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Gone with the Wind III: Ralls' Historic Appeal and Lessons for Foreign Investors

Jeremy Zucker, Darshak Dholakia & Hrishikesh Hari*

An unexpected July 2014 decision of the U.S. Court of Appeals for the District of Columbia Circuit pertaining to the Committee on Foreign Investment in the United States (CFIUS) merits consideration by both foreign investors and the U.S. national security community.¹ Reversing a decision of the District Court below, the Circuit Court found that CFIUS and the President denied Ralls Corporation (Ralls), a foreign investor, its constitutionally protected due process rights in connection with requiring Ralls to divest acquired property on national security grounds.

The case centered on a July 2012 finding by CFIUS that Ralls' acquisition of several windfarm projects located near a U.S. Naval facility in Oregon posed a national security risk to the United States. The President then issued an historic order—just the second of its kind—mandating the unwinding of the completed transaction pursuant to a national security review.

Ralls then took CFIUS and the President to court, arguing CFIUS and the President denied its due process.² Between two hearings in February³ and October 2013,⁴ the District Court dismissed all of Ralls' claims, finding national security interests outweighed Ralls' interest in learning the specific grounds for the President's divestment order. In the recent decision, the Circuit Court reversed and remanded to the District Court, finding CFIUS and the President failed to give constitutional due process to Ralls.⁵ The Circuit Court also ruled that CFIUS must share all unclassified information on which it relied and provide Ralls an opportunity to rebut.

As we explore below, the Circuit Court's decision could impact the CFIUS review process and considerations for foreign investors. Even if the decision ultimately does not stand, as we have discussed at length in companion articles,⁶ the Ralls case underscores the importance for potential foreign investors in the United States to carefully consider CFIUS issues early in the investment process.

I BACKGROUND

CFIUS is an inter-agency committee that, under the authority of the “Exon-Florio Amendment,” reviews transactions to determine their impact on national security.⁷ The CFIUS review process begins either when one or both parties to a “covered transaction” file a

voluntary notice with CFIUS or when CFIUS unilaterally initiates review of a covered transaction. A “covered transaction” is defined as “any merger, acquisition, or takeover... by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”⁸ Upon receipt of a complete notice of a covered transaction, CFIUS

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¹ Opinion of the Court, *Ralls Corporation v. Committee on Foreign Investment in the United States et al.*, Case No. 12-cv-01513 (D.C. Cir. 2014) (hereinafter *Ralls Decision III*).

² *Ralls' challenge marked the first time an aggrieved foreign investor has taken CFIUS to court.*

³ Amended Memorandum Opinion in *Ralls Corp. v. Barack H. Obama, et al.*, Case No. 12-cv-01513 (D.D.C. Feb. 26, 2013) (hereinafter *Ralls Decision I*).

⁴ Amended Memorandum Opinion in *Ralls Corporation v. Committee on Foreign Investment in the United States, et al.*, Civil Action No. 12-1513 (D.D.C. Oct. 09, 2013) (hereinafter *Ralls Decision II*).

⁵ *Ralls Decision III*, supra n. 1, at 47.

⁶ *Gone with the Wind: The Ralls Transaction and Implications for Foreign Investment in the United States*, 8 *Global Trade & Cust. J.* 7/8 (2013); *Gone with the Wind II: The Ralls Decision and Lessons for Foreign Investors*, 9 *Global Trade & Cust. J.* 1 (2014).

⁷ Section 721 of the Defense Production Act of 1950, as amended, 50 U.S.C. App. § 2170.

