

Ralls Case Affirms President's Broad CFIUS Authority

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On February 22, 2013, the U.S. District Court for the District of Columbia dismissed all but one claim in a lawsuit filed by Chinese-owned Ralls Corporation (Ralls) challenging an Executive Order issued by President Obama that requires Ralls to divest its ownership in four wind farm project companies located near restricted naval airspace in Oregon. [1] The Presidential Order was based on recommendations from the Committee on Foreign Investment in the United States (CFIUS or the Committee), [2] and the court determined that such orders were not subject to review by the courts. In so finding, the court held that the Exon-Florio Amendment, in which Congress established the President's and CFIUS' authority to examine foreign acquisitions of U.S. companies for national security implications, clearly excluded such orders from judicial review. The court also noted that in the absence of a CFIUS review *prior* to Ralls' acquisition of the project companies, Ralls' divestiture was an appropriate means of effectuating the Presidential Order prohibiting its acquisition of the project companies.

Interestingly, the court also found that it has jurisdiction to hear Ralls' claim that the Presidential Order deprives it of property without due process of law. Yet, it appears that even with a ruling in Ralls' favor on this issue, there may be little additional information that CFIUS or the President could provide to Ralls to explain their decision in light of the classified nature of the CFIUS process.

Background

In March 2012, Ralls, an Oregon corporation owned by two Chinese nationals who also hold senior management positions within the Sany Group (Sany), a Chinese global manufacturing company, (collectively,

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the parties), acquired interests in four wind farm project companies in Oregon from Terna Energy USA Holding Corporation (Terna). The project sites overlap with a restricted airspace and bombing zone used by military aircraft out of Naval Air Station Whidbey Island. Ralls' plan was to begin construction at the project sites to install wind turbine generators constructed in China by a subsidiary of Sany as a means of demonstrating the reliability of Sany wind turbines to potential customers in the United States.

Ralls and Terna did not voluntarily notify CFIUS of the transaction prior to closing their deal. Instead, they submitted a CFIUS notice only after CFIUS requested that they do so. At that time, an official from the U.S. Department of the Treasury also advised Ralls to postpone construction on the project sites until after CFIUS' review was completed. Ralls, however, declined to heed that advice, and proceeded with its planned construction of the Sany wind turbines prior to receiving CFIUS' approval.

After its initial 30-day review period, CFIUS determined that further investigation was warranted in light of national security concerns that it perceived as a result of the transaction. CFIUS also determined that interim mitigation measures were necessary to address the national security risks that arose from the transaction, in particular, from Ralls' continued construction at the project sites. On June 25, 2012, CFIUS issued a mitigation order directing Ralls to cease all construction and operations at the wind farm locations and prohibiting all access to the project sites except by CFIUS-approved U.S. citizens. On August 2, 2012, CFIUS issued an amended mitigation order (collectively, with the June 25 mitigation order, the CFIUS Order), prohibiting Ralls from, among other things, selling or transferring any Sany-produced items to third parties for use at the project sites. The CFIUS Order also prohibited Ralls from selling the project companies without first removing all affixed items at the locations and giving CFIUS notice and opportunity to object to any intended recipient or buyer. These measures were to remain in effect until CFIUS concluded its investigation or the President took action under his CFIUS authority.

On September 28, 2012, President Obama issued a Presidential Order, based on recommendations from CFIUS, prohibiting the acquisition and ownership, either directly or indirectly, of the wind farm project companies by the parties, on account of "credible evidence" indicating that the parties, "through exercising control of the [companies,] might take action that threatens to impair the national security of the United States." [3] Apart from this reference to "credible evidence," the Order did not provide any additional explanation for the President's decision.

Under the Presidential Order, Ralls was given 90 days to divest all interest in the project companies, and 14 days to remove all structures or physical objects from the project sites. Like the CFIUS Order, the Presidential Order prohibits the parties and their agents from accessing the project sites, from selling or otherwise transferring any items produced by Sany to any third party for use on the project sites, and from selling or transferring the project companies to any third party until all affixed items have been removed and CFIUS has been provided notice and the opportunity to object to any intended recipient. The Presidential Order also requires monthly certifications from the parties that they are in compliance with the Presidential Order, pending Ralls' complete divestment. Until such divestment is complete, the Order authorizes CFIUS to take all measures it deems necessary and appropriate to protect the national security interests of the United States, including gaining access to the project sites to verify compliance with the Presidential Order, inspection of

records and documents, and interviewing officers, employees, or agents of the parties.

Ralls v. Barack H. Obama

On September 12, 2012, Ralls took the unprecedented step of challenging CFIUS' and the President's authority to thwart its acquisition of the wind farm project companies. [4] In the lawsuit, Ralls challenged the Presidential and CFIUS Orders as violations of the Exon-Florio Amendment and the Administrative Procedures Act (APA), and their divestiture requirements as an unconstitutional "taking" of property without due process of law.

The U.S. Government moved to dismiss the suit, asserting that the court lacked jurisdiction over Ralls' claims. It argued that Congress, in drafting the Exon-Florio Amendment, authorized the President to take action necessary to protect the national security of the United States by suspending or prohibiting foreign acquisitions of United States businesses in circumstances where the acquisition presents a threat to national security, and specifically excluded such findings and actions from judicial review.

