# CFIUS Ruling Provides International Investors Additional Rights

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On July 15, 2014, the D.C. Court of Appeals ("D.C. Circuit") issued an unprecedented decision in *Ralls Corporation v. Committee on Foreign Investment in the United States (CFIUS)*, No. 13-5315, slip. op. (D.C. Cir. July 15, 2014) that if the President, pursuant to his powers under the Exon-Florio Amendment to the Defense Production Act of 1950 ("DPA"), deprives a non-U.S. acquirer or investor in the United States of its constitutionally protected property interests, the non-U.S. acquirer or investor must be accorded certain due process protections, including access to the unclassified evidence that CFIUS relies on during the review of the transaction, and rebut that evidence, before a potential transaction is blocked. The ruling may provide some enhanced procedural protections and leverage to the parties to the transaction undergoing a CFIUS review in preventing a transaction from being blocked because now the parties can obtain access to unclassified information used by CFIUS and try to rebut it. However, any resulting procedural changes are unlikely to affect the outcome of any CFIUS review process. Given the importance of this case, it is likely that the Department of Justice will seek an en banc hearing before the D.C. Circuit or successfully petition the Supreme Court to review the D.C. Circuit's decision. Further, Congress may also take action to provide clarity on whether Congress intended for the statutory bar to judicial review in the Exon-Florio Amendment to preclude review of constitutional due process claims.

## The Committee on Foreign Investment in the United States

CFIUS is an inter-agency committee authorized to review transactions that could result in a non-U.S. person controlling a U.S. business and assess the impact of such transactions on the U.S. national security. Pursuant to section 721 of the DPA, as amended by the Foreign Investment and National Security Act of 2007 (FINSA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800, CFIUS is charged to review "covered" transactions, which are defined to include any merger, acquisition, or takeover

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by a non-U.S. person that results in control of any U.S. business. Parties to a covered transaction are not required to provide notice to CFIUS prior to closing. However, not providing the voluntary notice exposes the non-U.S. purchaser to additional risk because CFIUS can force the non-U.S. purchaser to divest after the transaction has closed if CFIUS later determines that the covered transaction threatens U.S. national security.

**Case Background**

In March 2012, Ralls Corporation ("Ralls Corp.") (a U.S. company incorporated in Delaware that is owned by two Chinese nationals) purchased four U.S. companies previously formed to develop windfarms in Oregon without filing for CFIUS review prior to closing. After the acquisition was concluded, CFIUS determined that Ralls Corp.'s acquisition threatened the U.S. national security and issued temporary mitigation orders restricting Ralls Corp.'s access to and preventing further construction at the wind farm sites. The matter was subsequently submitted to the President of the United States who also concluded that the transaction posed a threat to national security due to the proximity of the wind farm sites to a U.S. Navy weapons training facility. The President thereafter issued a permanent order that prohibited the transaction and required Ralls Corp. to divest itself of the project companies.

On September 12, 2012, Ralls Corp. filed an extraordinary lawsuit in the U.S. District Court for the District of Columbia ("District Court"), challenging the CFIUS and Presidential Orders, alleging, among other things, that the orders resulted in an unconstitutional taking of property that was contrary to the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Ralls Corp. specifically claimed that neither CFIUS nor the President provided Ralls Corp. the opportunity to review and rebut the evidence that CFIUS and the President relied upon in reaching their decisions and therefore violated its due process rights. The District Court found that Ralls Corp. lacked a protected property interest in the four companies because it had acquired the companies knowing that it could be subject to divestiture following a CFIUS review. The District Court further ruled that even if Ralls Corp. had a protected property interest, its ability to submit agreements to CFIUS, meet with CFIUS personnel, and respond to CFIUS's inquiries provided Ralls Corp. with sufficient due process procedures. Ralls Corp. subsequently appealed.

As an initial matter, the D.C. Circuit rejected the District Court's jurisdictional findings, and concluded that it had jurisdiction to review the dismissal of Ralls Corp.'s due process claim. In reaching this conclusion, the D.C. Circuit rejected CFIUS's arguments that (1) the DPA imposed a statutory bar to judicial review and (2) the challenge to the President's order raised a non-justiciable political question. Although the DPA provides that the President's orders "shall not be subject to judicial review," the D.C. Circuit found that it had jurisdiction because it was not reviewing the final decision made by the President with respect to the transaction but rather the process pursuant to which such a decision was made. The D.C. Circuit concluded that the political question argument raised by CFIUS was wrong for a similar reason.

Having found jurisdiction to review Ralls Corp.'s claims on the merits, the D.C. Circuit

analyzed Ralls Corp.'s substantive due process arguments. The D.C. Circuit reversed the District Court's decision and concluded that the President's order divesting Ralls Corp. of its property interests was an unconstitutional deprivation of Ralls Corp.'s property rights without due process. The D.C. Circuit determined that state law property interests attached when Ralls Corp. acquired the property interests, and these interests were not contingent, regardless of any potential for federal intervention by CFIUS. Further, the D.C. Circuit determined that Ralls Corp. did not waive its property rights by failing to seek CFIUS approval, particularly since submission to CFIUS review is voluntary, and approval can be sought after the transaction has been consummated. The D.C. Circuit further explained that due process requires that an affected party be at least informed of the official action, be given access to the unclassified evidence on which the official government actor relied and be afforded an opportunity to rebut that evidence (i.e., tailor its submission to CFIUS's concerns or rebut the factual premises underlying the President's actions). The D.C. Circuit found that the government's substantial interest in national security supported CFIUS's decision to withhold classified information, but clarified that due process would not require public disclosure of "the President's thinking on sensitive questions" related to U.S. national security. However, CFIUS's failure to provide notice of, and access to, the unclassified information used to prohibit the transaction violated Ralls Corp.'s rights. The D.C. Circuit remanded the case to District Court with instructions that Ralls Corp. be provided with sufficient due process, including "access to the unclassified evidence on which the President relied and an opportunity to respond thereto."

**Conclusions**

While the decision is important and grants non-U.S. acquirers certain due process protections, several factors are likely to limit the practical impact of the D.C. Circuit's decision. To the extent that the determinations by the President or CFIUS concerning U.S. national security rely on classified information, the decision provides no recourse to the non-U.S. acquirer or investor. In addition, the D.C. Circuit decision also provides that the District Court may, on remand, consider the government's executive privilege argument, which if successful could limit the availability of unclassified evidence to the non-U.S. investors. Finally, the Exon-Florio Amendment's statutory bar to judicial review remains (The D.C. Circuit's due process holding reasoned that there was not "clear and convincing" evidence that Congress intended for the statutory bar to judicial review in the Exon-Florio Amendment to preclude review of constitutional due process claims). As a result, while the ruling may well decrease the secrecy around the CFIUS review process and thus provide some enhanced procedural protections, any resulting procedural changes are unlikely to affect the outcome of any CFIUS review process.

Given the importance of this case, it is likely that the Department of Justice will seek an *en banc* hearing before the D.C. Circuit or successfully petition the Supreme Court to review the D.C. Circuit's decision. Further, if Congress disagrees with the D.C. Circuit's reasoning that there was not "clear and convincing" evidence that Congress intended for the statutory bar to judicial review in the Exon-Florio Amendment to preclude review of constitutional due process claims, Congress may take action to amend the statutory bar to review.

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