

## **Blocking Ore. Wind Farms: Overstepping Authority?**

*Law360, New York (October 22, 2012, 2:45 PM ET)* -- The Ralls Corporation, a Chinese-owned wind farm developer, has sued President Obama and the Committee on Foreign Investment in the United States, raising statutory and constitutional challenges to recent orders by the president of the United States and CFIUS that effectively require Ralls to unwind its acquisition of four wind farm projects in Oregon. This appears to be only the second order issued by a sitting U.S. president since CFIUS was established in 1975.

Ordinarily, parties abandon transactions when CFIUS appears ready to recommend that the president issue a blocking order. Thus, this suit is a rarity. Although the plaintiffs face threshold barriers to having their claims heard on the merits, even a partial success could have broad significance for the review of foreign direct investment across all sectors of the economy because CFIUS approval is frequently a major concern for transactions involving foreign acquisitions of, or joint ventures with, U.S. businesses.

The Ralls lawsuit challenges not only the lack of transparency in CFIUS' procedures and decision making, but also the president's and CFIUS' authority to prevent or unwind a transaction involving a foreign person based on national security concerns. Further, the lawsuit indicates that CFIUS can have national security concerns regarding foreign acquisitions of even small wind turbine projects, particularly where a project site is located near a U.S. military base or other sensitive national security installation.

### **Background on CFIUS Review**

Since the 1970s, Congress has authorized the president "to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." National security reviews of foreign acquisitions of U.S. businesses are conducted through CFIUS, an interagency committee with jurisdiction to review "covered transactions," a term defined to include transactions "by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States."

Under the CFIUS authorizing statute, the parties to a transaction may, but are not required to, submit a joint written notice to the committee. If CFIUS determines that a notice involves a "covered transaction," it must determine "the effects of the transaction on the national security of the United States."

If CFIUS identifies a national security concern, the parties will often agree to take measures to resolve the concern, including entering into formal, contractual “mitigation agreements” with the government. If CFIUS and the parties are unable to negotiate mitigation measures or otherwise address the concern, the committee has statutory authority to refer the matter to the president. The authorizing statute requires the president to make certain findings and to announce his decision about whether to take action in 15 days.

The statute further authorizes the president to “take such action for such time as [he] considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States” and provides that the president’s findings and actions “shall not be subject to judicial review.”

### **CFIUS Review of the Ralls Wind Farm Project**

Ralls is a Delaware company owned by two Chinese businessmen (Dawei Duan and Jialiang Wu, the chief financial officer and vice president of Sany Group, a Chinese manufacturer); it is named for the Texas town where they built their first wind farm.

According to Ralls, its primary business purpose is to develop wind energy products for which wind turbines manufactured by Sany could be used. The Ralls complaint alleged that in early 2012, Ralls bought four small Oregon companies whose assets consisted of wind farm development rights, land rights to construct wind farms, power purchase agreements and government permits.

The projects — which collectively would produce a mere 40 megawatts of power — allegedly had received other federal regulatory approvals, such as a determination by the Federal Aviation Administration that the turbine towers presented no hazard to aviation. The U.S. Navy had initially requested that Ralls voluntarily relocate one of the turbines, apparently due to proximity to certain restricted military airspace. The complaint contended that after Ralls complied with the request, the Navy recommended that Oregon issue the necessary state regulatory approvals.

In response to a request from the committee in June of this year, Ralls submitted a notice to CFIUS of its (by-then-consummated) acquisition of the Oregon projects. In late July, CFIUS allegedly issued an order purporting to require Ralls to cease construction, remove all materials from the location and “immediately cease all access” to the properties.

Under the order, U.S. citizens contracted by the companies were permitted to access the site “solely for purposes of removing any items from the Properties in compliance with” the order. After Ralls informed CFIUS that it was considering selling the project companies, potentially to a U.S. buyer, CFIUS issued an amended order.

In addition to restating each of the previous directives, the amended order prohibited Ralls from transferring to any third party for installation at the project site, any item made by the Sany Group. The amended order also prohibited Ralls from transferring the properties themselves until all items on the properties had been removed, and Ralls gave CFIUS notice and opportunity to object to the potential buyer.

