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U.S. Government Blocks Foreign Investment in Renewal Energy Project

President Barack Obama issued a rare Executive Order on Sept. 28, 2012 requiring Ralls Corp., a Chinese-controlled corporation (Ralls), to unwind a wind farm project near a military base in Oregon and to sell all related assets due to national security concerns. The President’s Order enforced a recommendation from the Committee on Foreign Investment in the United States (CFIUS), exercising the President’s statutory power under the Defense Production Act to review and “to suspend or prohibit any covered” foreign purchase of a U.S. business “that threatens to impair the national security of the United States.” While many observers assert the unprecedented intervention was pre-election posturing by an Obama Administration seeking to demonstrate it could be tough with the Chinese, the broad coverage of transactions reviewable by CFIUS means foreign investors should be aware of the national security concerns that may arise when acquiring a U.S. business.

CFIUS reviews dozens of foreign investment deals for potential national security concerns every year. The President, however, is rarely called upon to issue a formal order because companies usually abandon their deals when faced with CFIUS opposition. Ralls, however, sued CFIUS in a historic case filed on September 12, 2012 to allow the transaction to proceed and then sued the President after he issued the Order. It appears quite unlikely that Ralls will succeed given that the Foreign Investment and National Security Act of 2007 specifically provides that the President’s action in issuing the Order “shall not be subject to judicial review.” In fact, the U.S. Department of Justice filed a motion to dismiss the suit on October 29, 2012 (which as of the writing of this article was not decided upon).

This case highlights the fact that completing an acquisition with a certain risk profile (such as the proximity of a naval facility) without first voluntarily filing with CFIUS can be a costly mistake. CFIUS may review a transaction on its own initiative at any time and impose measures to mitigate security risk, including requiring divestiture following a completed acquisition. In fact, Ralls was not only ordered to remove all items located at the project sites, but was also prohibited from selling the assets to a third-party without giving CFIUS notice and opportunity to object to the potential buyer. In addition, not voluntarily filing may raise suspicions and limit the time for discussing mitigation options with CFIUS. Moreover, while Ralls had interaction with the Department of Defense, one of the various governmental departments with a seat at CFIUS, it was wrong to assume that regulatory approval outside of CFIUS from one of its various participating bodies is enough in such cases.



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Because CFIUS considers both the nature of the U.S. business over which control is being acquired as well as the identity of the foreign person that is acquiring control, the fact that an acquirer's home country is a strong ally of the United States does not necessarily mean that a covered transaction does not present national security considerations or that submitting a voluntary notice is not advisable. In 2010, for example, more than one-third of the total notices filed involved acquirers from the United Kingdom and Canada.

CFIUS tends to focus on defense, technology and natural resources such as oil and gas reserves and factors that will heighten CFIUS's interest in a transaction include whether the acquisition target (1) has contracts with the U.S. government; (2) possesses sensitive or classified technologies; or (3) controls "critical infrastructure," including major energy assets. Thus, when a foreign controlled entity acquires a U.S. renewable energy business, national security concerns may arise in the following ways in which it is recommended that CFIUS approval should be sought:

- If the U.S. business holds sensitive, classified, or export controlled information or technology, or provides power or energy-related products directly to a U.S. government agency.
- Transactions involving foreign control over "major energy assets" (these are subject to "heightened scrutiny" and a mandatory 45-day investigation unless CFIUS concludes during its initial review that the acquisition will not impair national security).
- Foreign control over network assets like pipelines and electric transmission, and particularly nuclear generation.

In light of President's Obama's recent Order, it appears that "national security" may be a greater risk to renewable energy transactions than previously understood. Non-U.S. investors should be prepared for national security reviews and should carefully consider whether CFIUS clearance should be a condition to closing renewable energy development transactions.

