

# CLIENT ALERT

## Due Process Challenge to Presidential Order Prohibiting Energy Transaction Dismissed

October 30, 2013

Earlier this month, in *Ralls Corporation v. Committee on Foreign Investment in the United States, et al.*, the U.S. District Court for the District of Columbia dismissed the remaining challenge to orders issued by the Committee on Foreign Investment in the United States (CFIUS) and President Obama under section 721 of the Defense Production Act of 1950 (Section 721). In doing so, the court left in place a presidential order prohibiting Ralls Corporation's 2012 acquisition of an interest in an Oregon wind farm project. This case illustrates the broad discretion the federal government has in reviewing transactions on national security grounds and highlights the importance of considering CFIUS review early in the investment process.

### I. BACKGROUND

Section 721 provides the CFIUS, an interagency committee including representatives from nine executive departments and offices, and the president with authority to review any merger, acquisition, or takeover by non-U.S. buyers of U.S. businesses. CFIUS and the president may condition or prohibit transactions that may threaten to impair the national security of the United States. The statute states that actions and findings by the president are not subject to judicial review. While the government has broad authority to review transactions, regardless of whether the transaction has already closed, a company may voluntarily provide written notice to CFIUS before entering into a transaction, and if this pre-acquisition review concludes the transaction is not a threat to national security, CFIUS and the president generally may not later initiate a subsequent review of the same transaction.

Plaintiff Ralls Corporation (Ralls) is owned by Chinese foreign nationals that acquired interests in companies developing a wind farm project near a United States Navy installation in Oregon. Ralls did not seek voluntary CFIUS pre-acquisition review. After the transaction closed, CFIUS initiated review of Ralls' acquisition and, after finding that the transaction posed security risks, it imposed various mitigation measures. The president subsequently found that the transaction might impair the national security of the United States, revoked the CFIUS order, and instead issued an order prohibiting the transaction. Ralls sought judicial review of the CFIUS and the presidential orders. The majority of Ralls' claims were previously dismissed on the grounds that the president's order superseded the prior CFIUS orders, and the statute is clear that the president's findings are not subject to judicial review. Ralls' sole remaining claim was that the issuance of the president's order was unconstitutional in violation of the due process clause.

### II. COURT DISMISSES RALLS' REMAINING CHALLENGE

In the recent decision, the court dismissed Ralls' remaining challenge to the president's order prohibiting the transaction. Ralls argued that the president's order was unconstitutional because it deprived Ralls of its rights without due process of law. The court rejected this argument, emphasizing that Ralls opted not to pursue a pre-acquisition review to obtain a determination from CFIUS and the president before it entered into the transaction. Ralls instead chose to undertake the transaction and

acquire an interest in the wind farm project subject to the known risk of a presidential review and veto. Thus, Ralls could not predicate its due process challenge on that known risk coming to fruition.

The court then went on to find that Ralls received sufficient process of law. Ralls argued that it was not informed of the basis for the president's concerns and was, therefore, deprived of due process of law. The court similarly rejected this argument, stating that Ralls was provided notice before the decision was made and the president was not required to provide Ralls with the specific grounds for his finding that the transaction may threaten to impair national security. Based on these findings, the court dismissed Ralls' last remaining challenge to the presidential order.

### **III. SIGNIFICANCE FOR FUTURE TRANSACTIONS**

This case serves as a reminder to parties engaging in transactions involving non-U.S. buyers of U.S. businesses that they should be cognizant that the transaction is subject to CFIUS and presidential review. Because the government has broad authority to review transactions, and the decisions of the president are not subject to judicial review, parties should take appropriate measures to protect their interests. Parties are not generally required to seek pre-approval review from CFIUS, but as the court observed, this voluntary review process enables parties to obtain an upfront determination as to whether the proposed transaction would be considered a threat to national security. Therefore, considering potential risk associated with review under Section 721, parties to a transaction that may potentially raise national security concerns should consider engaging CFIUS early in the investment process.

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