## **The Ralls Lawsuit and the President's order Unwinding the Transaction**

On Sept. 12, Ralls filed a complaint in the U.S. District Court for the District of Columbia challenging the CFIUS actions as a violation of the federal Administrative Procedure Act (APA) and an unconstitutional deprivation of property without due process. The complaint specified the CFIUS review process in some detail.

The suit raised a host of challenges, asserting that CFIUS exceeded its authority by failing to give reasons for its actions; prohibiting the transaction outright, rather than imposing conditions to mitigate national security risks; and prohibiting Ralls from selling items produced by Sany even to U.S. buyers and wind farm projects without CFIUS approval, even to a U.S. buyer.

The suit also alleged that the order deprived Ralls of property without due process by prohibiting further construction, use of (or even access to) the property and sale of assets on the property to which Ralls holds project development land rights.

On Sept. 28, President Obama issued an executive order directing Ralls to divest its interest in the wind farm projects within 90 days (by Dec. 27). The order is an unusual event — the first time since 1990 that a U.S. president has exercised authority under the CFIUS statute to prohibit a foreign transaction on national security grounds.

The president's order revokes the interim CFIUS measures but imposes even broader restrictions. It first finds, without additional details, that Ralls and its affiliates and subsidiaries, through their control of the wind farm projects, "might take action that threatens to impair the national security of the United States."

Although the order does not specify the precise national security risk, a press release from the U.S. Department of the Treasury (the CFIUS chair agency) suggests one possibility: "The wind farm sites are all within or in the vicinity of restricted air space at Naval Weapons Systems Training Facility Boardman." (As noted above, Ralls had initially relocated one project at the Navy's request to avoid that airspace. Although the Navy recommended that Oregon regulators issue the necessary approvals, it cautioned that even the new location "may have negative national security implications.")

Ralls' court filings also suggested that proximity to the naval air station was the only national security concern.

The order prohibits Ralls' already-completed acquisition of the four projects and their assets and orders Ralls to divest them within 90 days (with a possible three-month extension on such terms as CFIUS may require). The order further requires Ralls to divest all interests in the projects' "intellectual property [and] technology."

Ralls has just 14 days to remove "all items, structures, or other physical objects (including concrete foundations)," from the four sites, and, other than CFIUS-cleared U.S.-citizen contractors performing the removal, Ralls and its employees "shall cease all access." Ralls cannot sell the four projects if CFIUS objects.

The president's order also supplements the interim CFIUS order by providing for inspections: "[O]n reasonable notice," the order states, U.S. government employees "shall be permitted access, for purposes of verifying compliance with this order, to all premises and facilities" of the four project companies, as well as those of Ralls, its subsidiaries, and even those of Sany Group: "(i) to inspect and copy any books, ledgers, accounts, correspondence, memoranda, and other records and documents ... that concern any matter relating to this order" and "(ii) to inspect any equipment and technical data (including software) in the possession or under the control of the Companies."

Ralls promptly amended its complaint to add the president as an additional defendant and to challenge the Sept. 28 order and moved for expedited consideration, arguing that it needed a decision on its claims before the Dec. 27 divestment deadline.

Ralls also submitted discovery requests seeking all documents in the government's possession "relating to Ralls, Sany, or the [wind farm] Project Companies," as well as details about the president's evidence of a national security threat and what "actions" the U.S. government believes Ralls "might take" to threaten U.S. national security. The government argued that the court lacks power to hear the claims because, under the CFIUS statute, the president's actions are not subject to judicial review.

On Oct. 3, the district court set an expedited schedule for the government's motion to dismiss, with the first brief due on Oct. 29 and a hearing scheduled for Nov. 28. The court put all discovery on hold (including Ralls' requests described above) until it decides the motion.

## **Looking Forward**

If successful, the lawsuit could have broad implications on a number of different grounds.

First, the plaintiffs challenge the president's and CFIUS' procedures for reviewing transactions. Ralls objects to the president and CFIUS' failure to provide any "evidence or explanation for its determination[s]" that the transaction was a "covered transaction" (and thus under CFIUS jurisdiction), that the transaction poses national security risks and that those risks cannot be mitigated by less-restrictive means than the overbroad (in Ralls' view) measures in the amended order.

