



Ralls Case: How It Will Impact the CFIUS Process

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What Remains the Same

Certain aspects of the CFIUS process clearly are not impacted by the court's decision. Specifically, the court's decision does not change the President's overall authority under the Exon-Florio law. The President still maintains authority to block or reverse transactions based on CFIUS recommendations. The president also can still block transactions based on classified information without providing a rationale, and there is no requirement that the president explain what the Court of Appeals referred to as his "thinking on sensitive questions related to national security" for blocking a transaction. Finally, and most importantly, the decision does not provide a process for judicial review of the rationale for the presidential determination. To the contrary, the decision explicitly states that the courts have no authority (either constitutionally or statutorily) to review the president's final determination regarding the national security implications of a transaction.

Significant Issues Left Open by the Decision

At this point, due to a number of questions that remain unsettled, the full impact of the Ralls decision on the CFIUS process remains unclear. Indeed, the following issues are still open:

- Appeal of the Case – The government has yet to announce whether it will appeal, or seek an en-banc rehearing, of the appellate court decision. This decision and the issues to be determined on remand at the District Court will dictate how CFIUS implements the decision, including any changes to the CFIUS regulations and/or its practice in the review, investigation and presidential phases that would result in more information regarding the basis of the government's decision.

- Executive Privilege – In its opinion, the D.C. Circuit refused to opine on an executive privilege argument raised by the U.S. government for the first time during oral arguments. This issue will likely be raised again in the District Court and could have implications on any requirement to share the rationale regarding the national security determination.
- Additional Challenges to the CFIUS Process – In the past, parties have been reluctant to challenge CFIUS actions. This decision could encourage parties to fight CFIUS decisions in court.
- Incentives for CFIUS to Rely on Classified Information – Irrespective of the outcome at the District Court level, this decision appears to create the incentive for CFIUS to rely more heavily on classified information in making its determinations. While unclassified information must be released to the affected party prior to a presidential order, this rule does not apply to classified information. Therefore, to the extent that CFIUS does not want to disclose information to the affected parties, it can rely to a greater degree on classified information in its determination.
- Incentives for Parties to Create Property Interests in Advance of CFIUS Filings – Currently, many parties evaluate whether to file a CFIUS notice in advance of signing or closing a transaction to minimize the risk of CFIUS unwinding a deal or, more likely, imposing burdensome mitigation on the parties after the execution of a transaction. This decision may have a countervailing effect on that typical approach by incentivizing parties to create “property interests” in advance of a CFIUS filing to shroud the deal in the constitutional protection of due process.

To the extent that the decision stands, it will require the U.S. government, at a minimum, to take three steps to ensure that a party with a property interest affected by a CFIUS proceeding is not unconstitutionally deprived of due process: (1) inform the party of the official action, (2) give the party access to unclassified data information on which the presidential order is based and (3) provide the party with the opportunity to rebut that evidence. These requirements apply only prior to the issuance of a presidential order, which has occurred only one other time in CFIUS’s history. The vast majority of transactions are resolved prior to this stage through engagement with CFIUS and not the president. Thus, the current impact of this decision is very limited, while the open questions and possibilities for further changes remain significant depending on the procedural path the case takes from here.

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