that additional steps were necessary with respect to Plaintiffs TikTok and its Beijing-based parent company ByteDance; provided that certain transactions with ByteDance or its subsidiaries would be prohibited; and directed the Secretary of Commerce to identify the prohibited transactions within forty-five days. On September 18, 2020, the Secretary published a list of five transactions to be prohibited with respect to ByteDance and its operations within the United States, and on September 19, revised the implementation date for one of the sets of prohibitions and re-published the list of prohibited transactions.

The first of those five prohibitions goes into effect at 11:59 p.m. today. On September 18, 2020, Plaintiffs filed this lawsuit alleging that the prohibitions exceed the President's and Secretary's authority under IEEPA, violate the Administrative Procedure Act ("APA"), and are unconstitutional under the First and Fifth Amendments and the Takings Clause. On September 23, Plaintiffs moved for preliminary injunctive relief, arguing that they have a likelihood of success on their claims and that, absent an injunction, they will suffer irreparable harm. Pls.' Mem. Supp. Mot. Prelim. Inj., ECF No. 15-1, 15 ("Pls.' P.I. Mot."). For the reasons discussed below, Plaintiffs' Motion is granted as to the prohibition that takes effect tonight.

I. BACKGROUND

The United States has long used economic sanctions to prohibit transactions that threaten national security. In 1977, Congress enacted IEEPA, which provides peacetime authority to the President "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a). Once the President has declared such an emergency, the President is empowered to:

[R]egulate, direct and compel, nullify, void, prevent or prohibit, any . . . transfer . . . of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . with respect to any property, subject to the jurisdiction of the United States[.]

Id. § 1702(a)(1)(B).

On May 15, 2019, the President issued Executive Order 13873, *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 22689 (May 15, 2019) ("ICTS Order"). The President found that the widespread use of "communications technology"

that may be exploited by foreign adversaries was creating an “extraordinary threat to the national security . . . of the United States.” *Id.* The President therefore declared a national emergency with respect to that threat and determined to prohibit certain transactions with foreign countries or foreign nationals that pose risks to the national security of the United States. A year later, the President renewed that declaration, highlighting the pervasive threat posed by the close ties between China-based technology firms and the government of the People’s Republic of China (“PRC”). *See Continuation of the National Emergency With Respect to Securing the Information and Communications Technology and Services Supply Chain*, 85 Fed. Reg. 29321 (May 13, 2020).

On August 6, 2020, the President invoked his powers under IEEPA and the national emergency declared in the ICTS Order by identifying TikTok Inc. as a source of emerging threats given its foreign ownership. *See Exec. Order No. 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 Fed. Reg. 48637 (“TikTok Order”). TikTok is a short-loop video sharing app presently used by over 100 million Americans. Compl., ECF No. 1, ¶ 1. The President determined that TikTok “automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories.” TikTok Order.

The President concluded that TikTok’s foreign ownership and data collection pose a risk that the Chinese Communist Party (“CCP”) can “access . . . Americans’ personal and proprietary information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.” *Id.* He also concluded that there is a risk of the CCP using TikTok to “censor[] content that the [CCP] deems politically sensitive,” *id.*, and “for disinformation campaigns that

benefit the [CCP], such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus.” *Id.*

To mitigate those risks, the President directed the Secretary of the U.S. Department of Commerce to identify a list of prohibited transactions with “ByteDance . . . or its subsidiaries,” including TikTok. *Id.* at 48637–38. The President also separately ordered ByteDance to divest itself of TikTok’s U.S. operations, including any interest it might have in U.S. user data. *See Regarding the Acquisition of Musical.ly by ByteDance Ltd.*, 85 Fed. Reg. 51297 (Aug. 14, 2020) (“Divestment Order”).

Acting pursuant to the TikTok Order, on September 18, 2020, the Secretary of Commerce published a list of five sets of prohibited transactions. The Secretary later revised the implementation date for one of prohibitions. As a result, the list now prohibits:

1. Any provision of services, occurring on or after 11:59 p.m. eastern standard time on September 27, 2020, to distribute or maintain the TikTok mobile application, constituent code, or application updates through an online mobile application store[;]
2. Any provision of internet hosting services, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, enabling the functioning or optimization of the TikTok mobile application[;]
3. Any provision of content delivery network services, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, enabling the functioning or optimization of the TikTok mobile application[;]
4. Any provision of directly contracted or arranged internet transit or peering services, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, enabling the functioning or optimization of the TikTok mobile application[; and]
5. Any utilization, occurring on or after 11:59 p.m. eastern standard time on November 12, 2020, of the TikTok mobile application’s constituent code, functions, or services in the functioning of software or services developed and/or accessible within the land and maritime borders of the United States and its territories[.]

U.S. Dep't 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 Fed. Reg. 60061-01 (Sept. 24, 2020) (“Commerce Identification”).

Before issuing those prohibited transactions, the Secretary reviewed and relied on a decision memorandum that assessed the threats posed by ByteDance and TikTok. U.S. Dep't of Commerce, Mem. for the Sec'y, *Proposed Prohibited Transactions Related to TikTok Pursuant to Executive Order 13942* (Sept. 17, 2020), ECF No. 22-1 (“Commerce Memo”); *see also* Defs.’ Mem. Opp’n Pls.’ P.I. Mot., ECF No. 22, 2 (“Defs.’ Opp’n”). In particular, the Secretary of Commerce found that the PRC is “building massive databases of Americans’ personal information” to help the “Chinese government to further its intelligence-gathering and to understand more about who to target for espionage, whether electronically or via human recruitment.” Commerce Memo, ECF No. 22-1, 6.

The Secretary also found that the CCP will exploit “close ties” with ByteDance to further its foreign policy agenda. *See id.* 7–9. ByteDance is headquartered in Beijing and remains subject to the PRC’s National Intelligence Law, which “permits Chinese intelligence institutions” to “take control of” any China-based firm’s “facilities” and “communications equipment.” *See id.* at 10. ByteDance has signed a cooperation agreement with a PRC security agency, closed one of its media platforms in response to CCP demands, and (as of August 2020) placed over 130 CCP committee members in management positions throughout the company. *Id.* at 7, 11; *see also* Defs.’ Opp’n, ECF No. 22, 7–8. And because “ByteDance is subject to PRC jurisdiction, [and] PRC laws can compel cooperation from ByteDance, regardless of whether ByteDance’s subsidiaries are

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