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DC Circ. Rebuke Could Shake Up CFIUS Review Process

By **Kaitlyn Kiernan**

Law360, New York (July 15, 2014, 6:34 PM ET) -- A surprising decision by the D.C. Circuit on Tuesday to resurrect the first-ever challenge to the Committee on Foreign Investment in the United States review process opens the possibility for significant changes to the often frustratingly opaque procedure, experts say.

The D.C. Circuit on Tuesday resurrected Ralls Corp.'s suit against the CFIUS for a decision to invalidate the company's acquisition of four Oregon wind farms on national security grounds, with the court arguing for the first time that such reviews are susceptible to due process challenges.

"This is a very surprising decision," said Stephen Paul Mahinka, a partner with the antitrust practice at Morgan Lewis & Bockius LLP. "Ordinarily, there is a presumption that presidential decisions with regard to foreign policy are given deference by the court, so it is unusual to see the court insert itself here."

The unusual move will likely open up the CFIUS review process to changes for the first time since the Foreign Investment and National Security Act of 2007 codified it and granted the committee secrecy in its deliberations. The president was first granted the authority to block proposed deals in the name of national security by the Exon-Florio Amendment in 1988.

"If implemented, this decision would impose significant changes to the CFIUS process," said Christopher R. Brewster, special counsel with the national security, CFIUS and compliance practice group at Stroock Stroock & Lavan LLP. "It is a very hard-hitting, blunt decision that sends the message that the prospect of procedural challenges is available."

But changes wouldn't come overnight, experts agree. The unexpected nature of the decision and its importance to the CFIUS process makes a U.S. Department of Justiceappeal likely, either through a petition for en banc review or a petition to the U.S. Supreme Court.

If it holds, though, it could force transparency into what has long been an opaque process, granting new insights into how the government deliberates on deal decisions involving real or perceived threats to national security.

The CFIUS review process has been described as a black box into which foreign investors feed information, only to get out a yes or no answer as to whether they can go ahead with a deal, with no means of recourse.

“The deck will still be stacked heavily in the government’s favor,” said Harry Clark, head of the international trade and compliance group at Orrick Herrington & Sutcliffe LLP. “But it might prompt a little discipline in what the government does that has never been seen before.”

The D.C. Circuit ruled that due process required that the president and the CFIUS at the very least inform a company as to why a decision was being made, grant it access to the unclassified evidence used to come to that decision and give it an opportunity to rebut the evidence.

That overturns a decision by a D.C. district judge in October to throw out the last of Ralls’ suit against the government, finding that the Delaware company owned by two Chinese citizens should have known the risks of the $6 million March 2012 deal and wasn’t denied due process.

It leaves a whole swath of classified evidence unavailable to prospective investors — presumably the bulk of what drives deal denials on national security grounds.

Still, the possibility that any evidence could be released to the general public will impact the president's decision-making process, experts say.

“The CFIUS will have to present a case to the transaction parties for their decision and will have to do so with the knowledge that the transaction parties could make that case public,” Clark said.

Generally, Clark said he believed companies would tend toward discretion, preferring to work quietly with the government, as this development may also open avenues for resolving conflicts a company otherwise may never have known existed.

On the other hand, the Ralls decision might also embolden investors to challenge decisions they previously wouldn’t have touched, according to Brewster, because it “upends a longstanding assumption that if a company tried to challenge the CFIUS in court, it would lose."

But the decision Tuesday does have its limits. The court went out of its way to explain that it wasn’t challenging the president’s authority to make these kinds of decision but just the procedural aspects of the process.

“The appeal is a long way from reversing the decision to block this project,” said Mahinka.

And the CFIUS will likely resist making any changes until it sees how any and all appeal processes shake out, experts agree.

Still, one of the most surprising aspects of the decision for some was its timing, given that CFIUS has gone 26 years without a major judicial challenge.

“This is a mature organization with a lot of history,” said Brewster. “This is a significant new element, and we don’t yet know what the full impact will be.”

“You can’t change something like this without fundamentally changing the totality of the process,” he added.

The DOJ did not respond to calls from Law360 on Tuesday.

Judges Karen LeCraft Henderson, Janice Rogers Brown and Robert L. Wilkins sat on the bench for the D.C. Circuit.

Ralls is represented by Paul D. Clement, Viet D. Dinh, H. Christopher Bartolomucci and George W. Hicks Jr. of Bancroft PLLC, and Tim Tingkang Xia of Morris Manning &Martin LLP.

The government is represented by U.S Department of Justice attorneys Douglas N. Letter and Sonia Katherine McNeil.

The case is Ralls Corp. v. CFIUS et al., case number 13-5315, in the U.S. Court of Appeals for the D.C. Circuit.

--Additional reporting by Keith Goldberg. Editing by Kat Laskowski and Christine Chun.
