

Court Finds CFIUS Violated Ralls Corporation's Due Process Rights

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On July 15, 2014, the United States Court of Appeals for the District of Columbia remanded Ralls Corporation's (Ralls) precedent-setting case against the Committee on Foreign Investment in the United States (CFIUS or the committee) and President Obama to district court for the enforcement of Ralls's right to due process.¹ Ralls had argued, *inter alia*, that CFIUS and the president had unconstitutionally deprived it of its right to property by forcing it to divest that property for national security reasons. The court found that the president had not provided process sufficient to satisfy the Fifth Amendment, and that Ralls was entitled to (a) notice of the official action, (b) review of the unclassified portions of the evidence relied upon by the president in his decision and (c) the right to respond to that evidence. Separately, the court found that the district court also had incorrectly dismissed a number of Ralls' other claims against CFIUS as moot, and remanded those additional claims for a hearing on the merits. The court's decision may add a new layer of uncertainty to CFIUS processes, impact both applicants' rights and committee procedures, and increase the number of tactical decisions involved in preparing for a CFIUS review.

The Ralls case stems from Ralls' March 2012 acquisition of four wind farms in Oregon in or near restricted Naval air space.² The parties to the sale originally failed to notify CFIUS of the transaction under the voluntary notice provisions of the Defense Production Act of 1950, as amended (DPA). Ralls ultimately submitted a CFIUS notice only after being told that the Department of Defense was preparing to file its own notice of the transaction and trigger review if Ralls did not. During its review and investigation, CFIUS ordered Ralls not to engage in construction or store goods at, or otherwise access, the wind farm sites, and required the company to offer the committee the right to review and object to any divestiture of the sites. At the end of the investigation, the committee recommended blocking the transaction and the president issued a further order extending most terms of the CFIUS order and requiring Ralls to divest the wind farms within 90 days.

Ralls filed suit against CFIUS during the investigation, charging that the CFIUS order exceeded the committee's statutory authority, that CFIUS had acted in violation of the Administrative Procedure Act, and that it had deprived Ralls of its property interests in violation of the Fifth Amendment right to due process. Subsequently, Ralls amended its complaint to charge that the presidential order also exceeded statutory authority and that both orders had violated its rights to due process and equal protection. The district court found that Ralls' claims with respect to the CFIUS order were mooted by the presidential order, and that its claims with respect to the presidential order failed on the merits.

In its decision, the appellate court reversed both of these findings, validating the Ralls Fifth Amendment claim and sending the CFIUS order claims back to the district court. With respect to the former, the court first found that (a) despite the statutory bar on

1 *Ralls Corporation v. Committee on Foreign Investment in the United States*, No. 13-5315 (D.C. Cir. July 15, 2014) ("*Ralls Slip Opinion*").

2 For more information on the Ralls case and decision, please see Ivan Schlager et al., *Obama Administration Blocks Chinese Purchase of Wind Farms on National Security Grounds* (Sep. 28, 2012), at http://www.skadden.com/sites/default/files/publications/Obama_Administration_Blocks_Chinese_Purchase_of_Wind_Farms_on_National_Security_Grounds.pdf.

judicial review of presidential decisions under the DPA,³ CFIUS could not evade judicial review of constitutional due process concerns and (b) national security reviews were not inherently non-justiciable. With this established, the court then found that Ralls had a state-recognized — and, therefore, constitutionally protected — property interest in the wind farm assets. Finally, referencing its decisions reviewing Foreign Terrorist Organization designations made by the secretary of state, the court found that there was no inherent due process exception for national security reviews. The existing CFIUS process, therefore, did not sufficiently “provide notice of, and access to, the unclassified information used to prohibit the transaction” to permit Ralls “to tailor its submission to [CFIUS] concerns or rebut the factual premises underlying the President’s action.”⁴ As a result, the court remanded to the district court with instructions that Ralls be provided the requisite process with respect to the presidential order.

With respect to the latter, the court concluded that the claims related to the CFIUS order could be considered under the “capable of repetition yet evading review” exception to mootness. The court remanded those claims to the district court for further review on the merits.

It is likely that the Obama administration will seek an *en banc* rehearing at the court as well as a stay of the opinion while the process continues. Moreover, the court’s decision does not change the basic framework of the DPA: a presidential determination regarding the national security risk posed by a transaction is still not judicially reviewable. As the court noted, “[o]ur conclusion that the procedure followed in issuing the Presidential Order violates due process does not mean the President must, in the future, disclose his thinking on sensitive questions related to national security in reviewing a covered transaction. We hold only that Ralls must receive the procedural protections we have spelled out before the Presidential Order prohibits the transaction.”⁵

However, the court’s decision, if allowed to stand, may alter the CFIUS process. Because the committee acts on behalf of the president in reviewing covered transactions under the DPA, and because the president acts only after reviewing the CFIUS record, the court suggested that “[a]dequate process at the CFIUS stage ... would also satisfy the President’s due process obligation.”⁶

The court’s decision may add complexity to the CFIUS process in a number of ways and expand the range of tactical options available to parties undergoing CFIUS reviews:

- In the past, in sensitive transactions, CFIUS would at times take a hard line in requiring mitigation terms that had the effect of blocking a transaction. The court’s ruling makes clear that only the president has such power. More generally, the court’s ruling also may provide more leverage to parties during negotiations with CFIUS over mitigation terms, because failure to agree on mitigation terms requires CFIUS to refer the case to the president for final review. CFIUS may now be more motivated to negotiate with parties to avoid the requirement that the president disclose unclassified evidence.
- CFIUS may become more willing to disclose the unclassified information on which it relies in assessing national security risks. This may benefit parties to transactions by permitting them the opportunity to review the evidence assembled against them. Parties facing significant mitigation may want to consider requesting and attempting to rebut the factual record on which a preliminary decision is made.

3 See 50 U.S.C. app. § 2170(e).

4 *Ralls* Slip Opinion at 37.

5 *Id.* at 38.

6 *Id.*

However, the change may also may prolong CFIUS reviews and investigations. Overburdened committee staff, currently challenged by the need to collect questions from several agencies and create consensus on the statutory schedule, would now be charged with collecting evidence from those agencies and redacting classified information on behalf of parties as well, all within statutorily prescribed timeframes that are not expanded as a result of the court's ruling. The decision may also encourage agencies to classify more of the information used in assessing cases and, therefore, may have the perverse effect of putting more evidence completely off-limits to parties.

- CFIUS also may collect more information from parties to bolster the factual record in the face of potential judicial review. Additional questions from CFIUS also would prolong reviews and investigations.
- Parties to transactions that may be blocked or face substantial mitigation may wish to consider their due process options. However, because property rights would be a prerequisite to such claims, such parties would need to consider closing their transactions or otherwise establishing such rights and only then filing. As the Ralls case and a number of other recent cases have demonstrated, CFIUS concerns are heightened when parties fail to voluntarily file in advance of a proposed transaction. Parties will need to weigh any procedural benefits against the potential substantive losses in a non-reviewable CFIUS or presidential national security determination.

There are a number of additional issues to be reviewed, and the case may well be reviewed by the Supreme Court of the United States. No matter the outcome of these forthcoming cases, inbound investment will continue to be closely scrutinized by CFIUS. It is critical that parties seeking to engage in cross-border transactions engage CFIUS counsel early in the process.