

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TIKTOK INC.,

and

BYTEDANCE LTD.,

Petitioners,

v.

THE COMMITTEE ON FOREIGN
INVESTMENT IN THE UNITED STATES,

STEVEN T. MNUCHIN, in his official
capacity as Secretary of the Treasury and
Chairperson of the Committee on Foreign
Investment in the United States,

DONALD J. TRUMP, in his official
capacity as President of the United States,

and

WILLIAM P. BARR, in his official capacity
as United States Attorney General,

Respondents.

No. _____

PETITION FOR REVIEW

Pursuant to Section 721 of the Defense Production Act (50 U.S.C.

§ 4565(e)(2)) and Rule 15(a) of the Federal Rules of Appellate Procedure,

TikTok Inc. and ByteDance Ltd. hereby petition this Court for review of the Presidential Order Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51,297 (Aug. 14, 2020) (the “Divestment Order”), and the related action of the Committee on Foreign Investment in the United States (“CFIUS”), including its determination to reject mitigation, truncate its review and investigation, and refer the matter to the President (collectively, the “CFIUS Action”).¹ This Court has original and exclusive jurisdiction to hear Petitioners’ challenges. 50 U.S.C. § 4565(e)(2); *see also Ralls Corp. v. CFIUS*, 758 F.3d 296, 311 (D.C. Cir. 2014); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327–28 (D.C. Cir. 1996).

The Divestment Order and the CFIUS Action seek to compel the wholesale divestment of TikTok, a multi-billion-dollar business built on technology developed by Petitioner ByteDance Ltd. (“ByteDance”), based on the government’s purported national security review of a three-year-old transaction that involved a *different business*. This attempted taking

¹ A copy of the Divestment Order and CFIUS’s July 30, 2020 letter to Petitioners memorializing the CFIUS Action are attached to this Petition.

exceeds the authority granted to Respondents under Section 721, which authorizes CFIUS to review and the President to, at most, prohibit a specified “covered transaction” to address risks to national security created by that transaction. Here, that covered transaction was ByteDance’s acquisition of the U.S. business of another Chinese-headquartered company, Musical.ly—a transaction that did *not* include the core technology or other aspects of the TikTok business that have made it successful and yet which the Divestment Order now seeks to compel ByteDance to divest.

The Divestment Order and CFIUS Action are also unlawful in other respects. They violated the Due Process Clause because they prematurely terminated the review to which Petitioners were entitled and denied them a meaningful hearing. The CFIUS Action violated the Administrative Procedure Act because the agency failed to adequately explain its decision and did not take account of the alternative mitigation proposals submitted by Petitioners. Finally, the forced divestment of Petitioners’ business without fair compensation would constitute an unlawful taking under the Fifth Amendment.

To facilitate this Court’s consideration of this Petition for Review, Petitioners summarize the pertinent factual background and the legal claims they intend to raise.²

Background and Nature of Proceedings

A. CFIUS’s Authority Over Certain “Covered Transactions”

1. CFIUS is an interagency committee authorized under Section 721 to “review” and “investigat[e]” a “covered transaction” to determine its effects on national security.³ 50 U.S.C. § 4565(b)(1)(A)–(B). Congress defined a “covered transaction” to include “[a]ny merger, acquisition, or

² Because Congress established the original and exclusive jurisdiction of this Court over CFIUS petitions for review recently, in 2018, Pub. L. No. 115-232, sec. 1715(2), 132 Stat. 1636, 2191, (50 U.S.C. § 4565(e)(2)), Petitioners are filing a Petition for Review that is more detailed than may be required by Federal Rule of Appellate Procedure 15(a) to provide background on the statutory and regulatory scheme and factual allegations. *See Am. Paper Inst. v. ICC*, 607 F.2d 1011, 1012 (D.C. Cir. 1979) (per curiam). Petitioners reserve their rights to raise additional facts and arguments in the briefing on the merits. *See, e.g., CropLife Am. v. EPA*, No. 02-1057, 2002 WL 1461788, at *1 (D.C. Cir. July 8, 2002) (per curiam).

³ Section 721 was enacted in 1988, Pub. L. 100-418, and amended several times, most notably in the Foreign Investment and National Security Act of 2007, Pub. L. 110-49, and the Foreign Investment Risk Review Modernization Act of 2018, Pub. L. 115-232.

takeover ... by or with any foreign person that could result in foreign control of any United States business.” *Id.* § 4565(a)(4)(B)(i).

2. Entities can voluntarily submit such transactions for review, *id.* § 4565(b)(1)(A), and CFIUS can request that parties submit transactions for review, 31 C.F.R. § 800.501(b). CFIUS’s review process begins once it accepts a notice of a transaction filed by an entity, *id.* §§ 800.501, 800.503(a), and must be completed within 45 days, 50 U.S.C. § 4565(b)(1)(F); 31 C.F.R. § 800.503(b). The statute provides that CFIUS “shall” conduct an investigation if, *inter alia*, the initial review “results in a determination that – the transaction threatens to impair the national security” and the risk has not been mitigated, to be completed within 45 days from the date the investigation is commenced. 50 U.S.C. § 4565(b)(2)(A), (B)(i)(I), (C)(i); 31 C.F.R. §§ 800.505(a), 800.508(a). CFIUS may, during the review or investigation, “complete the action of the Committee with respect to the transaction” and “refer the transaction to the President for action.” 50 U.S.C. § 4565(l)(2).

3. Before action by CFIUS is completed or action by the President is taken, CFIUS may “negotiate, enter into or impose, and enforce any agreement or condition with any party to a completed covered

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