⁸ 50 U.S.C. App. § 2170 (a)(3).

commences a thirty-day review and is authorized to conduct an additional forty-five-day investigation if it determines further investigation is warranted due to national security concerns.⁹ CFIUS may also negotiate an agreement with any party to a covered transaction to mitigate a national security threat that arises out of a covered transaction.¹⁰ Once CFIUS completes its review, and at any time during a subsequent investigation, CFIUS may conclude that national security concerns raised by a transaction have been addressed. If such concerns remain unaddressed at the conclusion of an investigation, CFIUS refers the transaction to the President for a decision. The President enjoys broad discretion in taking actions deemed appropriate to suspend, prohibit, or unwind a covered transaction when acting based on credible evidence, but must announce a decision within fifteen days.¹¹ According to the governing statute and regulations, “[t]he actions of the President ... and the findings of the President ... shall not be subject to judicial review.”¹²

Ralls is a Delaware corporation ultimately owned by Chinese nationals.¹³ In March 2012, Ralls purchased membership interests in several windfarm projects in close proximity to a restricted airspace and bombing zone maintained by the U.S. Navy in Oregon. The Navy requested Ralls move a windfarm to reduce airspace conflicts with low-level military aircraft training. Ralls agreed to move the windfarm and, with the Navy’s support, obtained the necessary local permits and began construction in April 2012. Ralls, however, did not avail itself of CFIUS’ review process prior to consummating the acquisition.

Mid-2012, CFIUS learned of Ralls’ project and invited Ralls to submit a voluntary notification of a covered transaction (or, inferentially, risk CFIUS unilaterally initiating a review).¹⁴ Ralls filed a voluntary notice in June, and in the ensuing weeks CFIUS asked a number of follow-up questions. In July and August 2012, CFIUS issued two orders establishing “interim mitigation measures” due to national security concerns perceived to

be posed by the Ralls transaction.¹⁵ CFIUS then determined that further investigation was warranted; at the end of the investigation period, CFIUS transmitted a report to the President. In September 2012, the President issued an order mandating the unwinding of the Ralls transaction, stating there is credible evidence that the Ralls transaction “threatens to impair the national security of the United States.”¹⁶ In response to the President’s order, Ralls filed a complaint in federal court challenging both CFIUS orders as well as the President’s order.

2 THE COURT CHALLENGE

In February and October 2013, the District Court dismissed all of Ralls’ claims against the President and CFIUS. The finality provision protecting the President’s order from judicial review formed the basis for the dismissal of Ralls’ substantive claims.¹⁷ Between February and October, the District Court permitted additional briefing regarding Ralls’ procedural argument that the President’s order violated the due process clause of the Fifth Amendment to the United States Constitution.¹⁸ The District Court then held that Ralls did not have a protected property interest.¹⁹ The court reasoned that Ralls’ acquisition occurred subject to a “known risk of a Presidential veto” because “Ralls waived the opportunity – provided by the very statute that it claims lacks the necessary process – to obtain a determination from CFIUS and the President before it entered into the transaction.”²⁰ The court concluded that “Ralls cannot predicate a due process claim now on the state law rights it acquired when it went ahead and assumed that risk.”²¹

Ralls’ appeal of the District Court ruling to the Circuit Court challenged whether CFIUS and/or the President are required to give companies an opportunity to review, respond to, or rebut any evidence upon which an Order requiring divestiture is based. Ralls argued that it had protected property interests in the windfarm projects and

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⁹ *Ibid.*, § 2170 (b)(1)(E). Further investigation is mandatory if the initial review results in a determination that: (1) the transaction is a “foreign government controlled transaction[.]” or (2) the transaction “would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person[.]” *Ibid.*, § 2170(b)(2).

¹⁰ *Ibid.*, § 2170(d)(1)(A).

¹¹ *Ibid.*, § 2170(d)(1).

¹² *Ibid.*, § 2170(e).

¹³ *Ralls Corp. v. Barack H. Obama et al.*, U.S. District Ct. for the District of Columbia (Case No. 1:12-cv-01513-ABJ), Amended Complaint for Declaratory and Injunctive Relief, Oct. 1, 2012 (hereinafter, Amended Complaint).

¹⁴ Ralls Decision II, *supra* n. 4, at 6.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 7.

¹⁷ Ralls Decision I, *supra* n. 3.

¹⁸ U.S. CONST. amend. V (stating “[n]o person shall be ... deprived of life, liberty, or property, without due process of law[.]”).

¹⁹ Ralls Decision II, *supra* note 4, at 12.

²⁰ *Ibid.*, at 19.

