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TikTok: Why we are suing the [Trump] administration

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TikTok is one of the fastest-growing video-sharing social networks in the United States and has led to Facebook-owned Instagram launching its own rival Reels product. Image credit: TikTok

By LUXURY DAILY NEWS SERVICE

TikTok, a Chinese-owned video-sharing social network, is increasingly popular with younger millennials and Gen Z consumers. It is also a rival to Facebook, Instagram and YouTube, and has run afoul of U.S. President Trump in his ongoing trade war with China.

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The president's executive order essentially ejecting TikTok from the United States has led to a lawsuit filed Aug. 24 against the U.S. federal government. Below is the letter in its entirety from TikTok explaining the rationale behind the lawsuit:

Today [Aug. 24] we are filing a complaint in federal court challenging the Administration's efforts to ban TikTok in the U.S. As a company we have always focused on transparency, so we want to explain why we are taking this step.

Over the past few years, people of all backgrounds have embraced the TikTok community. Today, 100 million Americans turn to TikTok for entertainment, inspiration, and connection; countless creators rely on our platform to express their creativity, reach broad audiences, and generate income; our more than 1,500 employees across the U.S. pour their hearts into building this platform every day, with 10,000 more jobs planned in California, Texas, New York, Tennessee, Florida, Michigan, Illinois, and Washington State; and many of the country's leading brands are on TikTok to connect with consumers more authentically and directly than they can elsewhere.

Put simply, we have a thriving community and we are grateful and responsible to them.

The Executive Order issued by the Administration on August 6, 2020 has the potential to strip the rights of that community without any evidence to justify such an extreme action, and without any due process. We strongly disagree with the Administration's position that TikTok is a national security threat and we have [articulated these objections previously](#).

Now is the time for us to act. We do not take suing the government lightly, however we feel we have no choice but to take action to protect our rights, and the rights of our community and employees.

In our complaint we make clear that we believe the Administration ignored our extensive efforts to address its concerns, which we conducted fully and in good faith even as we disagreed with the concerns themselves:

"The executive order seeks to ban TikTok purportedly because of the speculative possibility that the application could be manipulated by the Chinese government. But, as the U.S. government is well aware, Plaintiffs have taken extraordinary measures to protect the privacy and security of TikTok's U.S. user data, including by having TikTok store such data outside of China (in the United States and Singapore) and by erecting software barriers that help ensure that TikTok stores its U.S. user data separately from the user data of other ByteDance products. These actions were made known to the U.S. government during a recent U.S. national security review of ByteDance's 2017 acquisition of a China-based company, Musical.ly. As part of that review, Plaintiffs provided voluminous documentation to the U.S. government documenting TikTok's security practices and made commitments that were more than sufficient to address any conceivable U.S. government privacy or national security concerns ..."

The Administration ignored the great lengths that TikTok has gone to in order to demonstrate our commitment to serving the US market:

"The key personnel responsible for TikTok, including its CEO, Global Chief Security Officer, and General Counsel, are all Americans based in the United States and therefore are not subject to Chinese law. U.S. content moderation is likewise led by a U.S.-based team and operates independently from China, and, as noted above, the TikTok application stores U.S. user data on servers located in the United States and Singapore."

Further, as we note in our complaint, not only does the Executive Order ignore due process, it also authorizes the prohibition of activities that have not been found to be "an unusual and extraordinary threat," as required by the International Emergency Economic Powers Act (IEEPA), under which the Administration is purportedly acting:

"By banning TikTok with no notice or opportunity to be heard (whether before or after the fact), the executive order violates the due process protections of the Fifth Amendment."

"The order is ultra vires because it is not based on a bona fide national emergency and authorizes the prohibition of activities that have not been found to pose 'an unusual and extraordinary threat.'"

In the complaint we also point to the fact that the August 6 Executive Order is a misuse of IEEPA:

"... the actions directed in the August 6 executive order are not supported by the emergency declared a year earlier in Executive Order 13873."

