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COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES AND JUDICIAL REVIEW

By: Christina E. Holzer*

INTRODUCTION

*International investment in the United States promotes economic growth, productivity, competitiveness, and job creation. It is the policy of the United States to support unequivocally such investment, consistent with the protection of the national security.*¹

The monitoring of foreign direct investment (“FDI”)² in the United States is a balancing act between international relations and national security. The Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) is tasked with keeping the national security side of that balancing act in check.³ Prior to 2012, CFIUS had never been a named defendant in any lawsuit.⁴ However, as a committee, CFIUS has not been granted a judicial review exemption by any statutory scheme.⁵

This current status quo of exemption from judicial review will not stand domestically in the long run for two reasons: (1) even with a statutory exemption, it impedes the Administrative Procedure Act’s (“APA”)⁶ presumption favoring judicial review,⁷ and (2) questions of due process arise because CFIUS has neither a statute of limitations nor a time bar on involuntary transaction reviews.⁸

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¹ Exec. Order No. 13,456, 73 Fed. Reg. 4667 (Jan. 25, 2008).

² Historically, the United States has been one of the world’s largest recipients of foreign direct investment. *See, e.g., Foreign Direct Investment, Net Inflows (BoP, current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD> (last visited Oct. 20, 2013).

³ *See* 50 U.S.C. app. § 2170 (2011).

⁴ *See, e.g., Chinese Energy Developer Sues Committee on Foreign Investment in the United States (CFIUS) for Blocking Oregon Wind-Farm Investment on National Security Grounds*, VINSON & ELKINS (Sept. 17, 2012), <http://www.vclaw.com/resources/ChineseEnergyDeveloperSuesCFIUSBlockingOregonWindFarmInvestment.aspx>.

⁵ *Id.* It is the President alone who has been granted statutory exemption from judicial review on the action he takes when advised by CFIUS. 50 U.S.C. app. § 2170(c) (2011) (“The actions of the President . . . and the findings of the President . . . shall not be subject to judicial review.”).

⁶ Administrative Procedure Act, 5 U.S.C. §§ 500-96 (2006).

⁷ *See, e.g., Block v. Community Nutrition Institute*, 467 U.S. 340, 345-46 (1984); *Sackett v. EPA*, 132 S. Ct. 1367, 1373-74 (2012) (split on other grounds).

⁸ *See, e.g., Mark E. Plotkin et al., CFIUS and Network Security Agreements*, COVINGTON & BURLING, at 3 available at <http://www.cov.com/files/Publication/f23e0c74-c76d-4993-acb5-901415b8483f/Presentation/PublicationAttachment/9138cc87-ccb3-44f7-80dc-99d6ccd0835d/oid45143.pdf> (last visited Dec. 12, 2013); EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 37 (Inst. for Int’l Econ. cd., 2006) available at http://www.iic.com/publications/chapters_preview/3918/02iic3918.pdf.

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HISTORICAL OVERVIEW OF CFIUS

CFIUS is an independent, inter-agency committee tasked with the oversight of FDI in the United States.⁹ While the need to monitor FDI has been at the forefront of Congress's attention for much of the 20th Century,¹⁰ it was not until the Organization of Petroleum Exporting Countries' ("OPEC") oil embargo of the 1970s that the Ford Administration empowered CFIUS to "monitor" the impact of FDI in the United States.¹¹ Since then, the CFIUS has rapidly evolved.

During the 1980s, two unsuccessful high-profile bids led to Congressional action, exemplified by the Exon-Florio Amendment ["Exon-Florio"].¹² The first bid was spawned by the attempted takeover of Goodyear Tire and Rubber by a British corporation.¹³ The second bid came from a Japanese firm's attempted takeover of Fairchild Semiconductor Corporation.¹⁴ Suddenly, the Ford Administration's empowerment to CFIUS to monitor, review, and advise¹⁵ was found by Congress to be woefully lacking. Subsequently, Senator Exon and Representative Florio proposed Exon-Florio.¹⁶

Under Exon-Florio, the process of review was formalized and given standards.¹⁷ The factors established for consideration were:

domestic production needed for projected national defense requirements,

the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services, and

the control of domestic industries and commercial activity by foreign citizens as affects the capability and capacity of the United States to meet the requirements of national security.¹⁸

⁹ *The Committee on Foreign Investment in the US (CFIUS)*, U.S. DEP'T TREASURY, <http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx> (last visited Feb. 10, 2013).

¹⁰ Prior to World War I, Germany had investments in, *inter alia*, the U.S. chemical industry deemed critical to U.S. war efforts. Consequently, Congress acted quickly to protect U.S. interests by passing the Trading With The Enemy Act and providing the President with broad powers to block and remove foreign investment. *See, e.g., GRAHAM & MARCHICK, supra*, note 8, at 38.

¹¹ *See* Exec. Order No. 11,858, 3 C.F.R. 990 (1971-1975).

¹² *See* Clyde Farnsworth, *Petition Filed Opposing Offer to Buy Gold Fields*, N.Y. TIMES, Oct. 6, 1988, <http://www.nytimes.com/1988/10/06/business/petition-filed-opposing-offer-to-buy-gold-fields.html>; *accord GRAHAM & MARCHICK, supra* note 8, at 145.

¹³ *See* Denise Gellenc, *Goldsmith Drops Goodyear Bid, Will Sell Back His Stock*, L.A. TIMES, Nov. 21, 1986, http://articles.latimes.com/1986-11-21/business/fi-14781_1_takeover-plan; *see also* Stuart Warner, *A Good Year Remembered*, INSIDE BUS. MAG., Sept.-Oct. 2011, http://ibmag.com/Main/Archive/A_Good_Year_Remembered_11967.aspx.

¹⁴ *See Cold Feet: Fujitsu Drops Its Fairchild Bid*, TIME, Mar. 30, 1987, <http://www.time.com/time/magazine/article/0,9171,963877,00.html>.

¹⁵ *See* 3 C.F.R. 990.

¹⁶ 50 U.S.C. app. § 2170 (2011) (originally enacted as Omnibus Trade and Competitiveness Act of 1988 § 5021, Pub. L. No. 100-418, 102 Stat. 1107).

¹⁷ *Id.* § 2170(f)(1)-(3).

¹⁸ *Id.*

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President Reagan then issued an executive order that delegated the power of performing a review to CFIUS and reporting the findings back to the President.¹⁹ The executive order gave CFIUS thirty days after receipt of written notification to begin an investigation and forty-five days to complete the investigation,²⁰ which, while not a statute of limitations, provided companies a predictable timeframe in the event that they chose to submit voluntarily. As a result of the order, the President could make timely decisions on the advice coming from the CFIUS-led investigation of national security issues, often from forthcoming companies.

Despite the addition of Exon-Florio in 1988, CFIUS and the Office of the President had ostensible difficulty defending and defining precisely what “national security” meant. The ambiguity of the definition of national security, in part, led to the CATIC-MAMCO episode.²¹

In February of 1990, President George H. Bush, upon the advice of CFIUS, ordered the rescission of the merger of the preceding November between the China National Aero-Technology Import and Export Corporation (“CATIC”), a Chinese governmental agency, and the Seattle-based Mamco Manufacturing Inc (“MAMCO”).²² While President Bush claimed that his decision to void the transaction was based on national security concerns as investigated by CFIUS, the Chinese government and CATIC declared the decision to be retaliation for the killing of demonstrators in Tiananmen Square that previous June.²³

The president of MAMCO explained to numerous news sources that MAMCO was simply a machine shop with no classified contracts and no national security implications, which only added to the speculation that the rescission may have been more about retribution than national security.²⁴

As a result of the CATIC-MAMCO episode, Congress passed the Byrd Amendment of National Defense Authorization Act for Fiscal Year 1993 (“Byrd Amendment”).²⁵ The Byrd Amendment contained three major additions to the Exon-Florio structure:

1. mandatory, 45-day investigation of any transaction involving state or sovereign-owned entities which have the potential to affect national security,
2. elements 4 and 5 to Exon-Florio’s 3 standards for a CFIUS review of a transaction;
 - a. potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country identified . . . by the Secretary of State, and

¹⁹ See Exec. Order No. 12,661, 3 C.F.R. 618 (1988).