²¹ *Ibid.*, at 14.

thus was entitled to be informed of, and respond to, the basis for the Presidential Order.²² Ralls argued that given the non-specific national security justification for the divestment order, it is a victim of “simple economic protectionism”²³ and it should have the “opportunity to know about the possible grounds for the contemplated action and to respond in a meaningful fashion.”²⁴

The Circuit Court agreed with Ralls and overruled the District Court. The Circuit Court found that “the Presidential Order deprived Ralls of its constitutionally protected property interests without due process of law,”²⁵ and rejected the District Court’s view that Ralls’ property interest was waived or contingent. Referring to its precedents regarding designations of Foreign Terrorist Organizations by the U.S. Secretary of State, the Circuit Court held that due process requires “an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.”²⁶ The Circuit Court continued, “Ralls was not given any of these procedural protections at any point.”

Significantly, the Circuit Court distinguished between the President’s ultimate national security decision, which it agreed is not subject to judicial review, and the CFIUS review process associated with reaching such a decision. The court reasoned that because the President’s review occurs after CFIUS compiles a record and makes a recommendation to the President, that “adequate process at the CFIUS stage . . . would satisfy the President’s due process obligation.”²⁷

3 CONCLUSION AND LESSONS FOR FOREIGN INVESTORS

The Circuit Court’s surprising decision will continue—but will not end—an important conversation about how the CFIUS process balances national security and commercial considerations arising in the context of review of foreign direct investment in the United States.

If the Circuit Court decision stands, the CFIUS review process might change in ways both beneficial and harmful to foreign investors:

First, CFIUS reviews often involve consideration of both classified and unclassified information. (The U.S. Government told the Circuit Court during oral argument that CFIUS and the President had relied on both in reaching a decision regarding Ralls.)²⁸ This decision might have the unintended consequence of leading the CFIUS to rely more heavily (and perhaps exclusively) on classified information, especially when reaching “negative” decisions, so that less unclassified information then is subject to any disclosure requirement.

Second, the decision may lead CFIUS to disclose unclassified information during the review process, and in particular in the context of negotiations to mitigate perceived threats to national security. CFIUS also might have additional incentive to reach agreement with the parties and avoid the prospect, now relatively more likely than before, that failure to reach agreement would be subject to legal challenge by the parties and judicial second-guessing on procedural grounds.²⁹

Third, CFIUS might insist upon receiving more information from parties than previously required. This would permit CFIUS to develop a thicker file in anticipation of potential judicial review and to expand upon the unclassified basis for any decision to suspend or prohibit a transaction. Collection of additional information might add to the duration and complexity of the review process.

Fourth, even absent a decision by CFIUS to collect additional information, the Circuit Court decision could result in longer and more complex reviews. CFIUS staffers honoring a disclosure obligation will have the additional burden of gathering relevant information from CFIUS member agencies, separating classified from unclassified material, and sharing the unclassified portion with the parties. All of this will take time. It should be noted that the Circuit Court decision imposed these additional burdens without expanding CFIUS review timelines or

Notes

²² Reply Brief for Appellant Ralls Corporation, On Appeal from the United States District Court for the District of Columbia, No. 1:12-cv-01513-ABJ, at 27-28.

²³ Corrected brief for Appellant Ralls Corporation, On Appeal from the United States District Court for the District of Columbia, No. 1:12-cv-01513-ABJ, at 42.

²⁴ Reply Brief for Appellant, *supra* n. 21, at 19.

²⁵ Ralls Decision III, *supra* n. 1, at 36.

²⁶ *Ibid.*

²⁷ *Ibid.*, at 37. The Circuit Court also held that the District Court erred in finding Ralls’ claims regarding the two CFIUS interim orders (issued prior to the President’s order) to be moot, finding that those claims fall within the exception to mootness for claims that evade review but are capable of repetition. These claims now must also be addressed by the District Court on remand.