"That previous executive order was designed to address asserted U.S. national security concerns about certain telecommunications companies' ability to abuse access to 'information and communications technology and services' that 'store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people.'"

"TikTok Inc. is not a telecommunications provider and it does not provide the types of technology and services contemplated by the 2019 executive order. Specifically, TikTok Inc. does not provide the hardware backbone to 'facilitate the digital economy,' and TikTok Inc. has no role in providing 'critical infrastructure and vital emergency services.'"

In the complaint we also go into significant detail about the nearly year-long effort we made in good faith to provide the Committee on Foreign Investment in the United States ("CFIUS") the voluminous information requested was disregarded and the numerous steps we offered to take in our commitment to transparency and cooperation:

"In 2019, CFIUS contacted ByteDance to consider whether to review its acquisition of Musical.ly, a China-based video-sharing platform even though Musical.ly was based in China and had very limited assets in the United States. This review was highly unusual in that ByteDance had acquired Musical.ly two years earlier in 2017, Musical.ly was previously Chinese-owned and based in China, and ByteDance had predominantly abandoned Musical.ly's limited U.S. assets by the time of CFIUS's outreach in 2019."

"During this period, and through the course of the CFIUS review, ByteDance provided voluminous documentation and information in response to CFIUS's questions. Among other evidence, ByteDance submitted detailed documentation to CFIUS demonstrating TikTok's security measures to help ensure U.S. user data is safeguarded in storage and in transit and cannot be accessed by unauthorized persons including any government outside the United States."

"CFIUS never articulated any reason why TikTok's security measures were inadequate to address any national security concerns, and effectively terminated formal communications with Plaintiffs well before the conclusion of the initial statutory review period. Notwithstanding the U.S. government's failure to identify any security risk, in an effort to address any conceivable concerns that the U.S. government may have and to assure continuity for the U.S. users who had come to value and cherish the platform that TikTok provides, Plaintiffs took the extraordinary step of offering to restructure their U.S. business ...

"Despite these repeated efforts and concrete proposals to alleviate any national security concerns, the agency record reflects that CFIUS repeatedly refused to engage with ByteDance and its counsel about CFIUS's concerns."

Finally, despite all of these efforts, without the standard communication appropriate in a CFIUS case, and with little regard to the mitigation proposals that TikTok had made, CFIUS rushed out its decision within five minutes of its deadline:

"At 11:55 p.m. on July 30, 2020 the final day of the statutory CFIUS review period the Committee issued a letter stating that 'CFIUS has identified national security risks arising from the Transaction and that it has not identified mitigation measures that would address those risks.'

"The CFIUS letter was principally based on outdated news articles, failed to address the voluminous documentation that Plaintiffs had provided demonstrating the security of TikTok user data, and was flawed in numerous other respects."

Likewise, in the August 6 Executive Order issued under IEEPA, the Administration failed to follow due process and act in good faith, neither providing evidence that TikTok was an actual threat, nor justification for its punitive actions. **We believe the Administration's decisions were heavily politicized, and industry experts have said the same.** As the complaint explains:

"The executive order is not rooted in bona fide national security concerns. Independent national security and information security experts have criticized the political nature of this executive order, and expressed doubt as to whether its stated national security objective is genuine ...

"The President's demands for payments have no relationship to any conceivable national security concern and serve only to underscore that Defendants failed to provide Plaintiffs with the due process required by law."

To be clear, we far prefer constructive dialogue over litigation. But with the Executive Order threatening to bring a ban on our US operations eliminating the creation of 10,000 American jobs and irreparably harming the millions of Americans who turn to this app for entertainment, connection, and legitimate livelihoods that are vital especially during the pandemic we simply have no choice.

We will continue the work we have long been undertaking to earn the trust of our full US community. For example, **our Transparency and Accountability Center** is central among those ongoing efforts as an industry-leading step to build trust and understanding of our moderation policies, source code, and data practices. Our legal challenge is a protection to ensure that these efforts can take place without the threat of an unwarranted ban hovering like a dark cloud over the joy and creativity of our community.