²⁰ *Id.*

²¹ See, e.g., Harriet King, *China Ends Silence on Deal U.S. Rescinded*, N.Y. TIMES, Feb. 20, 1990, <http://www.nytimes.com/1990/02/20/business/china-ends-silence-on-deal-us-rescinded.html>; *Chinese Firm Protests Order to Sell Aircraft Parts Operation*, L.A. TIMES, Feb. 20, 1990, http://articles.latimes.com/1990-02-20/business/fi-994_1_aircraft-parts.

²² King, *supra* note 21.

²³ *Id.*

²⁴ Tom Brown, *Mamco: Victim Of China Anger? - Firm May Have Been Target Of Opportunity*, SEATTLE TIMES, Feb. 9, 1990, <http://community.seattletimes.nwsource.com/archive/?date=19900206&slug=1054575>; see King, *supra* note 21.

²⁵ 50 U.S.C. app. § 2170 (2011) (originally enacted as National Defense Authorization Act for Fiscal Year 1993 § 837(a), Pub. L. No. 102-484 106 Stat. 2315).

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b. potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security.²⁶

CFIUS's new empowerment, which included the power to investigate any FDI activity that potentially affected national security and required CFIUS to investigate all transactions involving sovereigns or their entities, set the stage for the next series of FDI episodes that were less about national security and more about national politics.

In the spring of 2005, Unocal Corporation was in the process of being purchased by Chevron Corporation when China National Offshore Oil Corporation ("CNOOC") made a larger, unsolicited, all-cash bid for Unocal.²⁷ This unexpected bid was immediately met with so much negative Congressional reaction that the CEO of CNOOC wrote an open letter to Congress, addressing its concerns through the media.²⁸

On top of the on-going CFIUS review, Congress added a provision to the 2005 Energy Policy Act that required a four-month study of Chinese energy needs.²⁹ Before CFIUS completed its investigation, the negative publicity that resulted was so strong that CNOOC withdrew its bid, and the less lucrative plan with Chevron went through.³⁰ Thus, one result of the failed Unocal-CNOOC transaction was that Chinese entities publicly learned to be more hesitant when getting involved with U.S. possibilities for FDI.³¹

Soon after, in the autumn of 2005, Dubai Ports World ("DP World") announced its intention to acquire a British company that had operation leases on six busy, American, ports.³² DP World submitted its notification to CFIUS. On January 17, 2006, after an investigation, CFIUS announced that the transaction was approved, provided that DP World complied with mitigation agreements.³³ However, the public outcry³⁴ and Congressional

²⁶ *Id.* § 2170(b), (f)(4)-(5).

²⁷ David Barboza & Andrew Ross Sorkin, *Chinese Oil Giant in Takeover Bid for U.S. Corporation*, N.Y. TIMES, June 23, 2005, <http://www.nytimes.com/2005/06/23/business/worldbusiness/23unocal.html>; see also *CNOOC Withdraws Unocal Bid*, XINHUA NEWS AGENCY, Aug. 3, 2005, <http://www.china.org.cn/english/2005/Aug/137165.htm>.

²⁸ See Press Release, CNOOC Limited, Statement by Fu Chengyu, Chairman and CEO of CNOOC Limited (June 24, 2005), available at <http://www.cnooltd.com/cnooltd/newszx/news/2005/958.shtml>; Interview With Fu Chengyu, TIME, July 11, 2005, <http://www.time.com/time/magazine/article/0,9171,1081436,00.html>; *Is CNOOC's Bid for Unocal a Threat to America?*, KNOWLEDGE@WHARTON (Nov. 21, 2005), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1240>.

²⁹ H.R. Res. 6, 109th Cong. § 1837 (2005) (enacted).

³⁰ *CNOOC Withdraws Its Bid For Unocal*, ASIA TIMES, Aug. 4, 2005, <http://www.atimes.com/atimes/China/GH04Ad02.html>.

³¹ Sri Jcgarahcj, *CNOOC's Failed Unocal Bid Paved Way for Nexen Deal*, CNBC, July 24, 2012, http://www.cnbc.com/id/48296409/CNOOC_s_Failed_Unocal_Bid_Paved_Way_for_Nexen_Deal; *CNOOC Withdraws Unocal Bid*, ASIA TIMES, Aug. 4, 2005, <http://www.atimes.com/atimes/China/GH04Ad02.html>.

³² David Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES, Mar. 10, 2006, <http://www.nytimes.com/2006/03/10/politics/10ports.html?pagewanted=all>.

³³ Press Release, U.S. Dep't of the Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), available at <http://www.treasury.gov/press-center/press-releases/Pages/js4071.aspx>.

³⁴ See, e.g., *Key Questions About the Dubai Port Deal*, CNN, Mar. 6, 2006, http://articles.cnn.com/2006-03-06/politics/dubai.ports.qa_1_dp-world-uac-dubai-port-dcal.

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resistance,³⁵ combined with the House Appropriations Committee's blocking of DP World's ability to purchase access to critical ports,³⁶ led to DP World abandoning all plans for U.S. assets.³⁷ The combination of the failed Unocal-CNOOC and DP World transactions were seen as "suggesting a less hospitable business environment relative to the 1990s," leading to a more hesitant approach for the holders of FDI interested in the United States.³⁸

After DP World's abandonment, Congress was concerned that CFIUS investigations were not transparent enough, which led the House to quickly pass the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, overhauling CFIUS operating procedures.³⁹ Once the National Security Foreign Investment Reform and Strengthened Transparency Act passed in the House, it was retooled in the Senate as the Foreign Investment and National Security Act of 2007 ("FINSA").⁴⁰

The passage of FINSA clarified the definition of "national security," added more mandatory investigations, codified the mitigation process, and added to CFIUS's Congressional reporting duties.⁴¹ The FINSA additions defined CFIUS's aggressive focus on National Security.

Despite the amount of press CFIUS receives, the hard numbers reveal that extreme measures are rarely taken. In 2009, 2010, and 2011, the Committee conducted 65, 93, and 111 reviews, respectively,⁴² as well as 25, 35, and 40 investigations, respectively.⁴³ Additionally, no transactions resulted in Executive action during this time period.⁴⁴

CFIUS STRUCTURE

CFIUS is designed for the single purpose of analyzing a narrow range of transactions: covered transactions.⁴⁵ Modern CFIUS has been through numerous structural changes to meet that purpose since its amorphous beginning during World War I.⁴⁶ During that period, the need to balance national security with allowing foreign entities to bid on U.S.

³⁵ See, e.g., *Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. Comm. on Fin. Servi.*, 109th Cong. (2006), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg30179/html/CHRG-109hhrg30179.htm>.

³⁶ Deidre Walsh, *Congress Declares War on Ports Deal*, CNN, Mar. 8, 2006, <http://www.cnn.com/2006/POLITICS/03/08/port.security/index.html>.

³⁷ Dana Bash, *UAE Firm to Transfer Port Operations to 'U.S. Entity'*, CNN, Mar. 10, 2006, <http://www.cnn.com/2006/POLITICS/03/09/port.security/index.html>.

