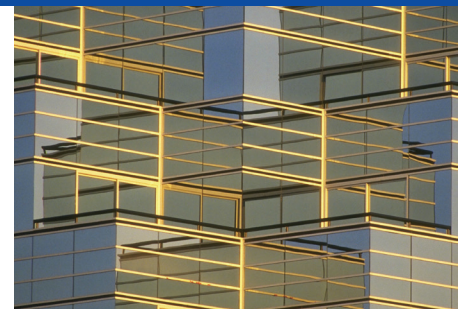


ClientAlert

International Trade

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DC Circuit Requires Committee on Foreign Investment in the United States to Provide Due Process Protections to Investors



On July 15, 2014, the US Court of Appeals for the District of Columbia (DC Circuit) ruled that if the President, pursuant to his powers under the Exon-Florio Amendment to the Defense Production Act of 1950 (DPA), deprives a foreign acquirer or investor in the United States of its constitutionally protected property interests, the foreign acquirer or investor must be accorded certain due process protections. The case at issue, *Ralls Corp. v. CFIUS et al*, is the first-ever challenge to the review process conducted by the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee within the US federal government that reviews foreign acquisitions and investments in the United States for potential threats to US national security (see previous discussion [here](#)).

In March 2012, Ralls Corp., a US corporation owned by Chinese nationals, purchased four wind farm project companies in Oregon without filing for CFIUS review prior to closing. After the acquisition was concluded, CFIUS determined that Ralls's acquisition threatened US national security and issued temporary mitigation orders restricting Ralls'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 US Navy weapons training facility. The President thereafter issued a permanent order that prohibited the transaction and required Ralls to divest itself of the project companies.

On September 12, 2012, Ralls filed an unprecedented lawsuit in the US District Court for the District of Columbia (District Court) against CFIUS and later President Obama, alleging, *inter alia*, that the CFIUS and Presidential orders violated the due process clause of the Fifth Amendment to the United States Constitution because neither CFIUS nor the President provided Ralls the opportunity to review and rebut the evidence upon which they relied. The District Court dismissed Ralls's claims on the grounds that the DPA barred judicial review of the President's order, that Ralls possessed no constitutionally protected interests, and that the President possessed "absolute, unreviewable discretion to prohibit a covered transaction."

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On appeal before the DC Circuit, Ralls challenged the District Court's decisions regarding whether Ralls was accorded due process and whether the court may review a Presidential decision under the CFIUS regime. The DC Circuit reversed the District Court's decision, finding that the court has the authority to adjudicate due process claims regarding the CFIUS review process, that "the Presidential Order deprived Ralls of significant property interests," and that the lack of due process afforded to Ralls "constitutes a clear constitutional violation." More broadly, the DC Circuit stated that according due process in a CFIUS review context requires: (i) provision of notice of the President's intended action, (ii) access to certain unclassified evidence upon which the President relied to take action, and (iii) a meaningful opportunity to rebut that evidence.

The DC Circuit's ruling constitutes an important albeit narrow victory for foreign investors who have sought greater transparency in the CFIUS review process. While the ruling grants certain due process protections to investors, the CFIUS legal regime remains intact, and the due process to be accorded will still need to be balanced against other interests. For example, in remanding the matter to the District Court with instructions to provide Ralls the requisite process described in its decision, including access to the unclassified evidence on which the President relied, the DC Circuit cites the possibility of the District Court having to resolve an executive privilege claim that, if successful, may limit or preclude the sharing of such unclassified evidence. In addition, the US Department of Justice may appeal the ruling to the Supreme Court or request that the ruling, which was decided by a three-judge panel, be reviewed *en banc* by the full DC Circuit.

Investors therefore would be prudent to interpret the DC Circuit's ruling cautiously and continue to carefully consider engaging and filing for review with CFIUS to obtain clearance and safe harbor from further review and to avoid the risk of a costly divestment process after closing.

Click [here](#) for the DC Circuit's decision.

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