

E-ALERT | Cross-Border Investment

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UPDATE ON CFIUS DEVELOPMENTS: DISTRICT COURT ORDER IN *RALLS V. CFIUS*

Last week the U.S. District Court for the District of Columbia issued an order (the “Order”) addressing the matters remanded to it by the U.S. Court of Appeals for the District of Columbia Circuit (“DC Circuit”) in *Ralls Corporation (“Ralls”) v. Committee on Foreign Investment in the United States (“CFIUS”)*. The Order largely implements the [DC Circuit’s prior ruling](#) in *Ralls v. CFIUS* — the first ruling by a federal circuit court on a CFIUS case — which held that the 2012 Presidential Order deprived Ralls of a constitutionally protected property interest without due process of law, and that due process entitled Ralls to review an unclassified version of the evidence on which the President relied in making his determination and to have an opportunity to rebut that evidence. Nevertheless, the Order is noteworthy in several respects.

PROCESS OWED RALLS AND TRANSACTION PARTIES

The Order sets forth a process for Ralls to receive and respond to unclassified information underlying CFIUS’s recommendation that the President exercise his authorities to prohibit the transaction. Specifically, the Order requires CFIUS to provide Ralls with access to “all unclassified material contained in the record compiled by CFIUS and all unclassified factual findings or evidence underlying CFIUS’s recommendation to the President.” The scope of the information that CFIUS is required to provide Ralls is therefore quite broad, encompassing the entirety of the unclassified information in the record that supported CFIUS’s recommendation. The information must be provided to Ralls no later than November 21, 2014. Ralls then will have an opportunity to respond to or rebut the information in writing. CFIUS must consider the material submitted by Ralls, issue an updated recommendation to the President, and inform Ralls of the substance of that recommendation. After the President has reviewed the record in its entirety, including Ralls’ submission, CFIUS must inform Ralls whether the Presidential Order has been reaffirmed, rescinded, or revised in any way.

The more significant aspect of the process that Ralls receives is not what it will mean for the owners of Ralls (as it seems likely CFIUS will reach the same ultimate result), but rather what it may portend for future CFIUS cases. As we have described previously, the Ralls case involved a transaction that closed before CFIUS had an opportunity to review it, and the transaction involved the potential close proximity of multiple installations (wind turbines) to a sensitive U.S. Navy testing range. As a general matter, it can be challenging for CFIUS to resolve national security concerns related to proximity to sensitive military assets, but it can be especially so when the transaction already has closed and, in turn, precluded CFIUS from the ability to require that conditions be adopted at or prior to closing to protect national security.

One possible interpretation of the Order going forward, therefore, is that process similar to that due Ralls would only be applicable for similarly extraordinary circumstances, where the Committee is prepared to recommend that the President take action to prohibit a transaction — and in particular where that action would force a divestiture of a property interest. We think, however, that would be

too narrow a reading of the DC Circuit decision. Rather, to the extent parties are owed due process in the context of a CFIUS review, as the DC Circuit has held, that process also should apply in circumstances where the Committee finds a need to mitigate the potential national security risk, while allowing the transaction to proceed. That is, parties that are required to enter into mitigation agreements should be afforded the opportunity to understand and address the unclassified material supporting the Committee's findings regarding the transaction. Any narrower application of the DC Circuit decision potentially would have the perverse result of according greater process protections to those transaction parties that exceed the tolerable limits of threats to national security (including parties that fail to file a transaction voluntarily) than to parties who voluntarily bring to CFIUS transactions that can be permitted, but that must bear some costs going forward.

EXECUTIVE BRANCH MAY SEEK TO ASSERT EXECUTIVE PRIVILEGE

A second notable aspect of the Order is that it allows for the possible assertion of executive privilege over some or all of the materials required to be provided to Ralls. The Order therefore requires CFIUS to provide Ralls and the court with a privilege log indicating the nature of the material withheld, if any, and the reasons for the withholding. If executive privilege is successfully asserted, it could significantly narrow the scope of materials disclosed to Ralls and, in turn, determine the scope of information to which parties will have access in future CFIUS reviews.

DISTRICT COURT TO CONSIDER CFIUS'S AUTHORITY TO IMPOSE INTERIM ORDERS

A third important aspect of the Order relates to the District Court's consideration, on remand from the DC Circuit, of whether CFIUS's interim order — which effectively froze work at the wind farms and prohibited Ralls from accessing them even prior to President Obama's issuance of the Presidential Order — exceeded the Committee's authority or violated the Administrative Procedure Act. While the question is likely to be relevant only in very unusual circumstances like Ralls — i.e., where transaction parties close a transaction without submitting it to CFIUS and CFIUS determines that interim protective measures are required prior to the conclusion of the CFIUS process — the issue is an important one: it goes to the heart of CFIUS's authority to impose conditions in the absence of, or prior to, a presidential order, especially when those conditions have the effect of prohibiting a transaction (which, under the statute, is a power reserved for the President). The District Court's Order requires the parties to propose a schedule for submitting briefs on this outstanding question.

MOTION TO DISMISS U.S. ENFORCEMENT ACTION DENIED

Finally, in addition to the matters on remand, the Order also addresses the status of a separate lawsuit commenced by the U.S. government to enforce the Presidential Order and require Ralls to sell the project companies to a CFIUS-approved purchaser. Ralls recently sought to have the enforcement action dismissed as moot because Ralls already had identified a purchaser for the assets. The Order rejects Ralls' motion, noting that the Presidential Order requires that any transfer of the assets be approved by CFIUS, and, interestingly, that the "unusual circumstances," including the plan to "sell a \$6,000,000 asset for \$50,000," raise questions about the arms-length nature of the proposed transaction. The District Court has stayed the enforcement action pending Ralls' receipt of due process.

We will continue to monitor the Ralls litigation for developments that are of interest to parties involved in or contemplating cross-border transactions.

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