³⁸ Christina V. Balis et al., *After Dubai Port: Rethinking M&A Strategy in a New Security Context*, 11 AVASCENT REV. (SPECIAL ISSUE) 1, 31 (2006), available at <http://www.avascentinternational.com/Files/Publications/0606-TAR-11-Rethinking-MA-Strategies-in-a-New-Security-Context.pdf>.

³⁹ H.R. Res. 556, 110th Cong. (2005) (enacted).

⁴⁰ 50 U.S.C. app. § 2170 (2011) (originally enacted as Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246).

⁴¹ *Id.* § 2170(a)(5), (f)(11), (l), (m).

⁴² 2012 CFIUS ANN. REP., at 1, available at <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2012%20CFIUS%20Annual%20Report%20PUBLIC.pdf>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 50 U.S.C. app. § 2170(a), (b).

⁴⁶ The first executive order outlining formal CFIUS structure came from President Truman during the Korean Conflict. See Exec. Order No. 11,858, 3 C.F.R. 990 (1971-1975).

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assets, crystalized when the U.S. realized the German Empire was heavily invested in the war production industry.⁴⁷ While the influx of capital from foreign countries has benefits, foreign capital originating behind enemy lines but being used to buttress critical war efforts is another matter entirely.

Currently, the CFIUS Committee, guided by the Chairman and directed by the Lead Agency follows its Congressional mandate by initiating a national security review ("Review") with the possibility of a national security investigation ("Investigation") of covered transactions.⁴⁸ Upon completion of the Review and possible Investigation, CFIUS reports to the President.⁴⁹ Once CFIUS reports, the President can issue an Executive Order.⁵⁰ Finally, CFIUS reports to Congress both annually and on the basis of individual actions.⁵¹

I. Covered Transactions

Transactions covered by CFIUS empowering documents are the core of what CFIUS does. Specifically, the "covered transactions" CFIUS is empowered to analyze are defined as "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States."⁵²

After August 23, 1988, CFIUS's mandate to review extends to any and all transactions that involve the exchange of foreign capital for control over American assets that have or may have any effect on American interstate commerce. Considering the reach of "interstate commerce" as defined by U.S. federal judicial review,⁵³ it is unlikely that foreign investors will seek out American assets insubstantial enough to avoid "interstate commerce". Since the Reagan Administration, CFIUS has been empowered to review any and all transactions in the United States that led to foreign control of U.S. assets.

In theory, the CFIUS mandate that permitted the analysis of all covered transactions is enormous; however, the practical application of CFIUS is minimal. For example, in 2010, the FDI entering the United States totaled \$194 billion.⁵⁴ However, the number of notices reviewed were ninety-three with thirty-five Investigations and no Presidential action.⁵⁵ Thus, as a practical matter, CFIUS reviews a small fraction of the FDI entering the United States.

⁴⁷ GRAHAM & MARCHICK, *supra*, note 8, at 4.

⁴⁸ 50 U.S.C. app. § 2170(a), (b) (2011).

⁴⁹ *Id.* § 2170(b)(1)(A).

⁵⁰ *Id.* § 2170(d).

⁵¹ *Id.* § 2170(b)(3).

⁵² *Id.* § 2170(a)(3).

⁵³ *E.g.*, Wickard v. Filburn, 317 U.S. 111, 124 (1942) (holding that wheat grown on a farm for the personal use of the farmer was under the scope of interstate commerce); A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 545 (1935) (holding that the methods of selection of poultry in local poultry markets was not under the scope of interstate commerce).

⁵⁴ ECON. & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, ESA ISSUE BRIEF #02-11, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES I (2011), available at <http://www.csa.doc.gov/sites/default/files/reports/documents/fdiesaisuebriefno2061411final.pdf>.

⁵⁵ 2012 CFIUS ANN. REP., at 3, available at <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2012%20CFIUS%20Annual%20Report%20PUBLIC.pdf>.

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II. CFIUS Members

There are nine official committee members that make up CFIUS.⁵⁶ The head of CFIUS, the “Chairperson,” is a position filled by the Secretary of the Treasury.⁵⁷ The Chairperson is obligated to determine which federal departments, agencies, and independent establishments would be appropriate to consult with during the Review or Investigation of a covered transaction.⁵⁸

The other voting members of the Committee are the:

1. Secretary of Homeland Security,
2. Secretary of Commerce,
3. Secretary of Defense,
4. Secretary of State,
5. Attorney General of the United States, and
6. Secretary of Energy.⁵⁹

The nonvoting, *ex officio* members of the Committee are:

1. Secretary of Labor, and
2. Director of National Intelligence.⁶⁰

Beyond the nine official positions on the Committee, there is a provision to include “the heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis.”⁶¹ Furthermore, there are four other offices that regularly observe and participate. They are the:

1. Office of Management and Budget,
2. Council of Economic Advisors,
3. National Security Council, and
4. National Economic Council.⁶²

By statute, the only permissible delegation of Committee power by any of its members during a Review or Investigation is to (1) the Deputy Secretary of the Treasury, or (2) “the deputy head (or the equivalent thereof) of the lead agency, respectively.”⁶³ Consequently, while the Committee may be added to as needed, the Committee’s core members cannot shrink, under current legislation. All members will, most likely, be involved in all Reviews and Investigations in at least a cursory manner.

⁵⁶ *Composition of CFIUS*, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (last updated Dec. 1, 2010).

⁵⁷ *Id.*; 50 U.S.C. app. § 2170(a)(1), (k)(3) (2011).

⁵⁸ *E.g.*, 50 U.S.C. app. § 2170(b)(2)(D)(i) (2011).

⁵⁹ *Id.* § 2170(k)(2)(A)-(G); *Composition of CFIUS*, *supra* note 56.

⁶⁰ 50 U.S.C. app. § 2170(k)(2)(H)-(I) (2011).

⁶¹ *Id.* § 2170(k)(2)(J).

⁶² *Composition of CFIUS*, *supra* note 56.

⁶³ 50 U.S.C. app. § 2170(b)(2)(D) (2011).

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CFIUS PROCESS

There are two steps that CFIUS, as a committee, has the authority to exercise in order to carry out its mandate. The first step is that CFIUS reviews an FDI transaction. Should the review process reveal that the FDI transaction involves a foreign government or national security concerns, that Review must proceed to an Investigation. Once CFIUS has completed either only a Review or a Review and subsequent Investigation, the Committee must advise the President and report to Congress on its findings.

I. National Security Review

The Review process of covered transactions can occur one of two ways: party-initiated or CFIUS-initiated.⁶⁴ If one or more of the parties involved with the FDI transaction voluntarily submit their transaction to CFIUS, they do so with a written notice of the transaction to the Chairperson of CFIUS.⁶⁵ Even if none of the parties involved in the transaction voluntarily submit their transaction to CFIUS, either the Committee or the President may unilaterally initiate a Review of the covered transaction.⁶⁶ At any point, a Review may be repeated after the completion of the initial Review⁶⁷ only should the materials provided by any party during the initial Review be thought to be “false or misleading,” if there were material omissions in the materials provided, or if any party to the covered transaction is found to be in breach of a relevant mitigation agreement.⁶⁸

As the Review period (distinct from an Investigation period⁶⁹) shall, by statute, only last up to thirty days, the advantage to voluntary submission is that the beginning of the thirty-day Review begins upon acceptance of the written notice.⁷⁰ If none of the parties submit their transaction for Review, the thirty-day Review period does not start until the Chairperson initiates the Review.⁷¹ Failure to submit is a risky proposition because after “covered transaction” reviews started in 1988,⁷² any transaction made thereafter, which qualified as covered, was subject to both a Review and the possibility of complete unwinding.⁷³ Therefore, the option of voluntary submission provides a faster and more reliable background than waiting to see if the transaction ever gets the Committee’s attention.

