
President Obama Issues Order Prohibiting Foreign Acquisition of US Company

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On September 28, 2012, President Obama issued an order prohibiting a Chinese-owned company from acquiring four U.S. wind farm project companies. The acquisition by the Ralls Corporation, an affiliate of the Chinese machinery manufacturer Sany Group, was prohibited because the President found that there is “credible evidence” to believe that parties to the transaction “might take action that threatens to impair the national security of the United States.”¹ The President’s order requires that Ralls, under the supervision of CFIUS, divest all interests in the acquired companies within 90 days. Formal presidential orders prohibiting transactions or requiring parties to unwind transactions that have already occurred are extremely rare. The last order of this type was issued by President George H.W. Bush in 1990 to block China National Aero-Technology Import and Export Corporation’s (“CATIC”) acquisition of MAMCO Manufacturing, Inc.

Although the U.S. government has not disclosed the national security issues raised by the transaction, the Treasury Department noted in a press release that the “wind farm sites are all within or in the vicinity of restricted air space at Naval Weapons Systems Training Facility Boardman in Oregon.”² The activities at the Navy Facility include “conducting air combat maneuvers within special use airspace[,] . . . conducting electronic combat training, including intercepting, identifying and locating enemy emitters, and preventing or reducing the effective use of enemy electronic equipment[,] . . . conducting bombing and missile exercises[,] . . . and performing research, development, test and evaluation activities on unmanned aerial systems.”³ The airspace at issue “is the only restricted area in the Western U.S. in which EA-6B Prowler and EA-18G Growler fighter jets . . . can complete Low Level Tactical Training and Surface-to-Air Counter Tactics maneuvers.”⁴

The national security concerns underlying the President’s order appear similar to a proposed but ultimately unsuccessful transaction involving the acquisition by a Chinese-owned company of a mine near Fallon Naval Air Station in Nevada. As we discussed in a [prior alert](#), in late 2009 Northwest Nonferrous International Investment Company, a Chinese company, abandoned its proposed acquisition of fifty-one percent of Firstgold, a Nevada-based mining company, due to CFIUS objections.⁵ The Committee’s concerns reportedly related to the close proximity of Firstgold’s property to sensitive military installations, including Fallon Naval Air Station and other “classified security and military assets that cannot be identified,” as well as Firstgold’s control of mineral

resources.⁶

Beyond the unusual Presidential action, the Ralls case is also unique because the corporation has brought a lawsuit challenging the scope of the government's authority under the CFIUS statute.⁷ To our knowledge, this is the first time a party to a transaction has challenged a CFIUS decision through litigation. In the rare situation where parties encounter national security concerns in the CFIUS process that cannot be resolved through mitigation agreements, the parties typically withdraw from the process and modify or abandon their transaction. For example, in 2011 Huawei encountered national security objections from CFIUS in connection with a planned acquisition of 3Leaf Systems, Inc., a technology company that developed virtualization solutions for enterprise data centers. Huawei decided to withdraw its filing prior to a presidential decision. In 2010 Tangshan Caofeidian Investment Corporation ("TCIC") abandoned its proposed acquisition of Emcore Corporation, a maker of fiber optic equipment, reportedly based on concerns expressed by CFIUS.⁸

Implications for Future Transactions

The President's action has significant implications for parties considering foreign investments in U.S. businesses:

- Parties should broadly consider possible issues related to national security even if their business is not directly involved in defense or other national security work. The location of a facility or the identity of a buyer can raise national security concerns even if the acquired business is not involved in sensitive technology or activities.
- Parties should consider discussions with the Committee prior to closing a transaction if a transaction may raise significant national security issues, even if the parties do not plan on making a formal voluntary filing with the Committee. Although CFIUS is unlikely to provide a party with significant feedback on a transaction without a formal filing, initial contact with the Committee may provide an opportunity for the Committee to request further discussions or a formal filing prior to closing a transaction. Without any form of pre-closing communication from the parties, CFIUS may learn of a transaction post-closing and impose conditions that impact the transaction or force divestment. In both the Ralls and Huawei-3Leaf transactions, the Committee was not notified by the parties but instead CFIUS learned of the transaction on its own. According to the government's declaration in the pending litigation involving Ralls, "CFIUS was apprised of the transaction by the Department of Defense, which also forwarded a May 2012 report in the periodical *Wind Power Monthly* that indicated that the transaction had already been consummated."
- Parties considering foreign investment should not overreact to the President's action or become unnecessarily alarmed about the Committee's review process in terms of bias against foreign investment or investments from particular countries based on the Ralls case. For example, according to one study, "Chinese foreign direct investment (FDI) in the United States has increased rapidly since 2009, growing from an annual average of around 30 deals worth less than \$500 million before 2009 to almost 100 deals worth about

\$5 billion in 2010 and 2011.”⁹ Acquisitions and investments involving Chinese companies span a number of industries, including computer manufacturing (IBM PC division), aerospace (Teledyne Continental Motors and Cirrus), and energy (Devon Energy, Chesapeake Energy, and AES). An overwhelming percentage of CFIUS-reviewed transactions are cleared without significant difficulty. In 2010, CFIUS reviewed 93 transactions and in only five cases did the parties abandon their transaction.¹⁰ In 2011, CFIUS reviewed 111 transactions, and in six cases the filings were withdrawn.¹¹ CFIUS does not disclose if a transaction was abandoned for national security reasons or reasons unrelated to the CFIUS review.