On February 26, 2013, the court dismissed Ralls' claims of violations of the Exon-Florio Amendment and the APA as beyond the scope of judicial review. In doing so, it found that the Exon-Florio Amendment granted the President extremely broad authority to take action, for such time as he deems necessary, to suspend or prohibit transactions that threaten the national security of the United States, and held that the Amendment explicitly prohibits courts from reviewing such Presidential action. Significantly, the court noted that Ralls did not seek approval from CFIUS prior to acquiring the projects and beginning construction at the project sites. Once presented with the completed purchase, the President determined that the transaction leading to the acquisition was prohibited, and required divestiture in order to effectuate the Order. This, the court found, was "well within the scope of taking such action . . . as the President considers . . . appropriate to prohibit" the transaction. The court also determined that claims against the CFIUS Order were moot, given its revocation by the Presidential Order.

The court, however, has allowed Ralls' due process claim to proceed, ruling that there is no clear and convincing evidence that Congress, in excluding such Presidential Orders from judicial review, also intended to strip the courts of their ability to hear the due process challenge arising from the Executive action. Ralls' claim alleges that the Presidential Order violated the Due Process Clause of the Fifth Amendment by depriving Ralls of its property interests in the project companies without an opportunity to review, respond to, or rebut any evidence upon which CFIUS or the President based their orders. Importantly, the court has not ruled on the merits of this challenge. Instead, the court simply found that it has jurisdiction to hear this claim. To that end, the court stated: "[i]t may be that the Court will ultimately decide that in the context of a national security decision committed to the President's discretion, the opportunities provided to [Ralls] here comported with due process, or [Ralls] is not entitled to the reasons. Since that matter has not yet been fully briefed, the Court expresses no opinion on those issues." [5]

Implications

The court's ruling has important implications. First and foremost, the ruling reaffirms the President's broad authority under the Exon-Florio Amendment to block foreign acquisitions based on national security concerns. As the court noted, the Presidential Order at issue involved a "discretionary determination made in the realm of foreign policy and national security," and, as a general rule, courts tend to defer to the President on such matters. The ruling also affirms that such decisions are not subject to judicial review and, therefore, cannot be overturned by the courts.

The more noteworthy aspect of the court's ruling, however, is the due process decision. At the heart of Ralls' due process claim is the issue of whether the President and/or CFIUS should be required to provide companies that proceed through the CFIUS review and investigation process with an opportunity to review, respond to, and rebut any evidence upon which a Presidential Order depriving them of property is based. An inherent difficulty in requiring such an opportunity, however, is the fact that CFIUS' risk assessment for any particular transaction is based on classified information that is generally not susceptible to public disclosure.

More specifically, pursuant to the Exon-Florio Amendment, on the twentieth day of CFIUS' review, the Director of National Intelligence (DNI) is required to provide a classified assessment to CFIUS identifying the national security or intelligence issues that pose a threat to the United States as a result of the transaction. Based on this assessment, CFIUS then develops its analysis of the national security risks and vulnerabilities that arise from the transaction at issue. Because much of the information gleaned from DNI's assessment is classified, CFIUS and/or the President would likely be prohibited from divulging the vast majority of the evidence and reasoning on which such a divestiture order is based. If Ralls were to succeed in its due process claim, therefore, it is uncertain how the President and/or CFIUS would be able to provide Ralls (or any similarly situated party) with an opportunity to view and rebut such evidence.

On the other hand, the court could determine that the process and explanation afforded to Ralls was adequate in the context of a national security decision that is committed exclusively to the President's discretion. Such a ruling would likely foreclose any future challenges to the President's authority under the Exon-Florio Amendment, and would allow CFIUS and the President to proceed with their current processes and procedures unchanged.

Perhaps the most important take-away from the Ralls case, regardless of the ultimate outcome is that both foreign and U.S. businesses are well-advised to file voluntary notices with CFIUS *prior* to closing a transaction. Given, in accordance with the court's ruling, that courts are unable to review and overturn a divestiture order from the President, working with CFIUS to address national security concerns prior to an acquisition may be the only means of avoiding such an outcome.

[1] See Amended Memorandum Opinion in *Ralls Corp. v. Barack H. Obama, et. al*, Case No. 12-cv-01513 (D. D.C. Feb. 26, 2013).

[2] See Order of September 28, 2012 *Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation*, 77 Fed. Reg. 60,281 (Oct. 3, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>.

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[4] See Complaint in *Ralls Corp. v. Barack H. Obama, et al.*, Case No. 1-12-cv-01513 (D.D.C. Sept. 12, 2012). Ralls' complaint was filed prior to the issuance of the Presidential Order on September 28, 2012, and as a result, challenged only the CFIUS Order. Subsequent to the issuance of the Presidential Order, Ralls amended its complaint to include claims against the President. See Amended Complaint in *Ralls Corp. v. Barack H. Obama, et al.*, Case No. 1-12-cv-01513 (D.D.C. Oct. 1, 2012).

[5] The court will now allow both parties to submit briefs on the due process issue prior to deciding this claim. The U.S. Government's brief on the due process claim is due by March 21, 2013, while Ralls' opposition to the Government's arguments is due by April 8, 2013. The Government will be given an additional opportunity to submit a reply to Ralls' due process arguments, which is due by April 15, 2013.