In a voluntary submission, one or more of the parties to the transaction completes a Voluntary Notice to CFIUS pursuant to Section 721 of Title VII of the Defense of Production Act of 1950.⁷⁴ The Voluntary Notices require specific and detailed information regarding a

⁶⁴ *Id.* § 2170(b)(1)(C), (D) (2011).

⁶⁵ *Id.* § 2170(b)(1)(C)(i).

⁶⁶ *Id.* § 2170(b)(1)(D).

⁶⁷ *Id.* § 2170(b)(1)(D)(ii)-(iii).

⁶⁸ *Id.*

⁶⁹ Compare 50 U.S.C. app. § 2170(b)(1) (2007), with *id.* § 2170(b)(2).

⁷⁰ *Id.* § 2170(b)(1)(E).

⁷¹ *Id.*

⁷² *Id.* § 2170(a)(3).

⁷³ E.g., Nova J. Daly, *CFIUS’ Biggest Hits: Lessons for the Dealmaker*, WILEY REIN LLP (Apr. 2010), <http://www.wileyrein.com/publications.cfm?sp=articles&id=6023>.

⁷⁴ 31 C.F.R. § 800.401 (2013); see, e.g., Voluntary Notice to the Committee on Foreign Investment in the United States under Section 721 of Title VII of the Defense Production Act of 1950, as Amended, and 31

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range of things, including: the financing of the transaction, business projections, recent history of the entities involved, and any individuals with a significant role to play in the FDI transaction.⁷⁵ Any information that is false or misleading in the Voluntary Notice, or omitted from the Voluntary Notice, negates the binding effect of a completed Review and allows CFIUS to re-Review a covered transaction.⁷⁶ As further incentive for parties to fully and openly comply, Voluntary Notices remain confidential and exempt from Freedom of Information Act requests and will not be made public unless called for by either judicial or administrative proceedings.⁷⁷ Once the Department of the Treasury has officially accepted the Voluntary Notice and issued a Notice of Acceptance, the thirty-day time frame for CFIUS to complete its Review begins.⁷⁸

The Director of National Intelligence must be given notice of the commencement of a Review, as the Director of National Intelligence must provide CFIUS a “thorough analysis of any threat to national security”⁷⁹ no later than twenty days after the Notice of Acceptance.⁸⁰

Once the Director of National Intelligence has been given notice, the very first determination that CFIUS must make is whether the transaction will result in control by a foreign government.⁸¹ Section 721 defines “foreign government-controlled transactions” to be “any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.”⁸² Transactions involving foreign governments are, by default, cause for greater scrutiny under the mandate set for CFIUS.

The proposition of ceding control of any portion of interstate commerce to either a foreign government or a foreign-government-controlled entity on U.S. soil will automatically shift the thirty-day Review into a forty-five-day Investigation by CFIUS.⁸³ However, if the transaction is going to result in private, foreign control, and does not involve a foreign government, the thirty-day Review with a possibility of Investigation will continue.⁸⁴

During a CFIUS Review, the Chairperson first delegates a lead agency to spearhead the Review.⁸⁵ The lead agency during the Review of a transaction⁸⁶:

shall... be the lead agency or agencies on behalf of the Committee--

(A) for each covered transaction, and for negotiating any mitigation agreements or other conditions necessary to protect national security; and

C.F.R. Part 800 with Respect to a Transaction between Ralls Corporation and Terna Energy USA Holding Corporation, *Ralls Corp. v. Obama*, CFIUS & Geithner, No. 1:12-CV-01513-ABJ (D.D.C. Sept. 13, 2012).

⁷⁵ 31 C.F.R. § 800.402(c)-(c).

⁷⁶ 50 U.S.C. app. § 2170(b)(1)(D)(ii) (2011).

⁷⁷ *Id.* § 2170(c).

⁷⁸ *Id.* § 2170(b)(1)(E).

⁷⁹ *Id.* § 2170(b)(4)(A).

⁸⁰ *Id.* § 2170(b)(4)(B).

⁸¹ *Id.* § 2170(b)(1)(B).

⁸² *Id.* § 2170(a)(4).

⁸³ *Id.* § 2170(b)(1)(E), (2)(C).

⁸⁴ *Id.* § 2170(b)(1).

⁸⁵ *Id.* § 2170(k)(5).

⁸⁶ *Id.* § 2170(a)(8).

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(B) for all other matters related to the monitoring of the completed transaction, to ensure compliance with such agreements or conditions and with this section.⁸⁷

For practical purposes, the lead agency is in charge of the minutia of any specific Review. Once the lead agency is designated, the Committee may proceed with the Review.⁸⁸

In a Review, the Committee must consider ten generalized factors revolving primarily around the short- and long-term viability and stability of U.S. economic, energy, technology, and national security interests.⁸⁹ There is also a provision specifically tasked with preventing terrorism.⁹⁰

Beyond the eleven factors to consider, there is a catchall that provides for “such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific [R]eview or [I]nvestigation.”⁹¹ Thus, if none of the ten other categories are sufficient to cover what CFIUS may believe to be appropriate material to assess, the Committee or the President are free to expand on the factors that ought to be considered.

In addition, the lead agency is empowered to negotiate on behalf of the Committee and enter into mitigation agreements during the Review.⁹² These negotiations and mitigation agreements are constructed to address issues that arise when the Committee considers the covered transaction against the framework of the prescribed factors.⁹³

In situations where the private parties comply with mitigation agreements and allow monitoring as prescribed, the Committee need only submit a certification to Congress and the Congressional Member from the district of the new entity’s principal place of business.⁹⁴ Upon submission, the Review is over.⁹⁵ An Investigation is triggered when mitigation agreements are breached, government entities are involved, critical infrastructure is involved, or the Review was deemed insufficient to address the issues raised.⁹⁶

Regardless of the path to Review completion, CFIUS is obligated to promptly inform the parties of the results of the underlying covered transaction once the review has ended.⁹⁷

II. National Security Investigation

A CFIUS Investigation is triggered in one of three circumstances, provided that the lead agency recommended, and CFIUS agreed, that an Investigation should begin.⁹⁸ The first circumstance occurs when a national security threat found during the Review was not

⁸⁷ *Id.* § 2170(k)(5).

⁸⁸ *Id.*

⁸⁹ *Id.* § 2170(f)(1)-(8), (10).

⁹⁰ *Id.* § 2170(f)(9).

⁹¹ *Id.* § 2170(f)(11).

⁹² *Id.* § 2170(k)(5)(A).

⁹³ *Id.* § 2170(l)(1)(A).

⁹⁴ *Id.* § 2170(b)(3).

⁹⁵ *Id.*

⁹⁶ *Id.* § 2170(b)(2)(B).

⁹⁷ *Id.* § 2170(b)(6).

⁹⁸ *Id.* § 2170(b)(2)(B)(ii).

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mitigated, either prior to the Review or through a mitigation agreement.⁹⁹ The second circumstance occurs if the transaction results in U.S. assets being controlled by a foreign government.¹⁰⁰ The third circumstance triggering an Investigation occurs if the transaction involves the transfer of a U.S. asset that is deemed to be any form of “critical infrastructure”¹⁰¹ without mitigations for the risk.¹⁰²

Unlike the Review period that can be triggered by the Committee’s acceptance of a party’s writing, an Investigation begins “on the date on which the investigation commenced.”¹⁰³ In other words, a CFIUS Investigation begins when it is called for and there is nothing the parties can do to hasten or avoid its arrival. As soon as one of the three instances occurs and CFIUS deems an Investigation appropriate, an Investigation is required.

