

**Florida Bar Business Law Section
Computer Law and Technology Committee
Hot Topics**

*September 2, 2020 Meeting
Prepared by CTLC Leadership*

1) Executive Order (EO) Addressing TikTok and its Parent Company, ByteDance:

- On August 6, an Executive Order (EO) was addressing national security interests related to mobile applications developed and owned by companies in China. The EO states that action must be taken “to address the threat posed by one mobile application in particular, TikTok,” and the company’s data collection (e.g. location and browsing history) along with purported data sharing with the Chinese government.
- The EO includes a prohibition, beginning 45 days after the date of the order, of any transaction with ByteDance or its subsidiaries. The EO was issued under authority of the International Emergency Economic Powers Act, authorizing executive branch regulation of international commerce after declaration of a national emergency in response to an unusual and extraordinary threat to national security.
- On August 14, an additional EO was issued, providing ByteDance 90 days to divest all interests and rights in its US assets and any data that TikTok gathered in the US.
- On August 24, TikTok and ByteDance, filed a complaint for injunctive and declaratory relief in the Federal District Court for the Central District of California. The complaint alleges that the EO was not based on a bona fide national security concern and, instead, was based on political agenda. The complaint further alleges that the EO violates the Plaintiffs’ constitutional protections, including due process and First Amendment rights.

2) Court of Justice of the European Union (CJEU) Case C-311/18 – Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems (aka Schrems II)

- This decision arises from an Irish citizen challenging Facebook on the legal mechanism for its data transfer of data subjects’ personal data to the US.
- The Court invalidated the EU-US Privacy Shield as a legal means for cross-border transfer of personal data under GDPR. The EU-US Privacy Shield was a self-certification framework companies utilized as a legal means to permit such cross-border data transfer. The Court reasoned that the Privacy Shield did not include satisfactory limitations in order to ensure EU personal data was protected from access and use by US public authorities on the basis of US domestic law, particularly US surveillance laws like FISA 702.
- The Court reaffirmed Standard Contractual Clauses (SCCs) as a valid means for cross-border transfer of EU personal data. SCCs are a standard set of data transfer contractual clauses issued by the EU Commission. The Court emphasized the obligations in the SCCs that require the data importer and data exporter in a cross-border transfer of EU personal data to consider

whether the data importer's legal system establishes an essentially equivalent level of protection for the data.

3) The US National Institute of Standards and Technology (NIST) Publishes a Draft Report on the “Four Principles of Explainable Artificial Intelligence:”

- On August 18, 2020, NIST published a draft report (Draft NISTIR 8312) proposing a set of principles regarding the “explainability” of decisions made by artificial intelligence (AI) systems. Explainability refers to the idea that the reasons behind AI system outputs should be understandable. The NIST draft report was motivated by the growing complexity of AI systems and requirements in regulations, such as FCRA and EU GDPR, that address automated decision-making.
- According to the draft report, the Four Principles for Explainable AI are:
 - *Explanation*: AI systems should deliver accompanying evidence or reasons for all their outputs.
 - *Meaningful*: Systems should provide explanations that are meaningful or understandable to individual users. The Meaningful principle allows for explanations that are tailored to each of the user groups.
 - *Explanation Accuracy*: The explanation correctly reflects the system's process for generating the output.
 - *Knowledge Limits*: The system only operates under conditions for which it was designed or when the system reaches a sufficient confidence in its output. If a system has insufficient confidence in its decision, it should not supply a decision to the user.
- The draft report is intended to encourage input on what should be expected in decision-making devices and is part of a broader NIST effort to develop trustworthy AI systems. NIST has sought input on the draft from experts in engineering, psychology, computer science, and law.