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Technology

Trump's Bid to Force TikTok Sale Follows Well-Trod Legal Path

By David McLaughlin

President Donald Trump's push for the sale of TikTok to a U.S. company marks a major escalation in his battle to keep data on American citizens out of Chinese hands and a move that, if successful, would be nearly impossible to overturn under U.S. law.

Trump's demand has set off a geopolitical tug-of-war, but it has ample precedent. The administration has required at least three previous Chinese investments in U.S. companies to be unwound on national security grounds after they closed. Each involved data security.

Those decisions followed investigations by the Committee on Foreign Investment in the U.S., or Cfius, an interagency panel led by the Treasury Department that reviews acquisitions of American businesses by overseas investors and can recommend the president block and unwind deals to protect national security.

U.S. government decisions to block and unwind deals on national security grounds are all but impossible to overturn in court. The law that governs Cfius investigations says presidential findings "shall not be subject to judicial review." Only one company has ever challenged a Cfius determination and the case was ultimately settled after the federal appeals court in Washington said the company was entitled to see the unclassified information the committee used.

End of Story

“Essentially what the committee and the president decide is the end of the story,” said Brian Fleming, a lawyer at Miller & Chevalier who previously worked in the Justice Department’s national security division. “They could spend a lot of time and money to litigate but there’s an extraordinarily low likelihood of success in challenging something like this,” Under Trump, Cfius has become more aggressive toward Chinese investment and is using new authority granted by Congress in 2018 to scrutinize deals, particularly those involving companies like TikTok that collect data on Americans. Cfius typically reviews acquisitions before they close but it can also look back at completed deals when companies never filed for approval from the panel.

Cfius’s investigation of TikTok stems from the 2017 purchase by China’s ByteDance Ltd. of Musical.ly, an app which did business in the U.S and was later folded into TikTok. Now, Microsoft is in talks to buy TikTok’s operations in the U.S., Canada, Australia and New Zealand, and the company said it’s aiming to complete the deal no later than Sept. 15.

“It sounds like Microsoft is along the way of doing something,” Trump told reporters Tuesday.

“I don’t blame them. It’s a great company,” he said of TikTok. “It’s really a great company, but we cannot take the security risk.”

Given U.S. policy of openness to foreign investment, Cfius typically tries to negotiate mitigation agreements with companies to protect national security while allowing a deal to proceed. But these days the government is less willing to do that when it comes to Chinese investment, said Aimen Mir, a lawyer at Freshfields Bruckhaus Deringer in Washington.

“Openness to Chinese investment right now is at an all-time low because there’s a perception that openness to investment isn’t generating reciprocal treatment in China,” said Mir, a former deputy assistant secretary for investment security at the Treasury Department. “If there’s a material risk, there’s a lot less appetite to mitigate it.”

While the data about what videos users are watching may not be that sensitive, Cfius may be concerned about other information on a person’s phone and whether

the app can gain access to it. The White House has said it's concerned that ByteDance could be compelled to hand over American users' data to Beijing or use the app to influence the 165 million Americans, and more than 2 billion users globally, who have downloaded it.

TikTok says U.S. user data is stored in the U.S. with strict controls on employee access.

“This is emblematic of the increasing focus of Cfius on U.S. data-privacy considerations,” said Fleming.

TikTok isn't the first Chinese-owned company to spark concerns by the administration over data. Last year, the panel required Beijing Kunlun Tech Co. to sell the gay-dating app Grindr under an agreement that also prohibited the company from accessing information about Grindr's users.

Cfius also forced China-based iCarbonX to unwind an investment in PatientsLikeMe, a platform that allows people with the same diseases to connect and share information. And in March, Trump ordered Beijing Shiji Information Technology Co. to sell StayNTouch Inc., a hotel property management software company. The order prohibited the Chinese company from accessing hotel guest data through StayNTouch.