Furthermore, an Investigation may begin only during a Review period but no written notice is required from the Committee to the parties involved.¹⁰⁴ Not only is no written notice needed from the Committee, but the Committee is further empowered with a much more flexible mandate to “take any necessary actions in connection with the transaction to protect the national security of the United States.”¹⁰⁵ Therefore, while CFIUS is not required to inform the parties of the beginning of an Investigation, at the completion of an Investigation CFIUS must provide prompt notice of the findings to the parties of the covered transaction.¹⁰⁶

III. Findings of the President

All Reviews and prospective Investigations performed by CFIUS are done on behalf of the President.¹⁰⁷ However, when extraordinary measures are required, it must be the President—not the CFIUS Committee—that acts and does so on the advice of the Committee through the power granted in Section 721.¹⁰⁸

While the CFIUS Committee is permitted to take “any necessary actions in connection with the transaction to protect the national security of the United States[.]”¹⁰⁹ only the President is explicitly granted the power “to suspend or prohibit any covered transaction”¹¹⁰ and further to direct the Attorney General of the United States “to seek

⁹⁹ *Id.* § 2170(b)(2)(B)(i)(I).

¹⁰⁰ *Id.* § 2170(b)(2)(B)(i)(II).

¹⁰¹ *Id.* § 2170(a)(6) (“Critical infrastructure means . . . systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”).

¹⁰² *Id.* § 2170(b)(2)(B)(i)(III).

¹⁰³ *Id.* § 2170(b)(2)(C).

¹⁰⁴ *Id.* § 2170(b)(2).

¹⁰⁵ *Id.* § 2170(b)(2)(A).

¹⁰⁶ *Id.* § 2170(b)(6).

¹⁰⁷ *Id.* § 2170(b)(1)(A).

¹⁰⁸ *Id.* § 2170(d)(1), (c).

¹⁰⁹ *Id.* § 2170(b)(2)(A).

¹¹⁰ *Id.* § 2170(d)(1).

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appropriate relief, including divestment relief” in federal courts.¹¹¹ Moreover, only measures and findings by the President are exempt from judicial review under Section 721.¹¹²

In order for the President to seek an appropriate action, including suspension or prohibition of a covered transaction, the President must first make two findings.¹¹³ First, there must be “credible evidence” that leads the President to believe that the foreign interest involved in the covered transaction “might take action” that “threatens to impair the national security”¹¹⁴ Second, all other provisions of law, aside from the International Emergency Economic Powers Act, must fail to provide “adequate and appropriate authority” to the President to protect national security.¹¹⁵

An Executive Order containing these two findings must be announced no later than fifteen days after the completion of the relevant Investigation.¹¹⁶ Beyond those fifteen days, Section 721 provides no authority for the presidential action.

IV. Reporting to Congress

CFIUS is required to provide Congress with certified notice after the completion of each Review and a certified written report at the completion of each Investigation not submitted to the President for further action.¹¹⁷ The certified notice and reports must go:

1. to the Majority leader and the Minority Leader of the Senate;
2. to the chair and ranking member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of any committee of the Senate having oversight over the lead agency;
3. to the Speaker and the Minority Leader of the House of Representatives;
4. to the chair and ranking member of the Committee on Financial Services of the House of Representatives and any committee of the House of Representatives having oversight over the lead agency; and
5. with respect to covered transactions involving critical infrastructure, to the members of the Senate from the State in which the principal place of business of the acquired United States person is located, and the member from the Congressional District in which such principal place of business is located.¹¹⁸

¹¹¹ *Id.* § 2170(d)(3).

¹¹² *Id.* § 2170(c) (“The actions of the President under paragraph (1) of subsection (d) of this section and the findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review.”).

¹¹³ *Id.* § 2170(d)(4).

¹¹⁴ *Id.* § 2170(d)(4)(A).

¹¹⁵ *Id.* § 2170(d)(4)(B).

¹¹⁶ *Id.* § 2170(d)(2).

¹¹⁷ *Id.* § 2170(b)(3)(A)-(B).

¹¹⁸ *Id.* § 2170(b)(3)(C)(iii).

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These certifications to Congress include descriptions of the steps taken by CFIUS and specify the determinative factors considered from Section 721.¹¹⁹ Furthermore, each certification must be signed by the Chairperson and the head of the Lead Agency, certifying the Committee's determination that the covered transaction had "no unresolved national security concerns" in question.¹²⁰

Beyond the certifications, CFIUS must also present an annual report to Congress of all the Reviews and Investigations which transpired in the preceding twelve-month period.¹²¹ Although the annual reports provide specific information, they provide a broader overview than certifications, focused on "trend information."¹²² Unlike the certifications, there must also be an unclassified version of the annual report available to the public.¹²³

JUDICIAL REVIEW

CFIUS may be subject to judicial review. While Congress exempted Presidential findings and actions under Section 721 from judicial review,¹²⁴ the Committee itself has not been granted such an exemption.¹²⁵ CFIUS is an administrative committee, binding it not only to its various empowering statutes and executive orders,¹²⁶ but also to the APA.¹²⁷

Arguably, the structure of the Executive Committee lends itself to the notion that it may not in fact be an executive agency. If CFIUS is not considered an executive agency, it would not necessarily be subject to the APA. However, in the first case brought against CFIUS, the federal government failed to rebut the pleading that CFIUS was governed by the APA when the plaintiff pled "CFIUS constituted an 'agency' whose final actions are reviewable under the APA", indicating a concession by the federal government that CFIUS is, in fact, bound to the APA.¹²⁸

Moreover, Section 721 is bereft of support for the contention that the Committee's actions would be exempt from judicial review. In fact, there is language indicating anticipatory judicial review of CFIUS:

¹¹⁹ *Id.* § 2170(b)(3)(C)(i).

¹²⁰ *Id.* § 2170(b)(3)(C)(ii).

¹²¹ *Id.* § 2170(m).

¹²² *Id.* § 2170(m)(2).

¹²³ *Id.* § 2170(m)(3)(B); *see, e.g., Reports and Tables*, U.S. DEP'T TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx> (last updated Sept. 9, 2013).

¹²⁴ *See* 50 U.S.C. § 2170(c) (2011).

¹²⁵ *See id.* § 2170(c).

¹²⁶ The legislation and executive orders have been codified at 50 U.S.C. app. § 2170 (2011).

¹²⁷ 5 U.S.C. §§ 500-60 (2006).

¹²⁸ Amended Complaint for Declaratory and Injunctive Relief at 24, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4931759, at ¶ 109. Furthermore, in none of the defendants' papers in the *Ralls* case did the U.S. government raise any attempt to counter the plaintiff's claim of an APA violation. Moreover, the U.S. government did move the district court to dismiss for lack of jurisdiction on claims of APA violations. Thus far, the U.S. government has implicitly affirmed that CFIUS action is bound by the APA. Defendants' Memorandum in Support of Motion to Dismiss, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 5338791; Defendants' Reply Memorandum in Support of their Motion to Dismiss, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 5945531.

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Any information or documentary material filed with the President or the President's designee pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code [5 U.S.C.A. § 552], and no such information or documentary material may be made public, except as may be relevant to any administrative or *judicial* action or proceeding.¹²⁹

Although the statutory language does not specify CFIUS as a prospective party within the judicial action or proceeding, or as a non-party witness on the outer boundaries of the judicial action or proceeding, the statute does not rule out the possibility of CFIUS as a party to the judicial action or proceeding.

