COLLECTIVE INTELLIGENCE

US TikTok Law's Business Implications:

Companies Engaged with China Should Reassess Investment Strategy, Operational Risk and Compliance Requirements

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US President Joe Biden has signed a bill that mandates a significant restructuring of TikTok's operations in the United States, driven by concerns from US lawmakers and intelligence agencies about potential foreign surveillance and data privacy breaches. The new law also addresses apprehensions about algorithm-based influence operations that could manipulate public opinion or political processes. The law requires ByteDance, TikTok's parent company, to either completely divest its US operations or face a total ban on the platform's activities within the US market. This move may influence future US policies concerning foreign technology firms operating in the country, resulting in complex legal, commercial and diplomatic concerns.

This development carries significant implications for businesses, especially those engaged with China or the global technology sector. It prompts a need to reassess investment strategies, operational risks and compliance requirements. Companies can benefit from guidance on how to adapt to changing US cybersecurity and data sovereignty laws. This includes preparing for how these regulatory changes might affect international trade and their operations.

Geopolitical Context & Concerns

The law was passed during a time of intense competition between the United States and China, driven by numerous concerns by US lawmakers, including China's military maneuvers in disputed areas like the South China Sea and the Taiwan Strait, its failure to denounce Russian aggression in Ukraine while allegedly supporting Russia's military efforts, and worries about misinformation and disinformation as the 2024 US presidential election approaches.

For TikTok in particular, escalating worries about data privacy, cybersecurity and national sovereignty are at the forefront, led by the fear that ByteDance could potentially share sensitive information about US TikTok users with the Chinese government. US intelligence agencies and the FBI have highlighted the risks of the Chinese government compelling ByteDance under its national security laws—such as the National Intelligence Law of 2017 and the Cybersecurity Law—to assist in state intelligence efforts, raising alarms about data misuse and surveillance.

The US government views the control of operations of significant Chinese companies like ByteDance as crucial to protecting national security interests. Such protective measures align with previous US actions against Chinese tech giants like Huawei and ZTE, which were banned from US critical infrastructure for similar reasons. These actions are part of a larger strategy that includes the Biden administration's investigation into security risks associated with connected vehicles and its directive to replace Chinese-made cranes at US ports, illustrating a comprehensive approach to mitigate potential vulnerabilities.

The US Justice Department has also taken steps to prevent bulk data transfers to China, further tightening control over sensitive information. As ByteDance potentially prepares to challenge this new legislation, it sets the stage for a complex legal battle that could influence future policies on foreign technology firms and their operations within US borders.

Details of the Law

As part of a larger foreign aid package to Israel, Ukraine and Taiwan, President Biden signed the 21st Century Peace through Strength Act (H.R. 8038) into law last week, mandating a timeline for TikTok to divest from its Chinese parent company, ByteDance. While the implications for this new law are wide-ranging, below are the details of this legislation.

Divestment Requirements

- ByteDance is required to divest all its interests in TikTok's US operations. This divestiture must be completed within a 270-day period.
- The legislation provides for a possible extension of up to 90 days, granting the president the authority to prolong the initial timeline if ByteDance shows substantial progress toward achieving a divestiture agreement within the prescribed period.
- Criteria for assessing progress include, but are not limited to, engagement in good faith negotiations with potential buyers, compliance with preliminary regulatory requirements and transparent communication with US oversight entities.

Consequences of Non-Compliance

- Should ByteDance fail to meet the divestiture deadline, and if no extension is granted, TikTok will face a comprehensive ban across the United States.
- This ban would involve the removal of TikTok from all US app stores, prohibiting new downloads and potentially restricting access to the TikTok service for existing users.
- The ban would also prevent US-based web hosting services from supporting TikTok's operations.
- A ban would disrupt the availability of TikTok to its estimated 170 million American users, affecting content creators, consumers and businesses leveraging the platform for marketing and community engagement.

Reaction to Bill's Passage

TikTok's Response

TikTok has voiced its intention to challenge the law in court as violating First Amendment protections. Anticipating a prolonged legal battle, TikTok will likely seek a preliminary injunction to delay the law's implementation while contesting its constitutionality. Concurrently, TikTok might enhance its lobbying efforts to influence public and political opinion by stating its commitment to protecting US user data and emphasizing its role in the daily lives of millions of Americans. Should these efforts block the divestiture, TikTok could consider selling its US operations to a domestic company, resulting in negotiations to maintain influence over its algorithm.

China's Response

Following the bill's signing, China's Ministry of Foreign Affairs Spokesperson Wang Wenbin said during a regular press briefing, "My colleagues and I, as well as the spokesperson for China's Ministry of Commerce, have previously explained China's principled position on the US Congress's passage of the bill concerning TikTok." The Chinese government has previously denounced the legislation mandating TikTok's divestiture, viewing it as a violation of international trade norms.

The Chinese government's response to TikTok's ban is likely to lead to one of three possible outcomes:

1. **Blocking the sale of TikTok, citing national security concerns.** This is the most likely action the government would take, resulting in the app's total ban in the United States.
2. **Allowing the sale of TikTok without its critical algorithm.** This move by the Chinese government is a more probable scenario; however, it complicates the potential sale to US buyers as it significantly erodes TikTok's enterprise value, given how essential the algorithm is to the platform.
3. **Permitting ByteDance to sell TikTok, including its algorithm.** This action is the least probable due to China's Ministry of Commerce placing the platform's algorithm on an export control list.

International Community's Response

The response to the US TikTok ban has varied, with several countries, like the United Kingdom and Canada, remaining cautious about prohibiting the app altogether despite already restricting TikTok's use on government devices. Experts are quickly turning to the European Union to see if it will follow; however, its approach has consistently differed from that of the United States.

Leveraging GDPR (General Data Protection Regulation) and the Digital Services Act (DSA), European leaders have not been as aggressive towards social media platforms. Recommendations & Next Steps

Given this new law, businesses should continue to monitor the situation and consider the following risks and opportunities that might present themselves as the divestiture process commences.

Considerations & Next Steps

- **Chinese companies operating in the United States will face increased scrutiny.** This could involve more investigations into data handling practices and corporate governance structures. Consequently, they may need to significantly enhance their compliance frameworks to align with heightened regulatory expectations.
- **Companies should monitor legal developments.** Staying informed will enable businesses to anticipate and respond to shifts in the policy landscape that could affect their operations. Brunswick's team of experts is available to inform you of key developments and provide insights into what this means for you now and in the future.
- **Executives should assess whether they need to update their risk management strategies.** This includes establishing contingency plans that enable swift responses to sudden market changes or regulatory updates, ensuring business continuity and protecting critical assets and data. Brunswick is also here to lend its expertise on the policy and regulatory front, with insights on how best to anticipate and prepare for a quickly changing operational and reputational landscape.

For more information on the passage of this recent piece of legislation and the broader US-China relationship, please contact the ***Brunswick Group's China Hub***, ***Geopolitical Practice*** *or* ***US Public Affairs, Policy & Regulatory Practice.***