

## TikTok Ban on Government Contractors' Devices

In recent years, TikTok has become one of the most popular social media apps in the United States, with more than 150 million users,<sup>i</sup> and the most popular smartphone app in the United States.<sup>ii</sup> Despite its widespread popularity in the United States, TikTok has come under regulatory scrutiny due to data security concerns relating to its Chinese parent, ByteDance, and the United States government has even threatened to ban the TikTok app nationally if ByteDance does not sell the app.<sup>iii</sup>

While no national ban has been introduced, the government has now made it more difficult for government contractors whose employees use TikTok by introducing regulations to implement a federal statute that prohibits the use of TikTok on devices used by government contractors. In particular, an interim rule implementing section 102 of Division R of the Consolidated Appropriations Act, 2023 (Pub. L. 117-328), entitled the “No TikTok on Government Devices Act,” became effective as of June 2, 2023.<sup>iv</sup> This new rule has the effect of prohibiting government contractors and their employees from having TikTok on any device that is used for government work. Any business or nonprofit engaged in government contracting needs to take note of this new regulation.

In order to carry out the congressional purpose behind the plan, government contracting officers are required to include a clause set out at [FAR 52.204-27, Prohibition on a ByteDance Covered Application](#), in all solicitations issued on or after the effective date.<sup>v</sup> The “Prohibition on a ByteDance Covered Application” clause prohibits any information technology “used or provided by the contractor under a contract, including equipment provided by the contractor’s employees” from having or using TikTok or any successor applications to TikTok that are developed or provided by ByteDance Limited, or another entity owned or managed by ByteDance Limited.<sup>vi</sup> This includes the presence of URLs associated with TikTok, even if the device does not actually have the TikTok application downloaded.<sup>vii</sup> In other words, TikTok videos cannot be watched on a web browser. Additionally, contractors must include the same clause in all subcontracts, and ensure subcontractors also do not use TikTok on information technology that is used or provided by the subcontractor.

The interim rule provides that by July 3, 2023, the clause must be implemented by amendment into solicitations issued before the effective date if the contract award occurs after the effective date, and by modification into existing indefinite-delivery contracts and when exercising an option or otherwise extending the period of an existing contract.<sup>viii</sup>

There are very limited exceptions to this clause available for law enforcement activities, national security interests and activities, and security research, as outlined in [Office of Management and Budget Memorandum M-23-13](#).<sup>ix</sup>

The rule uses the statutory definition of “information technology,” which means equipment or systems used to send, receive, store, analyze, or otherwise involving data or information from an executive agency, used as required by a contract, to a significant extent to perform the contract, and includes imbedded information technology.<sup>x</sup> The prohibition applies to devices used by contractors under a contract, regardless of whether the device is owned by the government, the contractor, or an employee of a contractor.<sup>xi</sup> However, a personally-owned

cell phone that is completely separate from the performance of the contract, or equipment acquired incidental to a federal contract, is not subject to the prohibition.<sup>xii</sup>

The implementing guidance provides that contractors will be afforded “adequate time to comply with the clause.”<sup>xiii</sup> The rule does not require contractors to review their supply chains or submit compliance reports. Contractors are expected to “leverage existing technology, policies, and procedures” to prohibit the presence or use of TikTok on devices used under a government contract.<sup>xiv</sup> However, failing to comply with the provision will likely be treated as a breach of the contract. There is also the risk that intentional non-compliance can give rise to the initiation of a case under the False Claims Act, which is frequently invoked when there are misrepresentations made by government contractors.<sup>xv</sup>

In short, government contractors in the process of making submissions should be aware that the clause at FAR 52.204-27 will be included in their contract. As a result, now is a good time to review your internal technology and security policies to ensure that you can comply with the prohibition. It is also a good time to review your subcontractor contracts to ensure that the clause is implemented there as well.