The challenges should be understood in the context that CFIUS review is generally confidential (CFIUS does not disclose even the fact that a review was requested). When CFIUS has a national security concern, the committee will often explain to parties that there is evidence of a national security concern but, in the interest of national security, the committee often will not share the reasoning or evidence with the parties.

Here, Ralls is complaining about the inability to hear or understand the issues and seeking additional information in court through (now-stayed) discovery. If successful, the suit could increase the transparency of the review — such as a requirement that the committee articulate for the parties a justification for orders or recommendations to the president, beyond a bare finding of "national security risk." If this were to come to pass, such disclosure could open the door to fruitful mitigation discussions.

Second, and more fundamentally, the possibility that CFIUS actions could be subject to even a limited form of judicial review would reflect a sea change in CFIUS practice. As a practical matter, lawsuits seeking to challenge actions by CFIUS are rarely brought.[1] CFIUS' authorizing statute, the Foreign Investment and National Security Act of 2007, gives the president authority to suspend or prohibit any covered transaction based on his finding of national security risks and states that his actions and supporting findings "shall not be subject to judicial review."

The Ralls complaint is based, in part, on the notion that CFIUS can be subject to judicial review through the APA even after the president has acted — particularly where, as here, CFIUS purported to issue an order under its own authority. Ralls also seeks review of the president's actions on the ground that they exceed his statutory authority.

Whether any aspects of this suit can proceed in a federal court will be the central issue presented by the government's motion to dismiss. The plaintiffs will likely draw support from the background presumption that "final" agency actions are subject to judicial review.

Finally, Ralls challenged the scope of CFIUS' and the president's remedial authority. The company asserts that only the president, not CFIUS, may suspend or prohibit a transaction and that CFIUS exceeded its authority to "mitigate" threats to U.S. national security in issuing the various restrictions in the interim orders. Ralls also argued that the president overstepped his authority to "suspend or prohibit" a transaction by ordering removal of equipment from the site and prohibiting access and by prohibiting Ralls from selling "to any third party" any items produced by the Sany Group.

Such an order, Ralls asserted, oversteps both the limitation that CFIUS and the president may review only transactions that involve acquisition of control by a foreign person (as the order covers purchases by U.S. buyers) and the limitation that such review applies only to acquisition of a U.S. business (since the order applies to "items" produced by Sany Group).

Ralls also challenged the president's authority to authorize broad searches of Ralls, the Sany Group and affiliated entities. The challenge reflects the unusual posture of this case, in which CFIUS — and then the president — issued unilateral orders rather than negotiating "consensual" mitigation with the parties upon threat that CFIUS would recommend that the president take action to block the transaction. Any judicial decision that limited CFIUS or the president's remedial power to impose national security-related mitigation conditions would be of great interest to the investment community.

CFIUS practitioners and the business community should watch this case closely. The plaintiffs will face significant threshold arguments from the government that the actions are nonreviewable and that the case should be dismissed. But if even one of Ralls' claims survives dismissal, it could have significant economic and legal effects for U.S. national security review of foreign investment.

Remarkably, this important development arises in the context of a CFIUS challenge to the acquisition of a nascent alternative energy project. CFIUS is charged with reviewing and investigating foreign acquisitions of critical infrastructure, including major energy assets. Small wind turbines are unlikely to fall into that category, but it is clear that CFIUS believes that foreign ownership of wind turbines could threaten national security, particularly where the assets are located near U.S. military or other sensitive installations.

We believe that the case has momentous import to the U.S. business community seeking to attract capital for investment and foreign persons seeking to invest in the United States. We expect there to be opportunities for interested parties to express their views through amicus filings with the court.

While we do not believe that this matter reflects a broad policy statement prohibiting foreign direct investment by Chinese companies in the U.S., it does suggest the importance of parties seeking strategic advice in advance about the full range of CFIUS risk that may be associated with a contemplated transaction and of appropriate engagement with CFIUS early in the process before a transaction is consummated. We expect further activity in this matter in late November when the court holds a hearing on the government's motion to dismiss.

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[1] One notable exception — a 2006 lawsuit by then-New Jersey Gov. Jon Corzine seeking to force CFIUS to investigate the acquisition by Dubai Ports World of an entity engaged in shipping and logistics operation at Port Newark — was dismissed voluntarily.

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