



## **Contracts Corner: Is It Time to Rein in Your Company's TikTok Influencers?**

**Commercial and Contracts**

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Is it time to rein in your company's social media influencers from posting to TikTok? Given that a TikTok ban seems imminent it may be a good time for in-house counsel to dust off their stack of influencer agreements and double check that they contain appropriate provisions if the ban becomes effective. This article provides an overview of the law concerning the TikTok ban, data points on TikTok's marketing lure and options for in-house counsel to consider if the TikTok ban becomes effective on January 19, 2025.

Last week the US Supreme Court nodded in the direction of upholding the [federal law banning TikTok](#), unless it divests from its parent company ByteDance starting on or before January 19, 2025. The Justices will be deciding whether the law that effectively bans TikTok in the United States due to national security risks supersedes the First Amendment rights of free speech, namely those of TikTok content creators and the 170 million Americans who regularly use the social media platform.

In April 2024, Congress passed the Protecting Americans from Foreign Adversary Controlled Applications Act (Act). The Act requires TikTok's parent company, ByteDance, to sell the social media platform to an approved US-based buyer by January 19, 2025. Specifically, the Act provides that if TikTok is not sold within that timeframe, it will be unlawful for app stores in the United States to distribute, maintain, or update the platform.

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By way of background, ByteDance is a Chinese technology conglomerate that purchased the karaoke app, Musical.ly, back in 2017 and relaunched it as TikTok. Shortly thereafter United States' national security officials began raising concerns, including assertions that the Chinese government may manipulate content that US viewers see on TikTok and might demand access to Americans' sensitive data that the TikTok app collects. Nonetheless, in the interim, TikTok's popularity has soared. It's become the short-form video sharing app of choice with [59 percent of American adults under 30 confirming they use the app](#), according to the Pew Research Center, with many relying on it as a news source. With these numbers, TikTok's viability as a marketing channel seems nonpareil and hence the reason companies leverage TikTok influencers to promote their brands.

## 5 contract provisions to review before the ban goes into effect

Dig out your company's influencer agreements and take note of the provisions you may rely on to rein in your company's influencers from posting to TikTok if the ban happens. As noted in my ACC Docket article, [4 Key Aspects of Influencer Agreements](#), services agreements generally require the service provider to comply with all applicable laws; influencer agreements are no exception. So this type of provision should be in your company's influencer agreement and one that you may point out to your influencer in this situation.

In addition, clauses like the following will help counsel substantiate their request that the influencer cease posting content concerning your company, its brands, its goods, or its products to TikTok.

1. Compliance with Applicable Law. If the TikTok ban becomes effective, then counsel may seek to halt the influencer from posting content to TikTok by relying on their agreement's compliance with all applicable laws provision. Such as a provision like:

*Each party shall comply with all applicable laws, rules and regulations concerning their performance of their respective obligations under this Agreement.*

2. Representations and Warranties. Generally, the terms of an influencer agreement will include certain representations and warranties, so counsel may rely on such provisions to require the influencer to halt activities. For example, a clause like:

*Influencer represents and warrants that it has not engaged and will not engage in activities or conduct injurious to the reputation of the Company or inconsistent with the positive images and/or goodwill to which the Company wishes to associate.*

3. Take Down Requirement. As described in my ACC Docket article, [4 Key Aspects of Influencer Agreements](#), the company should have the right to request and enforce an immediate takedown of any of the influencer's posts. So, this will be a useful clause for counsel to rely on if the ban takes effect. For example, a clause like:

*Company has the right to request and enforce an immediate takedown of any of the influencer's posts, which the company — in its sole discretion — considers to be offensive, damaging to the brand, not aligning with company policies, not complying with applicable laws and guidelines, advocating illicit activities, inciting violence, or endorsing a political viewpoint.*

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4. Termination + Cease Use of Company Trademarks. Counsel may elect to terminate the influencer agreement by relying on its termination for convenience right and, together with the trademark rights provision, require the influencer to stop using the Company name, logo, etc. For example, a provision like:

*Company may terminate this Agreement for any or no reason upon written notice to Influencer and upon such termination all rights granted to the influencer concerning the use or display of the company's brand, products, name, trademarks, hashtags and the like must immediately cease.*

5. Injunctive Relief. If counsel knows or has reason to believe that the influencer may continue to post Company-specific content to TikTok after the ban becomes effective, then counsel may rely on an injunctive relief provision and seek to obtain an injunction accordingly. Such as a provision like:

*The Parties agree that there may be no adequate remedy at law if there is a breach or threatened breach of the agreement by one Party and, accordingly, that either Party is entitled (in addition to any legal or equitable remedies available to such Party) to seek injunctive or other equitable relief without the necessity of proof of actual damages to prevent or remedy such breach.*

## **Consider proactively amending influencer agreements**

Given the likelihood of the TikTok ban, as well as the ever-changing social media landscape, counsel may want to consider proactively amending the company's current influencer agreements to include provisions that offer flexibility if a social media platform becomes unavailable due to changes in law or regulation, or otherwise.

For example, a provision that allows for an alternative platform for social content delivery, like:

*"In the event that the social media platform originally agreed upon by the Parties for social content delivery hereunder ("Original Platform") becomes unavailable, whether due to a change in law or regulation, a widespread technical failure, or a discontinuation of service, the Parties shall, [at the Company's discretion], mutually agree in writing to an alternative social media platform for social content delivery that meets the same or comparable audience reach and engagement level as the Original Platform ("Alternative Platform"). Upon mutual written agreement, the Alternative Platform shall be substituted for the Original Platform for the purpose of this Agreement, and all obligations related to the delivery of social content shall apply to the Alternative Platform in the same manner as applied to the Original Platform, except to the extent otherwise agreed upon in writing by the Parties. If the Parties are unable to reach mutual agreement on an Alternative Platform within thirty (30) days of the Original Platform unavailability, Company may terminate this Agreement upon written notice to Influencer."*

These clauses provide both flexibility and continuity for the company and its influencers, and can be particularly important for the company's significant brand partnerships with celebrity influencers. Counsel likely will want the company to maintain control concerning the decision whether to shift to an alternative platform or terminate the agreement and, if so, that aspect should be specified. Now is also a good time for counsel to examine the *force majeure* clauses of their company's influencer

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agreements, which, if drafted broadly, may excuse performance in the event of a legal or regulatory change rendering performance impossible, and reach out to key influencer partners to renegotiate content delivery terms, as appropriate.

Lastly, in light of the possible TikTok ban, companies running sweepstakes or contests on TikTok, on their own or in partnership with an influencer, should check the Official Rules drafted and publicized by the company, which serve as governing terms as between the company and the people entering the contest, to determine how to proceed and ensure compliance with applicable state regulations and federal law.

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For example, Florida and New York require online sweepstakes that offer prizes over a specific value to be registered with the state, and for the company to submit winner's lists for registered sweepstakes. Counsel may consider whether there are terms in their Official Rules, like a Force Majeure or "void where prohibited" clause, that may excuse the company from fulfilling its sweepstakes-related obligations if TikTok is banned. Potential resolutions will vary depending on the specifics of each sweepstakes or contest, so counsel should work with their company's internal marketing or promotions teams to mitigate impacts and document the resolution in each instance. Counsel may also consider updates to their company's Official Rules templates, if necessary, to include terms that clarify the company's options and obligations if a change in law or regulation renders it impossible or unlawful to carry out the sweepstakes or contest.

Given that the Supreme Court is expected to rule on this matter in the coming days, if the TikTok ban goes into effect, corporate counsel now have had a refresher on the provisions in its company's influencer agreements that will enable counsel to require its influencers to cease posting on TikTok, and to adapt to the ever-changing social media landscape.

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