Alternatively, the largest indicator that CFIUS is subject to judicial review is the silence of the statute. While the statute explicitly states that the President is immune from judicial review when taking action under framework of Section 721, CFIUS is never granted statutory immunity from judicial review. Subsection E—entitled “Actions and Findings Nonreviewable”—of Section 721, states, in its entirety, “[t]he actions of the President under paragraph (1) of subsection (d) of this section and the findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review.”¹³⁰

The extent of the President's immunity, as stated in “Actions and Findings Nonreviewable[,]” is that the President's actions, as authorized within the parameters of Section 721, are nonreviewable.¹³¹ The fact that Congress went so far as to grant the President immunity from judicial review, while remaining silent on the CFIUS Committee itself, is a strong indicator that Congress never intended to grant the CFIUS Committee immunity.

Moreover, the absence of CFIUS's reviewability under Section 721, combined with the following provision of the APA, provides strong evidence that CFIUS is likely subject to judicial review. The section of the APA entitled “Right of Review” states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled to judicial review* thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority *shall not be dismissed nor relief therein be denied* on the ground that it is against the United States or that the United States is an indispensable party.¹³²

Thus, if a member of CFIUS, who is both a member of the CFIUS Executive Committee and a member of another administrative agency,¹³³ steps beyond the scope of granted authority in Section 721, the APA indicates that judicial review is available to the injured party.

The Supreme Court has consistently held that the APA creates “a presumption favoring judicial review of administrative action.”¹³⁴ The Supreme Court further determined

¹²⁹ 50 U.S.C. app. § 2170(c) (2011) (emphasis added).

¹³⁰ *Id.* § 2170(c).

¹³¹ *Id.*

¹³² 5 U.S.C. § 702 (2006) (emphasis added).

¹³³ 50 U.S.C. § 2170(k)(2) (2011).

¹³⁴ *Sackett v. EPA*, 132 S.Ct. 1367, 1369 (2012); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 348-49 (1984).

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that the APA only creates a *presumption*, of judicial review that “may be overcome by specific language”¹³⁵ or overcome by “inferences of [Congressional] intent drawn from the statutory scheme as a whole.”¹³⁶

To that point, CFIUS was formed almost four decades ago¹³⁷ and has seen three, high-profile Congressional overhauls.¹³⁸ Accordingly, the matter of judicial review exemption was not overlooked.¹³⁹ Exemption from judicial review was expressly granted to the President alone.¹⁴⁰ Over the past four decades, with considerable input from Congress, the Committee has only been empowered to make public relevant information, should the Committee be involved in a judicial proceeding or action.¹⁴¹ Therefore, Congress did not intend for the Committee to be exempt from judicial review.

UNCHARTED WATERS: RALLS V. CFIUS

On September 12, 2012, the Ralls Corporation (“Ralls”) filed a complaint for declaratory and injunctive relief against CFIUS and Timothy Geithner, in his official capacity as Secretary of the Treasury and CFIUS Chairperson, in the United States District Court in Washington, D.C.¹⁴² This complaint was the first legal challenge to a CFIUS action in the agency’s history.¹⁴³ Customarily, foreign entities withdraw their bids for U.S. assets when CFIUS gives them a negative review,¹⁴⁴ and none have ever sought judicial review of CFIUS action.¹⁴⁵

Ralls asserted that the District Court had jurisdiction over the claim,¹⁴⁶ and, therefore that the claim could be reviewed by the courts on the grounds of: (1) federal question¹⁴⁷ and (2) creation of a remedy.¹⁴⁸ Given the silence in Section 721 on the

¹³⁵ *Block*, 467 U.S. at 348-49.

¹³⁶ *Sackett*, 132 S.Ct. at 1369.

¹³⁷ Exec. Order No. 11,858, 3 C.F.R. 990 (1971-1975).

¹³⁸ 50 U.S.C. app. § 2170 (2011) (originally enacted as Omnibus Trade and Competitiveness Act of 1988 § 5021, Pub. L. No. 100-418, 102 Stat. 1107); *id.* (originally enacted as National Defense Authorization Act for Fiscal Year 1993 § 837(a), Pub. L. No. 102-484 106 Stat. 2315); *id.* (originally enacted as Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246).

¹³⁹ 50 U.S.C. app. § 2170(c) (2011).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* § 2170(c).

¹⁴² Complaint for Declaratory and Injunctive Relief, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 626 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646.

¹⁴³ *E.g.*, Gary Beihn et al., *What Foreign Investors Can Learn from President Obama’s Prohibition of Ralls Corporation’s Acquisition*, WHITE & WILLIAMS LLP (Dec. 19, 2012), <http://www.whitcandwilliams.com/resources-alerts-What-Foreign-Investors-can-Learn-from-President-Obamas-Prohibition-of-Ralls-Corporations-Acquisition.html>.

¹⁴⁴ *E.g.*, Sara Forden & Tom Schoenberg, *Chinese-Owned Ralls Corp. Sues U.S. Over Wind-Farm Order*, BLOOMBERG (Sept. 14, 2012), <http://www.bloomberg.com/news/2012-09-13/chinese-owned-ralls-corp-sucs-u-s-over-wind-farm-order.html>.

¹⁴⁵ Beihn et al., *supra* note 143.

¹⁴⁶ Complaint for Declaratory and Injunctive Relief at 3, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 626 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646, at ¶¶ 5-6.

¹⁴⁷ 28 U.S.C. § 1331 (2007).

¹⁴⁸ *Id.* § 2201.

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Committee's judicial reviewability beyond that which exempted the President, the presumption of reviewability of the Committee was in line with the APA and Section 721.¹⁴⁹

I. Original Complaint

In the original complaint, filed on September 12, 2012, Ralls asserted an APA violation and a Constitutional violation.¹⁵⁰ Ralls claimed CFIUS acted arbitrarily and capriciously by operating beyond the scope of its empowerment, thereby violating the APA.¹⁵¹

Ralls' claim that CFIUS violated the APA by acting beyond the scope of its authority was meritorious. Moreover, the argument was two-pronged. The first argument was that the Committee potentially acted beyond the scope of its authority when it issued an "Order Establishing Interim Mitigation Measures" on July 25, 2012 ("July Order").¹⁵² The July Order terminated all of Ralls' construction, operations, and access at all properties and required the removal of all of Ralls' items at all properties.¹⁵³ The second argument was that CFIUS likely overextended its power when it issued an "Amended Order Establishing Interim Mitigation Measures" ("August Order"), on August 2, 2012.¹⁵⁴ The August Order added restrictions to the July Order, forbidding sales of any items made by Ralls' parent Chinese Company to any third party.¹⁵⁵ Additionally, the August Order forbade the sale of the properties or assets to any third party without the consent of CFIUS.¹⁵⁶

II. The July Order

The July Order invoked the Committee's mitigation power under an Investigation. The July Order includes the language "there are national security risks to the United States that arise as a result of the Transaction."¹⁵⁷ Section 721 subparagraph B, under the subheading "Mitigation, tracking, and postconsummation monitoring and enforcement" ("Mitigation Subheading") states: "Any agreement entered into or condition imposed under subparagraph (A) shall be on a *risk-based analysis*, conducted by the Committee, of the threat to national security of the covered transaction."¹⁵⁸ This language makes it apparent that the Committee was invoking the power provided in the Mitigation Subheading.

Invoking the authority provided in the Mitigation Subheading provides the Committee several powers, but two constraints on those powers are pertinent to this issue:

¹⁴⁹ E.g., *Sackett v. EPA*, 132 S.Ct. 1367, 1369 (2012); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 348-49 (1984).

