

To: Our Clients and Friends

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## **The D.C. Circuit Imposes Some Due Process in the CFIUS Review Procedures But the Impact May be Limited and, in any case, Short-Lived**

The Committee on Foreign Investment in the United States (CFIUS) has the authority to investigate whether an acquisition by non U.S. entities or persons of a U.S.-controlled business would have an adverse impact on U.S. national security. CFIUS may require mitigation, up to and including a suspension of the proposed transactions, or limits on the acquirer's ability to operate the business. Ultimately, the President, relying on the investigation by CFIUS and other information available to the President, including classified information, may suspend or prohibit the proposed acquisition on national security grounds. The relevant statute provides that "the actions of the President . . . and the findings of the President . . . shall not be subject to judicial review." 50 U.S.C. app. § 2170(e).

In *Ralls v. CFIUS*, the U.S. Court of Appeals for the District of Columbia Circuit has concluded that the statutory prohibition of judicial review of the President's decision does not prohibit judicial review of the process applied by the President in reaching that decision in order to ensure compliance with the Due Process clause of the Constitution, at least in those instances in which the foreign party under investigation has already obtained a protectable property interest.

The Court's decision, if not revised or reversed, could increase the transparency of the CFIUS process by requiring the President to provide notice of any intent to suspend or prohibit a covered transaction, provide access to the unclassified evidence on which the president's action is based, and provide a meaningful opportunity to rebut that evidence. It may also limit the ability of CFIUS, acting on its own, to impose mitigation on existing (and possibly pending) transactions under its review that impede property rights. On the other hand, it may force more decisions to the President's desk from the CFIUS staff if the Courts determine that substantial mitigation requirements imposed by CFIUS are tantamount to prohibitions that may only be issued by the President.

### ***Ralls v. CFIUS***

In 2012, Ralls Corporation, an American company ultimately owned by two Chinese nationals, purchased four American-owned wind farm companies, each holding assets intended for wind farm development in north-central Oregon, including a project site located within restricted U.S. Navy

airspace. Several months after completion of those transactions, Ralls submitted a notice of the acquisition to CFIUS.

Following receipt of Ralls's post-transaction notice, CFIUS determined that Ralls's acquisition of the wind farm companies posed a threat to national security and issued mitigation measures requiring Ralls to cease all construction, operation, and access to the sites. The matter was then submitted to the President, who issued a permanent Presidential Order denying the transaction based on threats to national security. Ralls challenged the Order in the District Court, alleging violation of its Due Process rights under the Fifth Amendment because it was not provided the opportunity to review and rebut the evidence upon which the Presidential Order relied.

Earlier this week, the Circuit Court reversed the lower court and concluded that Ralls had a constitutionally protected property interest based on state law property rights that fully vested upon the completion of the transaction, which occurred prior to the CFIUS review. Further, the Circuit Court concluded that the Presidential Order, which deprived Ralls of its property interests, did so without due process of law because Ralls was not given access to the unclassified evidence on which the decision was based nor was Ralls given an opportunity to rebut that evidence.

In reaching its decision, the Court considered several key procedural issues that could have significant impact across a wide array of Executive Branch decision-making. First, while it acknowledged that Presidential Orders are not subject to judicial review generally, the Court found this limitation does not exempt the process by which the President reached his final determination from judicial review if there are substantial due process rights that have been impaired. The Court reasoned that because Ralls did not request a determination of the merits of the Presidential Order, but only whether Ralls was entitled to have notice of, and access to, the evidence on which the President relied and an opportunity to rebut that, the case is judicially reviewable and does not encroach on the prerogative of the political branches. The Court remanded the case to the district court with instructions to provide the required due process.

Additionally, the Circuit Court rejected the lower court's determination that Ralls's original claims related to the mitigation measures imposed by the CFIUS Order were moot inasmuch as the CFIUS Order was expressly revoked by the Presidential Order. The Circuit Court found that Ralls satisfied the "capable of repetition yet evading review" exception to mootness, and instructed the lower court to reconsider Ralls's claims that CFIUS violated the Administrative Procedure Act by requiring mitigation tantamount to divestiture, which it claimed exceeds CFIUS's statutory authority.

## Going Forward

The potential impact of this decision on Executive Branch authority in the national security area suggests it will be appealed, although that remains uncertain. Initially, it places a premium on completing an acquisition and establishing a protectable property right before CFIUS review occurs. Additionally, by finding that the brief imposition of severe mitigation by CFIUS, prior to the President's Order, was not moot, the Court in *Ralls* appears to sanction a due process attack on property right-restrictive mitigation imposed by CFIUS, which could increase the transparency of the CFIUS process and provide novel insight to CFIUS concerns. At the same time, the Court's limiting of the parties' access to unclassified information may make the parties' ability to delve deeply into the CFIUS process largely meaningless, because of the substantial reliance on classified information in a national security setting.

Further, this decision could affect the way CFIUS proposes mitigation for companies and could impact CFIUS's ability to resolve national security concerns. While initially determined to be moot by the district court, Ralls's challenge to CFIUS's authority to issue mitigation requirements that are tantamount to divestiture will be a live issue on remand. While CFIUS referrals to the President are currently an extremely rare occurrence, any limitation on CFIUS's ability to issue broad mitigation requirements is less likely to result in a reduction of such mitigation requirements, and more likely to result in a greater reliance on the President for final determinations that can impose such requirements.

For more information about this update, or if you have any questions, please contact [Daniel C. Schwartz](#), [Jennifer Kies Mammen](#), [Christina Zanette](#), or [Tyson Johnson](#) in Washington, D.C., at 202-508-6000, or any member of Bryan Cave's [National Security Team](#).