²⁸ *Ibid.*, at 37 (noting “[b]ecause the record did not reflect whether the evidence relied on was classified, unclassified or both, we issued an order before oral argument requesting that the Government be prepared to discuss the nature of the evidence reviewed by CFIUS and the President. Responding to our inquiry at oral argument, the Appellees’ counsel stated that CFIUS and the President relied on both classified and unclassified evidence.”).

²⁹ See *Committee on Foreign Investment in the United States Annual Report to Congress for CY 2011*, at 9 (December 2012) (available at <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2012%20CFIUS%20Annual%20Report%20PUBLIC.pdf>) (hereinafter *CFIUS Annual Report 2012*) (noting while Presidential orders requiring divestiture have only been issued twice (first in 1990, and then regarding Ralls), CFIUS has effectively blocked or required the unwinding of many other transactions without a formal order. For example, of the 269 notifications received by CFIUS from 2009–2011, 25 transactions were “voluntarily” withdrawn by the parties during CFIUS’ review or investigation period. In cases of this sort where CFIUS veto is (presumably) threatened but never exercised, it is not clear whether the parties enjoy any due process-driven disclosure rights).

mandating additional staffing to address the new requirements.

Fifth, the Circuit Court's findings regarding Ralls' due process rights are predicated on Ralls having closed its acquisition prior to making a CFIUS submission. It would appear that in the (more common) instance where CFIUS approval is sought on a pre-close basis, an aspiring foreign investor would not yet have an interest in property and attendant rights to due process. More so than before, foreign investors might give additional thought to the procedural advantages to be gained from closing prior to receiving CFIUS approval, although potentially significant substantive risks would remain.

At the same time, there are many reasons why the Circuit Court's decision might not stand:

First, the U.S. Government might seek a rehearing en banc at the Circuit Court level or might appeal the decision to the U.S. Supreme Court. In either instance, the decision might be reversed.

Second, even if the U.S. Government elects not to appeal, significant issues remain to be addressed on remand to the District Court. Notably, regarding its holding that the Government's "substantial interest in national security supports withholding only the *classified* information, but does not excuse the failure to provide notice of, and access to, the unclassified information,"³⁰ the Circuit Court did not address claims raised by the U.S. Government during oral argument that the President might shield unclassified information from disclosure under an assertion of executive privilege.³¹ If successful, this argument could enable the U.S. Government to limit the unclassified information to be made available to a foreign investor.

Third, the Circuit Court's determination that the Exon-Florio Amendment's statutory bar to judicial review does

not preclude review of constitutional due process claims is predicated on its reasoning that there was not "clear and convincing" evidence that Congress intended such review to be barred.³² Congress might take action to amend the language of the Exon-Florio Amendment to clarify its intentions.

Whether the Circuit Court's decision stands or falls, neither the Circuit Court nor the District Court found that a final action by the President to suspend or prohibit a transaction is subject to judicial review. That is, while the courts might impact the process by which a decision is reached, they have no role with respect to the substantive end result. The President retains the exclusive right to permit or prevent covered foreign investment transactions, and Ralls will not be able to change or challenge the President's decision.

Finally, Ralls' experience highlights a number of important considerations for foreign investors:³³

- Regulatory approval by various branches of the U.S. Government outside of the formal CFIUS approval process is not a safe harbor;
- CFIUS actions continue to indicate a concern regarding so-called persistent co-location, or the proximity of targets of foreign investment to sensitive U.S. Government facilities;
- Alternative approaches to investing in the United States (such as greenfield investments) that are not deemed "covered transactions" and therefore are not within the jurisdiction of CFIUS merit consideration; and
- Parties contemplating cross-border transactions with potential national security implications should consult with CFIUS counsel early in the process.

Notes

³⁰ Ralls Decision III, *supra* n. 1, at 37.

³¹ *Ibid.*, at 38. The Circuit Court stated that the issue of executive privilege "was not raised in the Appellees' brief" and therefore, the issue can be considered by the district court on remand.

³² *Ibid.*, at 20–21.

³³ See *Gone with the Wind: The Ralls Transaction and Implications for Foreign Investment in the United States*, *supra* n. 6, 186–190 (providing additional detail on the considerations summarized herein).

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