**Written comments for consideration in the formation of the final rule are due on or before August 1, 2023.**

The current rule discussed above is only an interim rule. Before the final rule is implemented, there are several open questions that will need to be resolved, including:

- What equipment is considered “incidental” to a federal contract? For example, would the ban cover devices only used to take occasional calls regarding the contract?
- What government contractor employees are covered? For example, does the rule cover administrative employees providing human resources, accounting, or other work that merely touches a government contract?
- How will this rule be enforced? Will fines or other penalties be imposed for non-compliance?

It seems inevitable that there will be court challenges to the scope of this rule, given that its reach seems to go far beyond what would be necessary to protect the government’s data security. However, it may prove difficult to challenge in court because the rule is purportedly a national security measure crafted to protect government information and communication technology systems. Policies put in place for national security reasons are often difficult to challenge due to the executive branch’s wide discretion over national security. It is also possible that TikTok will eventually be sold by ByteDance—whose owners include many global investment firms that might wish to exit the investment before more restrictive statutes or regulations are introduced.<sup>xvi</sup> If that happens, then this entire problem could disappear in as little time as it takes to watch an amusing, trendsetting TikTok video.

- <sup>i</sup> *Celebrating Our Thriving Community of 150 Million Americans*, TIKTOK (Mar. 21, 2023), <https://newsroom.tiktok.com/en-us/150-m-us-users>.
- <sup>ii</sup> Sara Fischer, *TikTok's Popularity Complicates Possible U.S. Ban*, AXIOS (Mar. 22, 2023), <https://www.axios.com/2023/03/22/tiktok-popularity-us-ban-congress>.
- <sup>iii</sup> Sara Fischer & Ashley Gold, *U.S. Tells TikTok Owners to Sell App or Face a Ban*, AXIOS (Mar. 15, 2023), <https://www.axios.com/2023/03/16/us-tells-tiktok-ban-sale-cfius>.
- <sup>iv</sup> Federal Acquisition Regulation: Prohibition on a ByteDance Covered Application, 88 Fed. Reg. 36430-02 (June 2, 2023).
- <sup>v</sup> *Id.*
- <sup>vi</sup> *Id.*
- <sup>vii</sup> *Id.*
- <sup>viii</sup> *Id.*
- <sup>ix</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMO. M-23-13, "NO TIKTOK ON GOVERNMENT DEVICES" IMPLEMENTATION GUIDANCE (2023), available at [https://www.whitehouse.gov/wp-content/uploads/2023/02/M-23-13-No-TikTok-on-Government-Devices-Implementation-Guidance\\_final.pdf](https://www.whitehouse.gov/wp-content/uploads/2023/02/M-23-13-No-TikTok-on-Government-Devices-Implementation-Guidance_final.pdf).
- <sup>x</sup> 40 U.S.C. §11101(6).
- <sup>xi</sup> Prohibition on a ByteDance Covered Application, 88 Fed. Reg. 36430-02.
- <sup>xii</sup> *Id.*; 40 U.S.C. §11101(6).
- <sup>xiii</sup> Prohibition on a ByteDance Covered Application, 88 Fed. Reg. 36430-02.
- <sup>xiv</sup> *Id.*
- <sup>xv</sup> *The False Claims Act*, U.S. DEP'T. JUST. CIV. DIV., <https://www.justice.gov/civil/false-claims-act> (updated Apr. 4, 2023).
- <sup>xvi</sup> Fischer & Gold, *supra* note iii.

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[Harry Sandick](mailto:hsandick@pbwt.com)  
[Justin Zaremby](mailto:jszaremy@pbwt.com)  
[Erika K. Birk](mailto:ebirk@pbwt.com)

212.336.2723  
212.336.2194  
212.336.2670

[hsandick@pbwt.com](mailto:hsandick@pbwt.com)  
[jszaremy@pbwt.com](mailto:jszaremy@pbwt.com)  
[ebirk@pbwt.com](mailto:ebirk@pbwt.com)

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Patterson Belknap Webb & Tyler LLP  
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New York, NY 10036-6710  
212.336.2000  
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