

ALERT

# Judge Orders CFIUS to Disclose Unclassified Information to Ralls

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November 7, 2014

On remand from the U.S. Court of Appeals for the D.C. Circuit, the D.C. District Court ordered the Committee on Foreign Investment in the United States (CFIUS or the Committee) to provide the Ralls Corporation (Ralls) with access to the unclassified information and factual findings on which CFIUS based its recommendation that the President block Ralls' acquisition of four wind farm companies in Oregon. Ralls will then have the opportunity to rebut that information in writing, following which CFIUS will issue an updated recommendation to the President.

The order is the result of Ralls' ongoing challenge to President Obama's September 28, 2012 order, based on CFIUS' recommendations, prohibiting Ralls' acquisition and ownership of the wind farm companies, either directly or indirectly, on the basis that the ownership could threaten to impair U.S. national security. Ralls, which is owned by two Chinese nationals who also hold senior management positions within the Sany Group, 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. Ralls, who was not given access to the information on which CFIUS based its recommendation, challenged the Presidential Order as an unconstitutional taking of property without due process, and the D.C. Circuit agreed.

Per the D.C. District Court's order on remand, CFIUS must now disclose to Ralls the unclassified information compiled during the investigation. For any unclassified documents that CFIUS withholds based on executive privilege, the court has ordered the Committee to submit a privilege log that identifies all material withheld and the reason for withholding. Ralls will then have an opportunity to oppose

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the government's assertion of privilege. Ralls will also be given an opportunity to respond to the unclassified information, based on which CFIUS will reconsider its recommendation to the President. Ultimately, CFIUS and the President will determine whether to reaffirm, revise, or rescind the Presidential Order.

Also noteworthy is the court's refusal to allow Ralls to sell its interest in the wind farm companies. The Presidential Order, which remains in place pending a final resolution of the appeal, requires CFIUS approval for any potential transfer of the property. In disallowing the transfer, the court noted the unusual circumstances surrounding the potential sale— Ralls was planning to sell the assets worth \$6 million for only \$50,000.

While CFIUS may consider challenging the court's order, another option is to comply with the order but withhold the unclassified information under the claim of executive privilege. CFIUS is very likely to assert the privilege, and it remains to be seen how extensively the government will seek to withhold this material, and this issue is almost certain to play out in court in the near future. Ultimately, however, and regardless of the volume of material disclosed, it is unlikely that access to unclassified information will provide Ralls with sufficient clarity on and the ability to address the apparently significant national security concerns that undid its acquisition.