¹⁵⁰ Complaint for Declaratory and Injunctive Relief at 2, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 626 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646, at ¶ 2.

¹⁵¹ *Id.*

¹⁵² *Id.* at ¶ 43.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at ¶ 50.

¹⁵⁵ *Id.* at ¶ 52.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at ¶ 44.

¹⁵⁸ 50 U.S.C. app. § 2170(l)(1)(B) (2011) (emphasis added).

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timing and broader language. First, the language used to apply the Mitigation Subheading to the transaction changes the Review into an Investigation.¹⁵⁹

*[An Investigation] shall apply in each case when the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person, if the Committee determines that the transaction could impair national security, and that such impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee, as described in [the Mitigation Subheading] of this section, during the [R]eview period*¹⁶⁰

By changing the Review into an Investigation, the Committee is granted forty-five days from the date of Investigation commencement to continue analysis.¹⁶¹ CFIUS accepted Ralls' written notification on June 28, 2012¹⁶² and issued the July Order on July 25, 2012,¹⁶³ indicating the latest start date of a forty-five day Investigation¹⁶⁴ with two days left on the Committee's thirty-day limit of a Review.¹⁶⁵ By issuing the July Order, the Committee had an additional forty-five days to complete their analysis.

Second, by invoking the language in subparagraph B of the Mitigation Subheading, the authority of subparagraph A is triggered. Subparagraph A provides:

The Committee or lead agency may on behalf of the Committee, negotiate, enter into or impose, and enforce *any* agreement or condition with any party to the covered transaction *in order to mitigate* any threat to the national security of the United States that arises as a result of the covered transaction.¹⁶⁶

Subparagraph A broadened the scope of the Committee's authority from reviewing submitted materials in the light of eleven factors¹⁶⁷ to wielding the power to make "any agreement or condition" the Committee deems necessary.¹⁶⁸ Therein lies the question: What is meant by the word "any" under the context of mitigation?

The Mitigation Subsection¹⁶⁹ is distinct from the subsection entitled "Action by the President."¹⁷⁰ Although the Mitigation Subsection discusses permissible methods to *mitigate* threats to national security, it does not explicitly grant the power to "suspend" or "prohibit" any covered transaction.¹⁷¹ The only power to suspend or prohibit a covered transaction,

¹⁵⁹ *Id.* § 2170(b)(2)(B)(i)(III).

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ *Id.* § 2170(b)(2)(C).

¹⁶² Defendants' Memorandum in Support of Motion to Dismiss at 5, *Ralls Corp. v. Committee on Foreign Inv.* in the U.S., 626 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2013 WL 1334728.

¹⁶³ *Id.*

¹⁶⁴ 50 U.S.C. app. § 2170(b)(2)(C) (2011).

¹⁶⁵ *Id.* § 2170(b)(1)(E).

¹⁶⁶ *Id.* § 2170(l)(1)(A) (emphasis added).

¹⁶⁷ *Id.* § 2170(b)(1)(A)(i)-(ii).

¹⁶⁸ *Id.* § 2170(l)(1)(A).

¹⁶⁹ *Id.* § 2170(l)(1).

¹⁷⁰ *Id.* § 2170(d).

¹⁷¹ Compare *id.* § 2170(l)(1), with *id.* § 2170(d)(1).

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under Section 721, is found in the subsection, “Action by the President,” which states, “the President may take such action for such a time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.”¹⁷²

The July Order stated that Ralls, *inter alia*:

Shall immediately cease all Construction and Operations, and shall not undertake any further Construction and Operations, at the Properties;

Shall remove all stockpiled or stored items from the Properties no later than July 30, 2012, and shall not deposit, stockpile, or store any new items at the Properties; and

Shall immediately cease all access, and shall not have any access, to the Properties.¹⁷³

Ceasing all construction, operations, and access to the property Ralls’ purchased may fall under the umbrella of “any” methods for mitigation, but it could just as easily fall under the President’s powers of suspension and prohibition. Accordingly, that further begs the question: what is meant by the word “any” under the context of mitigation? Additionally, whether or not the mitigation power allows the Committee to halt so many of Ralls’ property rights remains unanswered. The answers to these questions become the key for establishing subject matter jurisdiction over the Committee in this matter under the APA.

As the APA states: “An action in a court of the United States seeking relief... stating a claim that an agency or an officer or employee thereof acted or failed to act... under color of legal authority shall not be dismissed”¹⁷⁴ In the instant case, if the Mitigation Subsection does grant the Committee explicit presidential powers, then the court has no subject matter jurisdiction. However, if the Mitigation Subsection’s usage of the word “any” is exclusive of presidential powers, then subject matter jurisdiction is established through the APA, and the Committee may have stepped beyond its authority. These questions aside, the Court ultimately found this issue to be moot, because the July Order was replaced by the August Order, which in turn was repealed by the Executive Order.¹⁷⁵

III. The August Order

On August 2, 2012, CFIUS issued the second order: the August Order. In the August Order, CFIUS reaffirmed the restrictions of the July Order, but added that Ralls:

Shall not sell or otherwise transfer or propose, or otherwise facilitate the sale or transfer to *any* third party for use or installation at the Properties of any items made or otherwise produced by [Ralls’ Chinese parent company]

¹⁷² 50 U.S.C. app. § 2170(d)(1) (2011).

¹⁷³ Complaint for Declaratory and Injunctive Relief at 9, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 626 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646, at ¶ 45.

¹⁷⁴ 5 U.S.C. § 702 (2006).

¹⁷⁵ See *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 626 F. Supp. 2d 71, 79-80 (D.D.C. 2012).

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Shall not complete a sale or transfer of the Project Companies or their assets to *any* third party until:

All items deposited, installed, or affixed (including concrete foundations) on the Properties subsequent to the acquisition by Ralls of the Project Companies have been removed from the Properties;

the Companies notify CFIUS of the intended recipient or buyer;

the Companies have not received an objection from CFIUS within 10 business days of notification.¹⁷⁶

The August Order not only reaffirmed the previous issues of exerting explicit presidential powers by the Committee, but also provoked new complications.

The exertion of authority that is most questionable with regard to the August Order was the control CFIUS attempted to exert over sales or transfers to *any* third party. Under Section 721, CFIUS is empowered to review “covered transactions,” which encompasses transactions “which *could* result in *foreign* control” of U.S. assets.¹⁷⁷ The term “any third party” in the August Order did nothing to exclude wholly American parties, and, under current legislation, CFIUS has no power to regulate what wholly American parties purchase.¹⁷⁸

If Ralls—a Delaware Corporation with a Chinese parent company—had looked to sell its assets to an American company with no foreign parent company, then that American third party would fall beyond the scope of what CFIUS was empowered to consider. In fact, the August Order was issued after Ralls informed CFIUS that it had an American buyer that could close within a week of July 31, 2012.¹⁷⁹

CFIUS, in its current incarnation, is specifically designed to regulate U.S. assets *leaving* U.S. control. It has not been empowered to regulate assets being *added* or *returned* to U.S. control. Specifically, covered transactions concern transactions “which could result in foreign control[.]”¹⁸⁰ not transactions which could result in American control.

The August Order may have stepped beyond the boundaries of the power granted to CFIUS by Section 721 by asserting power over *any* interested third party because the August Order language is inclusive of American parties looking to purchase assets. As the APA states, “An action in a court of the United States seeking relief . . . stating a claim that an agency or an officer or employee thereof acted or failed to act . . . under color of legal authority shall not be dismissed . . .”¹⁸¹ Thus, Ralls’ claim against CFIUS should have, and did, survive a motion to dismiss for lack of subject matter jurisdiction.¹⁸²

¹⁷⁶ Complaint for Declaratory and Injunctive Relief at 10-11, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 626 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646, at ¶ 52 (emphasis added).