- CFIUS reviews remain highly fact-dependent. Although certain situations, such as acquisitions in telecommunications-related industries or acquisitions that involve U.S. facilities near sensitive military test ranges, will likely continue to draw intense interest from the Committee, parties should not automatically assume that certain foreign investments will encounter difficulties with the U.S. government. Careful planning and structuring of a transaction involving a sensitive national security issue can reduce the chances of a transaction encountering difficulty during the Committee review process.

WilmerHale attorneys represent clients at every stage of the international investment process, including providing strategic counseling, transaction structuring advice, preparing and submitting filings to the Committee and other agencies where appropriate, and in complying with post-filing requirements such as mitigation measures. Some representative recent engagements include:

- representation of Teledyne Technologies Incorporated in the sale of Teledyne Continental Motors, Inc., a manufacturer of aviation engines, to Aviation Industry Corporation of China International (AVIC International);
- representation of Chesapeake Energy Corporation, the second largest US producer of natural gas, in the \$4.75 billion dollar sale of its assets in the Fayetteville Shale area to BHP Billiton Petroleum (North America) LLC;
- representation of NYSE Euronext, operator of the New York Stock Exchange and other entities, with respect to its proposed merger with Deutsche Börse AG;
- representation of Chesapeake Energy Corporation with respect to approximately \$2 billion in investments from CNOOC Limited;
- representation of a California developer of mass spectrometry technologies in its acquisition by a US-based company majority owned by a French parent;
- representation of Brigham Exploration Company in its approximately \$4.4 billion sale to Statoil ASA; and
- representation of a subsidiary of Smiths Group plc, of the United Kingdom, in its acquisition of Power Holdings, Inc., a producer and distributor of electrical power distribution, monitoring, and switching equipment.

¹ Order Signed by the President regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, Sept. 28, 2012, *available at* <http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>.

² Statement from the Treasury Department on the President's Decision Regarding Ralls Corporation, Sept. 28, 2012, *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg1724.aspx>.

³ Naval Weapons Systems Training Facility Boardman, Training Activities, <http://nwstfboardmaneis.com/TrainingActivities/TrainingActivities.aspx> (last visited Sept. 30, 2012).

⁴ Exhibit E to Memorandum In Support Of Motion For Temporary Restraining Order And Preliminary Injunction, *Ralls Corporation v. CFIUS and Timothy Geithner*, No. 12-cv-01513-ABJ (S.D.N.Y. Sept. 9, 2012), ECF No. 7-6, p. 1.

⁵ *Committee on Foreign Investment in the United States (CFIUS) Concerns Cause Parties to Abandon Transaction*, July 7, 2010, <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9558>.

⁶ Eric Lipton, *Questions on Security Mar Foreign Investments*, N.Y. TIMES, Dec. 18, 2009, at B1, *available at* www.nytimes.com/2009/12/18/business/18invest.html?_r=1&scp=1&sq=questions%20on%20security%20mar%20foreign%20investments&st=cse.

⁷ *Complaint for Declaratory and Injunctive Relief, Ralls Corporation v. CFIUS and Timothy Geithner*, No. 12-cv-01513-ABJ (S.D.N.Y. Sept. 9, 2012), ECF No. 1. Ralls Corporation filed suit against CFIUS challenging interim orders entered by the Committee restricting the activities of the company while CFIUS reviewed the transaction. Those interim orders have now been revoked and replaced by the President's order prohibiting the transaction and ordering divestment of interests in the project. How the company responds to this new development remains to be seen, though the company has stated publicly that it intends to further pursue litigation to seek compensation for the government actions. The statute governing CFIUS, Section 721 of the Defense Production Act of 1950, contains a provision which states that actions and findings of the President are not subject to judicial review. This provision has not ever been challenged in court.

⁸ *Committee on Foreign Investment in the United States (CFIUS) Concerns Cause Parties to Abandon Transaction*, July 7, 2010, <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9558>.

⁹ THILO HANEMANN AND ADAM LYSENKO, THE RHODIUM GROUP, THE EMPLOYMENT IMPACTS OF CHINESE INVESTMENT IN THE UNITED STATES 2012, *available at* <http://rhgroup.net/notes/the-employment-impacts-of-chinese-investment-in-the-united-states>.

¹⁰ *CFIUS Annual Report Shows Increased Transactions, Increased Resort to Mitigation Measures*, Dec. 12, 2011, <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9990>.

¹¹*Id.*

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