

DISTRICT COURT AFFIRMS PRESIDENTIAL DISCRETION IN CFIUS PROCESS

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On October 10, 2013, the U.S. District Court for the District of Columbia dismissed the one remaining claim in a civil suit filed by Chinese-owned Ralls Corporation (“Ralls”) against the Committee on Foreign Investment in the United States (“CFIUS”) and President Barack Obama. After CFIUS reviewed Ralls’s acquisition of four wind farm projects in Oregon—located near restricted U.S. Navy airspace—the President ordered Ralls to divest its interest in the wind farms for national security reasons, pursuant to Section 721 of the Defense Production Act of 1950, as amended (“Section 721”). Ralls argued in court that the President’s divestment order deprived it of its property without due process. The court rejected this argument, concluding that Ralls had no protected property interest in the wind farm project companies it had acquired and that CFIUS’s review of the transaction afforded adequate process.

If this decision is upheld on appeal, it will render much more difficult any future challenges to exercises of Presidential and CFIUS authority under Section 721. The decision underscores the risks of consummating a transaction without prior CFIUS clearance.

I. Background

Section 721 provides for CFIUS review of acquisitions of control of U.S. businesses engaged in interstate commerce in order to protect national security interests. A party to such a “covered transaction” may initiate a CFIUS review by submitting a voluntary notice to CFIUS or, if a party does not voluntarily file, the President or CFIUS may initiate a review. CFIUS may decide after an initial 30-day review that the transaction poses no issues of national security sufficient to warrant formal investigation. CFIUS may also conduct a more in-depth 45-day investigation, resulting in either a report to Congress or submission of the matter to the President for decision. The President may then suspend or prohibit a transaction that he concludes poses national security concerns.

Ralls, a corporation owned by two Chinese nationals, acquired an interest in four wind farm project companies located near a restricted naval airspace and bombing zone in Oregon. After Ralls consummated the acquisition, CFIUS requested that Ralls notify CFIUS of the transaction. CFIUS subsequently conducted an initial review resulting in a CFIUS mitigation order and then a formal investigation of the transaction. The formal investigation resulted in a recommendation to President Obama that he order divestment because the transaction posed a threat to the national security of the United States. The President later did so.

II. Ralls's Court Challenge

In September 2012, Ralls brought a lawsuit in federal district court challenging CFIUS' mitigation order and the President's divestment order. Ralls alleged that CFIUS' order violated the Administrative Procedure Act and that the President exceeded his authority under Section 721. Ralls also alleged that the orders violated Ralls's right to equal protection and against deprivation of property without due process under the Fifth Amendment to the U.S. Constitution.

In March 2013, the court first dismissed for mootness all of Ralls's claims relating to the CFIUS mitigation order because the order had been expressly revoked by the President's order. The court also dismissed all but one of Ralls's claims challenging the President's order, concluding that Section 721 deprived the court of jurisdiction to review the merits of the President's decision.

The court's October 2013 decision dismissed Ralls's only remaining claim: that the President's order deprived it of its property interests without adequate process. The court reasoned that Ralls had not alleged a protected property interest in the wind farms because Ralls acquired its interest subject to the risk of a Presidential veto of the transaction. Ralls could have obtained a CFIUS determination before it entered into the transaction, the court concluded, and so could not later "predicate a due process claim . . . on the state law rights it acquired when it went ahead and assumed th[e] risk." The court also rejected Ralls's claim of an expectation interest in acquiring the property, reasoning that because Section 721 gives the President "absolute, unreviewable discretion to prohibit a covered transaction," Section 721 could not give rise to any protected expectation interest in approval of the transaction.

The court also decided that Ralls received sufficient process. The court noted that Ralls had the opportunity to respond to CFIUS' questions in writing and was afforded a chance to meet in person with CFIUS to present its argument that the transaction posed no national security concerns. CFIUS also notified Ralls that if it did not divest itself of the wind farm assets, CFIUS would recommend that the President order Ralls to do so. Accordingly, the court held, Ralls received both notice and a hearing. The court also concluded that Ralls's property interest was weak in comparison to the government's interest in protecting national security and that the added value of requiring the President to provide Ralls with the evidence and reasons underlying his decision would be minimal. The court therefore declined to require the President to disclose his reasons for ordering divestment or the evidence on which he based his order.

Ralls has already filed a notice that it will appeal the district court's decision to the U.S. Court of Appeals for the D.C. Circuit.

III. Implications

This recent court decision is the first to conclude that CFIUS and the President need not provide companies subject to the CFIUS process with the evidence on which decisions under Section 721 are based or the reasons for those decisions. It also further confirms the courts' reluctance to interfere with the President's broad discretion in matters of national security.

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Should the decision be affirmed on appeal, it will render even more difficult legal challenges to exercises of authority by the President and CFIUS under Section 721.

The decision also underscores the need for foreign investors seeking to invest in or acquire a U.S. business to file voluntarily with CFIUS before consummating a transaction if the transaction may implicate U.S. national security interests—and to assume that CFIUS will take an expansive view of such interests. While Section 721 does not require companies to file with CFIUS, the *Ralls* case demonstrates that parties that fail to notify CFIUS in advance may face harsh consequences, including a divestment order.

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