¹⁷⁷ 50 U.S.C. app. § 2170(a)(3) (2011) (emphasis added).

¹⁷⁸ See *id.* § 2170.

¹⁷⁹ Amended Complaint for Declaratory and Injunctive Relief at 18, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 626 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4931759, at ¶ 82.

¹⁸⁰ 50 U.S.C. app. § 2170(a)(3) (2011).

¹⁸¹ 5 U.S.C. § 702 (2006).

¹⁸² *Ralls*, 926 F. Supp. 2d 71.

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IV. Amended Complaint

On October 1, 2012, Ralls filed an amended complaint to include President Barak Obama, in his official capacity.¹⁸³ This amended complaint was filed in response to President Obama's Executive Order entitled "Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation" ("September Order"), issued on September 20, 2012.¹⁸⁴ In the September Order, the President not only invoked his power under Section 721, but also the power vested in the office by the International Emergency Economic Powers Act.¹⁸⁵

The text of this Executive Order fully complies with the requirements of Section 721 as laid out for the President in the subsection entitled "Findings of the President."¹⁸⁶ Section 721 permits the President "to suspend or prohibit any covered transaction that threatens to impair the national security of the United States"¹⁸⁷ only if the President finds that:

(A) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security; and

(B) provisions of law, other than [Section 721] and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President.¹⁸⁸

The first paragraph of the September Order states, "There is credible evidence that leads me to believe that Ralls . . . might take action that threatens to impair the national security of the United States."¹⁸⁹ This establishes the first requirement for the President to suspend or prohibit a covered transaction. The second paragraph of the September Order states, "Provisions of law, other than [S]ection 721 and the International Emergency Economic Powers Act . . . do not, in my judgment, provide adequate and appropriate authority for me to protect the national security in this matter."¹⁹⁰ This recitation of the second requirement, as cited in Section 721, establishes the second piece of the President's power to suspend or prohibit a covered transaction.

The September Order goes further than the cessation demanded in the Committee's July and August Orders. The September Order divests Ralls of "all interests in" the company,

¹⁸³ Amended Complaint for Declaratory and Injunctive Relief, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4931759.

¹⁸⁴ Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Sept. 28, 2012).

¹⁸⁵ 50 U.S.C. § 1701 (1977); Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Sept. 28, 2012).

¹⁸⁶ 50 U.S.C. app. § 2170(d)(4) (2011).

¹⁸⁷ *Id.* § 2170(d)(1).

¹⁸⁸ *Id.* § 2170(d)(4).

¹⁸⁹ Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Sept. 28, 2012).

¹⁹⁰ *Id.*

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the assets, intellectual property, technology, personnel, customer contracts, operations, and access to the property.¹⁹¹

Ralls argued that this element of the September Order was problematic because, much like the August Order, the Executive Order invoked the power provided in Section 721 to regulate Ralls' interaction with *any* third party.¹⁹² Specifically, the September Order stated that Ralls' "shall not sell or otherwise transfer, or propose to sell or otherwise transfer, or otherwise facilitate the sale or transfer of, any items made or otherwise produced by [Ralls' Chinese parent company] to any third party for use or installation at the Properties."¹⁹³ The September Order went on to say "Ralls shall not complete a sale or transfer of the Project Companies or their assets to any third party until," and then listed several requirements for sale to *any* third party.¹⁹⁴ Ralls argued that Section 721 was drafted to address the issue of assets *leaving* U.S. control, not assets *entering* U.S. control. While the President's actions under the authority of Section 721 were exempt from judicial review,¹⁹⁵ any presidential action that violates the constraints of the requirements of Section 721 cannot be granted the judicial review exemption contemplated by Section 721. Ultimately, the crux of Ralls argument rested on the notion that restricting the interaction between Ralls and American parties is simply beyond the authority granted by Section 721.

In sum, the Court held that assessing the President's findings on the merits is simply something the Court "cannot do."¹⁹⁶

V. Timing

It remains to be seen if the September Order invoked Section 721 presidential power within the statutory time limit. Ralls failed to plead procedural errors and only raised the merits of the September Order.¹⁹⁷

Under Section 721, the "[thirty]-day period beginning on the date of the acceptance of written notice" began on June 28, 2012 and "shall be completed before the end of the [thirty]-day period".¹⁹⁸ Section 721 demands that the clock start running on June 28, 2012, and not the day *after* acceptance of written notice; the outer limit of the Review would expire on July 27, 2012.

However, Section 721 also demands that the Committee refrain from beginning an Investigation at the *end* of a Review; rather, "the Committee shall *immediately* conduct an [I]nvestigation"¹⁹⁹ when the Committee has found that there are national security risks. Regardless of when the Review expired, the July Order issued on July 25, 2012 specifically

¹⁹¹ *Id.* at 60,282.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 50 U.S.C. app. § 2170(c) (2011).

¹⁹⁶ *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71, 76 (D.D.C. 2012).

¹⁹⁷ Complaint for Declaratory and Injunctive Relief at 10-11, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646, at ¶ 52; Amended Complaint for Declaratory and Injunctive Relief at 18, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4931759, at ¶ 82.

¹⁹⁸ 50 U.S.C. app. § 2170(b)(1)(E) (2011).

¹⁹⁹ *Id.* § 2170(b)(2)(A) (emphasis added).

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stated that “there are national security risks to the United States that arise as a result of the Transaction.”²⁰⁰

Assuming the Investigation began no earlier than the July Order’s issuance date of July 25, 2012, the forty-five day review period would have ended on September 10, 2012, at the latest, because Section 721 provides that any Investigation “shall be completed before the end of the [forty-five]-day period beginning on the date in which the [I]nvestigation commenced.”²⁰¹

In turn, if the President decides to take action, “[t]he President shall announce the decision on whether or not to take action . . . not later than fifteen days after the date on which an [I]nvestigation . . . is completed.”²⁰² If the Investigation began on July 25, 2012, when the Committee announced national security risks related to Ralls’ transaction, then the Investigation would have expired on September 10, 2012. Section 721 demands that the President announce any action that will be taken within fifteen days after the end of an Investigation.²⁰³ Fifteen days after September 10, 2012 is September 26, 2012. In this case, the September Order was issued on September 28, 2012. The time for the President to announce the September Order under the authority of Section 721 should have lapsed earlier the same week, rendering the September Order, procedurally, without Section 721 authority.

However, Ralls failed to plead procedural error and only asked the Court to review the September Order on its merits and as an offshoot of the Committee’s questionable action, rebutted in both the Original and the Amended Complaint.²⁰⁴ Consequently, the Court did not address any putative procedural error in the September Order.

CONCLUSION

As FDI continues to grow in the United States, CFIUS and the judicial system will most likely have more interaction as more transactions are challenged. This interaction between Committee and the judiciary should be welcomed, as broader case law will ultimately serve to strengthen CFIUS by further articulating Section 721.

²⁰⁰ Complaint for Declaratory and Injunctive Relief at 9, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646, at ¶ 44.

²⁰¹ 50 U.S.C. app. § 2170(b)(2)(C) (2011).

²⁰² *Id.* § 2170(d)(2).

²⁰³ *Id.*

²⁰⁴ Complaint for Declaratory and Injunctive Relief at 10-11, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4030646, at ¶ 52; Amended Complaint for Declaratory and Injunctive Relief at 18, *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2012) (No. 1:12-CV-01513-ABJ), 2012 WL 4931759, at ¶ 82.